DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **PACIFIC SKY SUPPLY, INC.**	FAA Order No. 95-18 Served: August 4, 1995 Docket Nos. CP93NM0398, 93EAJANM0014

ORDER AND DECISION

This is an attorney fees case brought under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1), and the Federal Aviation Administration's (FAA's) EAJA regulations, 14 C.F.R. Part 14. Both parties have appealed from the law judge's initial decision awarding Pacific Sky Supply, Inc. (Pacific Sky) attorney fees in the amount of $87,724.19.[1] On appeal, Pacific Sky argues that the law judge's award of fees and expenses was too low, while the FAA argues that Pacific Sky was not entitled to any award of attorney fees at all. This decision reverses the law judge's award of attorney fees because the FAA's case against Pacific Sky was substantially justified and because special circumstances make an award of attorney fees unjust.

Background

This action for attorney fees grew out of a civil penalty case initiated by the FAA against Pacific Sky for allegedly producing, without a Parts Manufacturer Approval, a replacement part "for sale for installation on a type-certificated

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

product," in violation of 14 C.F.R. § 21.303(a). In the complaint, the FAA alleged that Pacific Sky produced, without a Parts Manufacturer Approval, 62 seats (anti-icing valve seats) of which at least 18 were "sold for installation on type-certificated products." The complaint also alleged that in the same year, Pacific Sky produced, again without a Parts Manufacturer Approval, 100 rings (turbine air seal rings) of which at least one was "sold for installation on a type-certificated product."

The meaning of the regulatory language "for sale for installation on a type-certificated product" was hotly contested in the underlying civil penalty action. In its case against Pacific Sky, the FAA articulated the following interpretation of Section 21.303(a):

> If, under all of the surrounding circumstances, including the identity of the purchaser, a reasonable person would know that it was reasonably likely that at least some of the parts would be installed on a type-certificated product, then the producer had produced the part "for sale for installation on a type-certificated product" within the meaning of Section 21.303(a).

The law judge did not agree with this interpretation. Instead he held that to prove a violation of the regulation, the FAA had to show that at the time of production, Pacific Sky either had the *specific intent* that the parts would be installed on type-certificated products or had *actual knowledge* that the parts would be installed on such products. The FAA stipulated that it could not prove a violation under the law judge's interpretation of the regulation, and the law judge dismissed the FAA's case.

The FAA then appealed from the law judge's decision. After carefully reviewing the arguments on both sides, the Administrator rejected both the FAA's and the law judge's interpretations of Section 21.303(a). It was held that to prove a violation of the regulation, the FAA must show that the respondent knew or should

have known that it was substantially certain that the parts produced without a Parts Manufacturer Approval would be installed on type-certificated products. In the Matter of Pacific Sky Supply, FAA Order No. 93-19 at 6 (June 10, 1993). The Administrator explained in Order No. 93-19 that by requiring a showing of either specific intent or actual knowledge, the law judge had interpreted the regulation far too narrowly, and in doing so, created a loophole for producers who sell to "middlemen." *Id.* The FAA's "reasonably likely" standard was rejected also. Instead, the Administrator held, a "substantially certain" standard more appropriately balances the equities involved--the FAA's duty to promote safety by controlling the spread of unapproved parts, on the one hand, and the producer's right to produce parts without FAA approval when it is insufficiently probable that the parts will find their way into type-certificated aircraft, on the other. The case was remanded to the law judge for further proceedings consistent with the newly enunciated standard.

Several months later, the FAA withdrew its complaint, stating that it would not be in the public interest to prosecute the case further because the standard established on appeal differed from the one under which the action was initiated, and because more than 7 years had elapsed since the date of the alleged violations. The law judge then dismissed the case.

Pacific Sky filed an application to recover the attorney fees it incurred as a result of the civil penalty action, and the FAA filed an answer. Without holding a hearing or otherwise providing an opportunity for supplementation of the record, the law judge issued an order awarding Pacific Sky $87,724.19 in attorney fees. It is from this order that both parties appeal.

