UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **MARY WOODHOUSE**	FAA Order No. 96-22 Served: August 13, 1996 Docket No. CP94WP0184, 94EAJAWP0017

ORDER DISMISSING APPEAL

Mary Woodhouse has filed an appeal from the written initial decision of Administrative Law Judge Robert L. Barton, Jr., denying her application for fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.[1] Because Ms. Woodhouse's application for fees and expenses was late-filed, the law judge's initial decision dismissing the application is affirmed.

This case arose from an annual inspection conducted by Ms. Woodhouse, the holder of a repair station certificate, on a hot-air balloon, N364CB, a Model 0-105 balloon, manufactured by Cameron Balloon Ltd. (Cameron). At the time of the inspection, the balloon had two fuel manifolds and six portable fuel tanks. During the annual inspection, Ms. Woodhouse reviewed the balloon's type certificate data sheet, the manufacturer's maintenance manual, and the balloon's maintenance log. She found no information on fuel manifolds or on the number of fuel tanks for this balloon in these documents. Nonetheless, she presumed that the balloon was

[1] A copy of the law judge's written initial decision is attached.

"correct" with these fuel manifolds and fuel tanks, and, consequently, she signed off on the annual inspection, certifying that the balloon was airworthy.

The law judge held that Ms. Woodhouse violated Sections 43.15(a)(1) and 145.57(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 43.15(a)(1)[2] and 145.57(a),[3] when she certified the balloon as airworthy. The law judge held that the balloon was not authorized to have fuel manifolds or any more than two fuel tanks.[4] The law judge, however, reduced the $2,000 civil penalty sought by Complainant to $950. Ms. Woodhouse appealed from the law judge's decision to the Administrator.

The Administrator issued his decision and order, In the Matter of Woodhouse, FAA Order No. 94-2, on March 10, 1994. The Administrator affirmed the violations regarding the fuel manifolds, finding that the fuel manifolds in the balloon at the time of the inspection were clearly not part of the type design of the aircraft or any approved modification. *Id.*, at 4. However, the Administrator

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[2] Section 43.15(a) of the FAR provides as follows:

> (a) General. Each person performing an inspection required by Part 91, 123, 125, or 135 of this chapter shall --
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> (1) Perform the inspection so as to determine whether the aircraft, or portion (s) thereof under inspection, meets all applicable airworthiness requirements.

14 C.F.R. § 43.15(a)(1).

[3] Section 145.57(a) of the FAR provides in part as follows:

> (a) Except as provided in § 145.2, each certificated domestic repair station shall perform its maintenance and alteration operations in accordance with the standards in part 43 of this chapter.

14. C.F.R. § 145.57(a).

[4] Originally, it was alleged in the complaint that Ms. Woodhouse also violated these regulations by signing off on the annual inspection when fuel hoses and fittings, as well as pressure gauges, were installed improperly. In the amended complaint, Complainant deleted the allegations regarding improper installation of fuel hoses and pressure gauges.

reversed the law judge's finding that Ms. Woodhouse violated the regulations when she certified the balloon as airworthy with more than two fuel tanks. The Administrator held that because Complainant failed to establish the number of fuel tanks authorized by the balloon's type design, it could not be determined from the record on appeal whether the balloon met its airworthiness requirements regarding the fuel tanks. *Id.*, at 6. The Administrator held further that the $950 civil penalty accurately reflected the seriousness of Ms. Woodhouse's return to service of an unairworthy hot air balloon. *Id.*, at 7.

After the Administrator issued Order No. 94-2 on March 10, 1994, Ms. Woodhouse had 60 days to petition a U.S. Court of Appeals for review of that order under 49 U.S.C. App. § 1486(a).[5] Ms. Woodhouse filed her petition for review with the U.S. Court of Appeals for the Ninth Circuit on May 13, 1994, 4 days late. By order dated June 23, 1994, the court granted the agency's motion to dismiss and dismissed Ms. Woodhouse's petition for lack of jurisdiction. Subsequently, the court issued an order dated July 28, 1994, in which it construed Ms. Woodhouse's late opposition to the motion to dismiss as a motion to reconsider the court's order of June 23, 1994, and denied the motion to reconsider.