The Equal Access to Justice Act

Under the Equal Access to Justice Act (EAJA), a prevailing party is entitled to an award of attorney fees and other expenses unless the government's actions were "substantially justified" or "special circumstances make a fee award unjust." Sullivan v. Hudson, 490 U.S. 877, 883 (1989). The motivating concern is that without a potential right to reimbursement for attorney fees, private litigants might be coerced to agree to orders that represent an unreasonable exercise of government power. Roanoke River Basin Association v. Hudson, 991 F.2d 132, 138 (4th Cir. 1993). The EAJA was "designed to eliminate the financial disincentive individuals and small companies face in challenging unreasonable governmental action." Quality C.A.T.V., Inc. v. N.L.R.B., 969 F.2d 541, 543 (7th Cir. 1992). At the same time, however, the EAJA "was never intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong." Roanoke, 991 F.2d at 139.

The exact language of the EAJA, in pertinent part, is 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 the 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. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504 (a)(1). Thus, eligibility for a fee award in an agency adjudication requires:

1. that the claimant be a prevailing party;
2. that the Government's position was not substantially justified; and

3. that no special circumstances make an award unjust.

The FAA has not challenged the law judge's determination that Pacific Sky was the prevailing party. Thus, only the "substantially justified" and "special circumstances" conditions are at issue in this case.

The government bears the burden of proving that its position was substantially justified or that special circumstances exist. 14 C.F.R. § 14.04(a) provides that "[t]he burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel . . . ."; *see also* In the Matter of KDS Aviation Corporation, FAA Order No. 91-52 at 5, 6 (October 28, 1991); United States v. One Parcel of Real Property, 960 F.2d 200, 208 (1st Cir. 1992).

Substantial Justification

Although the substantial justification determination "has proved to be an issue of considerable conceptual and practical difficulty," United States v. Paisley, 957 F.2d 1161, 1165 (4th Cir. 1992), some guiding principles have been established. The United States Supreme Court has held that the term "substantially justified" means:

> "justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness.

Immigration and Naturalization Service v. Jean, 496 U.S. 154, 158 n.6 (1990), citing Pierce v. Underwood, 487 U.S. 552, 565-566 (1988). "'Substantially justified' does not mean 'justified to a high degree," but rather [is] satisfied if there is a 'genuine dispute,' or if reasonable people could differ as to the appropriateness of the

contested action." Underwood, 487 U.S. at 565. The question of substantial justification is whether the Government's position was one that had a reasonable basis in law and fact, *i.e.*, was such as to satisfy a reasonable person. Paisley, 957 F.2d at 1165.

For the government to meet its burden of showing substantial justification it must show:

1. a reasonable basis in truth for the facts alleged;
2. a reasonable basis in law for the theory it propounded; and
3. a reasonable connection between the facts alleged and the legal theory advanced.

United States v. One Parcel of Real Property, 960 F.2d 200, 208 (1st Cir. 1992); Smith v. National Transportation Safety Board, 992 F.2d 849, 852 (8th Cir. 1993); Harris v. Railroad Retirement Board, 990 F.2d 519, 520-521 (10th Cir. 1993). It is not enough to meet one or the other of the first two conditions: "[F]avorable facts will not rescue the government from a substantially unjustified position on the law; likewise, an accurate recital of law cannot excuse a substantially unjustified position on the facts." Thompson v. Sullivan, 980 F.2d 280, 281 (4th Cir. 1992).

Reasonable Basis in Law

The law judge believed that the FAA advanced two different and inconsistent legal standards during the course of the civil penalty proceedings against Pacific Sky. He also believed that the primary legal standard advanced by the FAA lacked an intent requirement and was therefore inconsistent with the FAA's own prior interpretation of the regulation. The law judge pointed out that one of the factors the courts have considered in difficult substantial justification cases is the

consistency of the government's position.[2] For these reasons, the law judge concluded that the FAA's case lacked a reasonable basis in law.