On August 22, 1994, Ms. Woodhouse filed an application for attorney's fees and costs under the EAJA.[6] The law judge issued a written initial decision on December 7, 1994, (hereinafter referred to as "EAJA Initial Decision") finding that

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[5] Recodified as 49 U.S.C. § 46110; *see* note 14 *infra*.

[6] Ms. Woodhouse, who has represented herself throughout these proceedings, sought $2,159.50 in fees charged by two attorneys who assisted her in preparing her defense to the civil penalty action. (EAJA Initial Decision, at 8.) Ms. Woodhouse also sought $1,931.00 in fees and costs, including $1,100.00 for the expert witness fee and expenses. Finally, she sought $15,000.00 in income lost due to time spent defending the action.

Ms. Woodhouse's EAJA application was late-filed, and granting the FAA's motion to dismiss.[7]

Ms. Woodhouse filed a notice of appeal from the EAJA initial decision. By FAA Order No. 95-9,[8] the Administrator held that good cause existed to excuse Ms. Woodhouse's late-filing of the notice of appeal from the EAJA initial decision. In addition, the Administrator construed her notice of appeal as an appeal brief,[9] and the FAA was granted time in which to file a reply brief.

Timeliness of the Application for Attorney's Fees and Expenses.

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). The EAJA provides that an applicant for attorney's fees and other expenses shall submit an application to the agency within 30 days of a "*final disposition* in the adversary adjudication." 5 U.S.C. § 504(a)(2)(emphasis added.) In this case, Ms. Woodhouse prevailed before the agency on the fuel tanks issue, and she petitioned the U.S. Court of Appeals for the Ninth Circuit for review of the Administrator's decision on the fuel manifold issue. If Ms. Woodhouse's petition had been timely so that the court had jurisdiction over the appeal, and had the court

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[7] Although the law judge denied the application as untimely, he resolved the remaining issues so as to create a complete record. (EAJA Initial Decision, at 11.)

[8] In the Matter of Woodhouse, FAA Order No. 95-9 at 4-5 (May 9, 1995).

[9] Ms. Woodhouse's notice of appeal/appeal brief was dated January 3, 1995.

ruled in Ms. Woodhouse's favor, she would have been the prevailing party on both issues. However, the court held that it lacked jurisdiction to consider Ms. Woodhouses's petition for review because she had filed her petition for review in an untimely manner. The pivotal question here is when was the final disposition of Ms. Woodhouse's underlying case on the merits.

In analyzing this issue, the law judge noted that the 30-day limitation in 5 U.S.C. § 504(a)(2) "is jurisdictional and therefore must be strictly construed in favor of the government because it is a waiver of the government's sovereign immunity."[10] (EAJA Initial Decision, at 8.) Citing Dole v. Phoenix Roofing, Inc., 922 F.2d 1202, 1207 (5th Cir. 1991), the law judge noted that "[a] 'final disposition' of the case does not occur 'until the entire decision is final and unappealable.' " (EAJA Initial Decision, at 10.) The law judge explained that the Administrator's decision and order issued on March 10, 1994, in the underlying civil penalty case became the final disposition of this matter when Ms. Woodhouse failed to file a timely petition for review with the U.S. Court of Appeals for the Ninth Circuit. He rejected Ms. Woodhouse's argument that the court's order of July 28, 1994, should be regarded as the final disposition because in that order the court denied the petition for lack of jurisdiction "meaning that the Court of Appeals never had jurisdiction to consider the case on the merits." *Id.* at 11. He held that because Ms. Woodhouse filed her application for fees and expenses on August 22, 1994, more than 30 days after the Administrator's order became final and unappealable, the

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[10] Citing Long Island Radio Co. v. N.L.R.B., 841 F.2d 474, 477 (2nd Cir. 1988); Action on Smoking & Health v. CAB, 724 F.2d 211, 225 (D.C. Cir. 1984); Columbia Mfg. Corp. v. N.L.R.B., 715 F.2d 1409, 1410 (9th Cir. 1983); Monark Boat Co. v. N.L.R.B., 708 F.2d 1322, 1326-27 (8th Cir. 1983).

application was untimely. Consequently, he denied the application, explaining that "[b]ecause the 30 day limit is jurisdictional, it cannot be enlarged." *Id.*

Ms. Woodhouse argues on appeal that "the content of the decision by the Court of Appeals is immaterial" and thus, the court's order -- not the Administrator's order -- was the final disposition of the case. (Appeal at 2.) She argues further that the Federal appellate court's decision was not final and unappealable until the time for filing an appeal to the U.S. Supreme Court had expired. She asserts that she could not have known that the court would dismiss her petition. (Appeal at 2.) For these reasons, she maintains, her EAJA application was timely.

The FAA argues in its reply brief that "it is inherently impossible for the final disposition of the matter to be the date of the Ninth Circuit's dismissal" because the court dismissed the appeal for lack of jurisdiction due to untimeliness. (Agency's Reply Brief at 3.) According to the FAA, Ms. Woodhouse's EAJA application was due "30 days from the date on which she was a partially prevailing party, specifically 30 days from April 10, 1994." *Id.* Consequently, the FAA argues, the law judge was correct in dismissing the EAJA application as untimely. *Id.*

The EAJA provides:

> *A party seeking an award of fees and other expenses shall, within thirty days of a* ***final disposition*** *in the adversary adjudication, submit to the agency an application* which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought . . . . When the United States appeals the underlying merits of an adversary adjudication, no adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

5 U.S.C. § 504(a)(2)(emphasis added.)[11] Under the FAA's rules implementing the EAJA, "An application may be filed whenever the applicant has prevailed in the proceeding, *but in no case later than 30 days after the FAA Decisionmaker's* ***final disposition*** *of the proceeding*." 14 C.F.R. § 14.20(a).

The term "final disposition" was defined in Dole v. Phoenix Roofing, Inc., 922 F.2d 1202 (5th Cir. 1991). It was held in that case that there is no final disposition until the *entire* decision is final and unappealable. The court explained:

> Holding that there is no "final disposition" until the entire decision is final and unappealable avoids both the unnecessary fragmentation of the fee petitions and the waste of judicial resources that would result from filing multiple petitions in different courts for fees incurred in one case. Such multiple fee litigation unduly burdens both the litigants and the courts. For all of these reasons, we hold that there is no "final disposition" of a case until the entire decision is final and unappealable.

Id., at 1207.

Under the 14 C.F.R. § 14.20(c), ***final disposition*** means the later of:

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[11] It is provided further in 5 U.S.C. § 504(c)(1), that "[i]f a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code." Likewise, it is provided in 28 U.S.C. § 2412(d)(1)(A) as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), *including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action*, 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) (emphasis added.)

But in Dole v. Phoenix Roofing, Inc., 922 F.2d at 1208, the court held that the "Congress intended that both the agency and the appellate court have jurisdiction to consider an application for attorney's fees under the EAJA if the appellate court has reviewed the agency decision." The court reached this conclusion after reconciling the apparently conflicting language of 5 U.S.C. § 504(c)(1) (quoted above) with the 1985 amendment to the EAJA in 5 U.S.C. § 504(a)(2), which provided that agencies retain authority to make awards in cases in which the United States appeals.

> (1) The date on which an unappealed initial decision becomes administratively final;
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> (2) Issuance of an order disposing of any petitions for reconsideration of the FAA Decisionmaker's final order in the proceeding;
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> (3) *If no petition for reconsideration is filed, the last date on which such a petition could have been filed*; or
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> (4) Issuance of 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.

14 C.F.R. § 14.20(c) (emphasis added.)

Thus, under Section 14.20(c)(3), the final disposition of this adversary adjudication occurred on the last date on which Ms. Woodhouse could have petitioned the Administrator to reconsider FAA Order No. 94-2. Under 14 C.F.R. § 13.234(a),[12] Ms. Woodhouse had 30 days in which to petition the Administrator to reconsider FAA Order No. 94-2, *and* under Section 14.20(a), she had an *additional* 30 days (after the petition for reconsideration was due) in which to file her EAJA application. *Thus, she had 60 days after the issuance of FAA Order No. 94-2 or until May 9, 1994, in which to file her EAJA application.*[13] However, Ms. Woodhouse did not file her EAJA application until August 22, 1994, over 5 months after the Administrator issued his March 10, 1994, decision, FAA Order No. 94-2, on the merits of this case.