The law judge erred, however, in finding that the FAA advanced two different legal standards. As the parties agreed in their Joint Statement of Admissions and Undisputed Facts, the FAA's case against Pacific Sky was based on the following interpretation of 14 C.F.R. § 21.303(a):

> If, under all of the surrounding circumstances, including the identity of the purchaser, a reasonable person would know that it is reasonably likely that the parts would be installed on type certificated products, then the parts were produced "for sale for installation" on those products.

(Joint Statement #27.) The law judge insisted that at one point during the proceedings the FAA departed from the interpretation quoted above by stating that it would show that "Respondent [Pacific Sky] knew that at least some of those parts would be installed on type-certificated products." (Answer to Pacific Sky's Motion to Dismiss at 5.) In the law judge's view, the latter FAA statement constituted an enunciation of a new legal standard that was inconsistent with the first because it referred to the knowledge of the *Respondent* rather than to that of a *reasonable person*. When the law judge raised this concern at a pre-hearing conference, FAA counsel explained that it "may be a distinction between a standard and a conclusion." (Pre-Hearing Conference, September 1, 1992, at 37.) The FAA attorney

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[2] "When the government acts inconsistently, and subsequently loses a civil suit challenging its behavior, it should be obliged to make an especially strong showing that its legal arguments were substantially justified in order to avoid liability for fees under the EAJA." Spencer, 712 F.2d at 561. Similarly, it has been held that "[w]hen the government makes an argument in one case that is contrary to an argument it made in an earlier case, we hesitate to find its legal position substantially justified." Ramon-Sepulveda v. Immigration and Naturalization Service, 863 F.2d 1458 (9th Cir. 1988), citing International Woodworkers of America, AFL-CIO v. Donovan, 792 F.2d 762, 765 (9th Cir. 1986) (government's position not substantially justified when the government urged one interpretation of a regulation in one case and a contrary interpretation in another).

confirmed that the "reasonable person" standard set forth in the Joint Statement was the legal theory upon which its case was based, but the law judge was unconvinced. In his decision awarding Pacific Sky attorney fees, the law judge insisted that the FAA had advanced two distinct and inconsistent interpretations of the regulation during the course of the proceedings.

In my view, the law judge was mistaken. The FAA attorney did not enunciate a new interpretation of Section 21.303(a) in his answer to Pacific Sky's motion to dismiss. The FAA attorney simply stated what he intended to prove at trial. Under the FAA's interpretation of Section 21.303(a), the FAA could prevail simply by demonstrating that a reasonable person in Pacific Sky's position should have known that it was reasonably likely that the parts would be installed on type-certificated products. However, the FAA attorney apparently believed that in this case his evidence was strong enough to prove that Pacific Sky actually knew that some of the parts would be installed on type-certificated products.

The law judge also erred in finding that the FAA's "reasonable person . . . reasonably likely" standard was inconsistent with the agency's own prior interpretation of the regulation. The prior interpretation at issue, a passage in a memorandum issued in 1980 by an FAA Assistant Chief Counsel, stated as follows:

> A person who produces a modification or replacement part that is intended to be installed on a type-certificated product must hold an FAA-PMA approval. If the part is not produced with that intent, but subsequently is installed in a type-certificated product, the producer is not subject to FAR § 21.303(a).

According to the law judge, although the 1980 interpretation established an intent requirement, the FAA's "reasonable person . . . reasonably likely" interpretation did not contain an intent requirement. In the law judge's view, the "reasonable person

. . . reasonably likely" standard was an objective standard, and objective standards do not contain an element of intent. He cited a criminal case stating that "'the reasonable person' test is an objective inquiry, and '[s]uch an objective inquiry pointedly eschews consideration of intent.'" United States v. McKines, 933 F.2d 1412, 1426 (8th Cir. 1991), quoting United States v. Montilla, 928 F.2d 583, 588 (2d Cir. 1991).

The word "intent," however, has different meanings in different contexts. For example, throughout the RESTATEMENT (SECOND) OF TORTS, the word "intent" is used not just to denote that the actor desires to cause the consequences of his or her act, but also that *the actor believes that there is a sufficient probability that the consequences will result from it*. *See* the entry for "Intent" in BLACK'S LAW DICTIONARY 727 (Fifth Edition), citing RESTATEMENT (SECOND) OF TORTS § 8. It was the latter meaning of intent that seems to have been comtemplated in the FAA's "reasonable person . . . reasonably likely" standard. Thus, the FAA's "reasonable person . . . reasonably likely" standard asserted in this action was not inconsistent with the existing 1980 interpretation. As explained in Order No. 93-19, the 1980 interpretation established an intent requirement, but did not explain its meaning. In the Matter of Pacific Sky Supply, FAA Order No. 93-19 at 7 (June 10, 1993).

The FAA's interpretation also was not inconsistent with the literal language of the regulation, the legislative and regulatory history, or any existing case law. At a minimum, this interpretive issue was unsettled, and it was sufficiently difficult and arguable that the FAA's position cannot be said to be without a reasonable basis in law. This was not a situation where the proper interpretation of the rule

was clear. As the FAA has pointed out in its brief, four distinct interpretations of the regulation have been advanced during the course of the civil penalty action against Pacific Sky. The FAA, Pacific Sky, the law judge, and the Administrator each in good faith articulated distinct interpretations of the regulation.

This case involved a very close question of law and one which required a delicate balancing of competing interests. Courts have based findings of substantial justification on such factors as "the complexity, uniqueness, and newness of the issues," their novelty and difficulty, and the fact that the case was one of "first impression." In the Matter of Wendt, FAA Order No. 93-9 (March 25, 1993) (citing other cases). Each of these factors is present in this case.

The courts also have held that the totality of the circumstances, including the reasonable overall objectives of the government, should be considered in substantial justification cases. Roanoke, 991 F.2d at 139. Here the totality of the circumstances include increasing concern on the part of the American people and the Congress about the proliferation of unapproved aircraft parts. The FAA has a mandate to ensure safety and to safeguard lives. The FAA did not depart from its reasonable overall objectives in advancing the "reasonably likely" standard.

Most importantly, however, the FAA's "reasonably likely" standard was a reasonable standard. It was an attempt to hold producers liable where a reasonable person would know that it was reasonably likely the unapproved parts would be installed on civil aircraft. The determination ultimately that the more rigorous "substantially certain" standard should be applied does not alter the fact that the standard espoused by the FAA attorney was reasonable. In its reply brief, Pacific Sky argues that since the FAA's interpretation of Section 21.303(a) was rejected, the

agency's position was *de facto* unreasonable, and therefore not substantially justified. However, the case Pacific Sky cites in support of this argument at page 10 of its Reply Brief, Abel Converting, Inc. v. United States, 695 F. Supp. 575, 577 (D.D.C. 1988), does not truly support that contention. In fact, the cited case indicates that even where an agency is ultimately found to have acted arbitrarily and capriciously, the agency may still have been substantially justified in its position. *Id.*

The courts have expressly stated that the losing party may have taken a substantially justified position. Pierce v. Underwood, 487 U.S. at 552, 565, 569 (1988) ("a position can be justified even though it is not correct . . ."); *see also* Hexamer v. Foreness, 997 F.2d 93, 94 (5th Cir. 1993) and Cummings v. Sullivan, 950 F.2d 492 (7th Cir. 1991) (to the same effect). Failing to prevail does not raise a presumption that the government position was not substantially justified. United States v. One Parcel of Real Property, 960 F.2d 200, 208 (1st Cir. 1992). Nor must the agency establish that its decision to litigate was based on a substantial probability of prevailing. Natchez Coca-Cola Bottling Co., Inc. v. National Labor Relations Board, 750 F.2d 1350, 1354 (5th Cir. 1985), quoting S & H Riggers & Erectors, Inc. v. Occupational Safety and Health Review Commission, 672 F.2d 426, 430 (5th Cir. 1982), quoting H.R. Rep. No. 1418, 96th Cong. 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4953, 4990. As the courts have emphasized,

> Although the impulse to equate ultimate judicial rejection of the Government's merits position--at whatever level--with its lack of substantial justification is understandable, the courts perforce have rejected it as inappropriate, for to do so, "would virtually eliminate the 'substantially justified' standard from the statute. . . . [I]t would be 'a war with life's realities to reason that the position of every loser in a lawsuit upon final conclusion was unjustified.'"