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[12] Section 13.234(a) provides in pertinent part: "A party shall file a petition to reconsider or modify with the FAA decisionmaker not later than 30 days after service of the FAA decisionmaker's final decision and order on appeal . . . ." 14 C.F.R. § 13.234(a).

[13] This is the same date on which she was required to file any petition for review with a Federal appellate court.

Would a petition for review filed with a Federal appellate court toll the time period for filing an EAJA application? Even if an EAJA application is not due until after an appellate court reviews a petition for review, that assumes the filing of a *timely* petition for review. In this case, Ms. Woodhouse filed her petition for review with the U.S. Court of Appeals for the Ninth Circuit *4 days late*, on May 13, 1994. As a result of the late-filing, the court held that it did not have jurisdiction to review the Administrator's decision. (*See e.g.*, Tiger International, Inc. v. CAB, 554 F.2d 926, 931 n. 11 (9th Cir.), *cert. denied*, 434 U.S. 975 (1977) (noting that time limitations for appeal and review set out in statutes are jurisdictional.) Filing the petition for review *after the expiration of the 60-day period* (for filing a petition for review under 49 U.S.C. App. § 1486(a)) did not toll the time period for filing the EAJA application because Ms. Woodhouse had already foregone her right to seek Federal appellate court review of the Administrator's decision. Likewise, the orders issued by the court could not be final dispositions of this matter because Ms. Woodhouse had foregone her right to appeal. Therefore, FAA Order No. 94-2 became the final disposition once Ms. Woodhouse failed to file a timely petition for reconsideration with the Administrator or a timely petition for review with the Federal appellate court.

Ms. Woodhouse argues that a finding that the Administrator's order was the final disposition in this matter would require her to have known in advance that the court would dismiss her petition for review. This argument is not persuasive. Under 49 U.S.C. App. § 1486(a), then in effect, it was clear that Ms. Woodhouse only

had 60 days in which to file her petition for review with the appellate court unless she had reasonable grounds for not filing her petition within that 60-day period.[14]

As the law judge noted in his decision, "[c]ourts interpreting the 30-day limitation period for filing an EAJA application have uniformly held that the time limit is jurisdictional and, therefore, must be strictly construed in favor of the government because it is a waiver of the government's sovereign immunity." (EAJA Initial Decision, at 8-9.)[15] Thus, the Administrator has no authority to waive or extend the time limitation for filing the EAJA application in this case to enlarge the

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[14] In pertinent part, 49 U.S.C. App. § 1486(a) provided:

> Any order, affirmative or negative, issued by the . . . Administrator under this Act . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order . . . . After the expiration of said sixty days a petition may be filed *only by leave of court upon a showing of reasonable grounds* for failure to file the petition theretofore.

49 U.S.C. § 1486(a) (emphasis added.)

(In the current recodification of the Federal Aviation Act, it is provided similarly in 49 U.S.C. § 46110(a) as follows:

> The petition [for review] must be filed not later than 60 days after the order is issued. *The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.*

Id. (Emphasis added).

For an example of reasonable grounds for failing to file a petition for review within 60 days of the date of the Administrator's order, *see* National Air Transportation Ass'n v. McArtor, 866 F.2d 483 (D.C. Cir. 1989), in which the court held that the original notice of the 1984 flammability seat cushion rule was inadequate and, therefore, tolled the statutory limit for petitioning for review of that rule until adequate notice was subsequently given through an Advisory Circular.

Thus, unless Ms. Woodhouse believed that she had reasonable grounds for not filing her petition for review within 60 days, then there was no need for her to be "clairvoyant." Nothing in the court's rulings or in Ms. Woodhouse's appeal suggest that Ms. Woodhouse argued before the appellate court that she had reasonable grounds for failing to file her petition for review on time.

[15] *See* Long Island Radio Co. v. N.L.R.B., 841 F.2d 474, 477 (2d Cir. 1988).

time for filing of Ms. Woodhouse's application. As a result, the law judge's order dismissing Ms. Woodhouse's EAJA application for lack of jurisdiction is affirmed.[16]

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 12th day of August, 1996.

[16] In light of this finding that the Administrator lacks jurisdiction to consider the EAJA application, there is no need to consider the other issues raised in Ms. Woodhouse's appeal.