United States v. Paisley, 957 F.2d 1161, 1167 (4th Cir. 1002), citing Broad Avenue Laundry & Tailoring v. United States, 693 F.2d 1387, 1391-92 (Fed. Cir. 1982).

To award fees in a case like this would likely deter the FAA in future cases from "advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts," H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4990, which are so essential to the public's safety. As one court has noted:

> [T]he Government's enforcement role requires that as between the opposing risks of taking too narrow or too broad a view of 'what it may prosecute,' it must in prudence choose the broad view, knowing that judicial review . . . stands guard against error in that choice, whereas an error in the opposite direction is not likely ever to be corrected. (Citation omitted.) In effect, this reflects a judicial perception that, within bounds of essential prosecutorial fairness, Government prosecutors have an obligation to establish the outer limits of a criminal statute's ambiguously-defined reach by making just such choices when occasion requires.

United States v. Paisley, 957 F.2d 1161, 1170 (4th Cir. 1992) (holding that Government's position in underlying civil penalty action was substantially justified). Because reasonable people could differ as to the appropriateness of the FAA's proposed legal standard, it passes the test set out in Underwood, 487 U.S. at 565-566, and the law judge erred in determining otherwise.

Reasonable Basis in Fact

To show substantial justification, the agency must also show that there was a reasonable basis in truth for the facts alleged--*i.e.*, that the FAA reasonably believed that it could prove the allegations in the complaint. The law judge determined that he did not need to reach this issue because, in his view, the agency's position had no reasonable basis in law and, as a result, the agency's claim of substantial justification would fail anyway. As discussed above, however, the law

judge erred in finding there was no reasonable basis in law for the agency's position. Thus, it is necessary to determine whether the agency's position had a reasonable basis in fact.

The law judge said that if he had to reach this issue, he would resolve it in Pacific Sky's favor because there were not enough facts in the record to support the agency's position. According to the law judge, the official record in this case consisted only of Pacific Sky's Answer to the Complaint, the Joint Statement of Admissions and Undisputed Facts, and the transcripts from the two pre-hearing conferences. According to the law judge, the exhibits on which the FAA relied, which were submitted by the agency pursuant to the law judge's pre-hearing order, never became part of the official record.

In determining whether substantial justification exists, the EAJA expressly requires that the administrative record be viewed as a whole. *See* 5 U.S.C. § 504(a)(1), providing that "[w]hether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." The law judge gave the term "administrative record" in the EAJA too narrow a reading. He should have considered the exhibits filed with him pursuant to his own order to be part of the "administrative record" for purposes of EAJA review.

Assuming, for the sake of argument, that the "administrative record" did not include the exhibits, the law judge should have permitted the parties an opportunity

to supplement the existing record with the exhibits[3] as well as with any other documentary evidence the parties could present that was relevant to the EAJA claim. The EAJA regulations expressly provide for the filing of additional written submissions upon the request of one of the parties or on the law judge's own initiative where necessary for a full and fair resolution of the issues. 14 C.F.R. § 14.26(a). Restricting the inquiry to a narrowly defined official record makes no sense when there is little or no record, said the court in Kuhns v. Bd. of Governors of Fed. Reserve System, 930 F.2d 39, 43 (D.C. Cir. 1991). The court explained:

> To confine the inquiry to the pleadings when the matter is brought to a close by a voluntary dismissal would be to place the government at a disadvantage Congress could not have intended. . . . There is of course the danger that the fee proceeding, if allowed to go beyond the pleadings, will turn into another major litigation. (Citation omitted.) But the chances of that occurring are minimized when the agency permits the parties to supplement the record only by filing affidavits or documents relating to whether the charges were warranted. To bar consideration of additional material would, in the words of Underwood, "not only distort the truth but penalize and thereby discourage useful settlements." 487 U.S. at 568, 108 S.Ct. at 2552. The same may be said about voluntary dismissals. Changes in agency policies or priorities, lack of resources, or developments outside the agency's control, rather than the absence of evidence or legal support, may cause the government to drop a proceeding it reasonably expected to win.

Id.

The law judge believed that the following passage from In the Matter of KDS Aviation Corporation required a hearing before any final determination concerning the factual reasonableness of the agency's position could be made:

> Without any evidentiary record in this case it would be difficult, if not impossible, for agency counsel to meet [its] burden [of showing that

[3] It is understandable how the FAA attorney might not have realized that he needed to request permission to supplement the record with copies of exhibits he had already filed with the law judge.

> the agency's position was reasonable in law and fact]. Unsworn assertions in the agency's brief do not sustain its burden of proof.
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> The Rules of Practice provide for "further proceedings," such as an evidentiary hearing, "when necessary for full and fair resolution of the issues arising from the application." 14 C.F.R. § 14.26(a). Further proceedings appear to be necessary in this case where significant factual issues remain controverted.

FAA Order No. 91-52 at 5-6 (October 28, 1991). The law judge was not inclined to hold a hearing, apparently because the U.S. Supreme Court had cautioned that requests for attorney fees should not result in a second major litigation. (Initial Decision at 17, quoting Pierce v. Underwood, 487 U.S. 552, 563 (1988), and Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).) However, KDS does not require an evidentiary hearing in all cases, particularly where the record can be readily supplemented by exhibits that bear an indicia of reliability beyond that of mere unsworn statements by counsel. In some cases, an evidentiary hearing may be both necessary and appropriate. The danger that a fee proceeding will turn into another major litigation is minimized where, rather than holding a full evidentiary hearing, the parties are permitted to supplement the record only by filing affidavits or documents relating to whether the allegations were warranted. Kuhns, 930 F.2d at 43.

Pacific Sky argues that if I determine that the proposed exhibits are part of the administrative record for purposes of EAJA review, then I should remand the case to the law judge so that he may first consider the exhibits. In the interest of administrative efficiency, I will not remand this case for further proceedings. Doing so would only add to the enormous legal fees and costs already incurred by both parties and would cause needless delay of the ultimate resolution of this case. The Rules of Practice provide that "[t]he FAA decisionmaker *may . . . make any*

necessary findings or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary." 14 C.F.R. § 13.233(j) (emphasis added).[4] Remanding the case would be necessary if there were credibility issues to resolve, because it is the role of the law judge to evaluate the demeanor of witnesses. Here, however, it is simply a matter of reviewing documentary exhibits submitted by the parties. Moreover, the law judge previously had an opportunity to consider the exhibits but declined to do so. For these reasons, and to avoid further delay and legal expense, remand seems to be neither necessary nor advisable.

In determining whether the FAA had a reasonable basis in fact for the allegations in the complaint, the legal standard under which the FAA was operating at the time must be borne in mind. *See* Kay Manufacturing Co. v. United States, 699 F.2d 1376, 1379 (Fed. Cir. 1983); and Broad Avenue Laundry and Tailoring v. United States, 693 F.2d 1387, 1392 (Fed. Cir. 1982) (both indicating that it would be unjust to measure the justification for the government's litigating position against the new law enunciated by the court through the appeal process). The FAA's factual evidence should be examined in light of the legal standard under which it brought this case, the "reasonably likely" standard.

The FAA needed only to show that there was a reasonable basis in truth for the facts it alleged, and that those facts had a reasonable connection to the FAA's legal theory in the case. The FAA did not need to show that it would prevail or that it even had a substantial likelihood of prevailing. Natchez Coca-Cola Bottling Co., Inc. v. National Labor Relations Board, 750 F.2d 1350, 1354 (5th Cir. 1985).

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[4] In addition, Section 8 of the Administrative Procedure Act provides that, on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision (except as it may limit the issues on notice or by rule). 5 U.S.C. § 557(b).

The specific allegations in the complaint dated June 11, 1991, were as follows:

1. Between June 26, 1986, and July 10, 1986, Pacific Sky produced, through Astronautic Engineering and Manufacturing Co., 62 Rev A Seats, P/N 6809572, of which at least 18 were sold for installation on type certificated products.

2. Between September 30, 1986, and December 30, 1986, Pacific Sky produced, through Aero Sheet Metal, 100 Rev B Rings, P/N 6892263, of which at least one was sold for installation on a type certificated product.

3. At the times referred to in Paragraphs 1 and 2, above, Pacific Sky did not hold a Parts Manufacturer Approval for either of the referenced parts.

Based on these allegations, the FAA alleged that Pacific Sky violated 14 C.F.R. § 21.303(a), which provides, in pertinent part, as follows:

> [N]o person may produce a modification or replacement part for sale for installation on a type certificated product unless it is produced pursuant to a Parts Manufacturer Approval issued under this subpart.

Starting with the last of the three allegations in the FAA's complaint, *i.e.*, that during the time of production, Pacific Sky did not hold a Parts Manufacturer Approval for the seats or rings, Paragraph 2 of the Joint Statement of Admissions and Undisputed Facts addressed this issue directly. It states, "At the time PSS [Pacific Sky] produced the seats and rings, PSS did not hold a Parts Manufacturer Approval for either of the parts." Thus, the FAA had a reasonable basis in fact for the third allegation in its complaint.[5]

The other two allegations in the FAA's complaint were that during the time in question, Pacific Sky produced 62 Rev A Seats, P/N 6809572, of which at least 18

[5] Although Parts Manufacturer Approvals (PMAs) were later issued to Pacific Sky for future production of the seats and rings, the parts referenced in the complaint were not produced under a PMA and therefore could never be considered PMA parts.

were sold for installation on type-certificated products, and 100 Rev B Rings, P/N 6892263, of which at least one was sold for installation on a type-certificated product. The following facts in the record, which includes the exhibits, indicate that the FAA had a reasonable basis in fact for these remaining two allegations in the complaint.

Pacific Sky was engaged generally in the production and distribution of aircraft parts. Paragraph 60 of the Joint Statement states: "Respondent has engaged in the business of selling aircraft parts for over 30 years."

Pacific Sky actively marketed and advertised those parts for sale to the aviation industry, including to those who need parts for type-certificated products. Paragraph 50 of the Joint Statement provides that "At all times mentioned in the Complaint, Respondent subscribed to the Inventory Locator Service (ILS) as an advertiser." Paragraph 52 of the Joint Statement provides: "At all times mentioned in the Complaint, the ILS advertised Respondent's aircraft parts for sale to the aviation and non-aviation industries." Pacific Sky's advertisement in aviation directories (Exhibits CX-Z and CX-AA) identify operators of type-certificated products as a part of its target market. For example, Pacific Sky's advertisement in the Aviation Buyer's Directory and the World Aviation Directory reads, "Trust The Hands of Pacific Sky For Fast Delivery of High Quality FAA-PMA Approved Replacement Parts for Allison 501 or 250 Series Engines . . . Pacific Sky is an innovative leader in FAA-PMA manufactured parts." Similarly, Pacific Sky's sales brochures contain statements that their parts meet FAA airworthiness standards and state, "At Pacific Sky we have a large inventory of parts in stock, ready for same day shipment. That's why the U.S. and foreign military, airlines, as well as

industrial operators and overhaul facilities worldwide choose Pacific Sky." (Exhibit CX-CC.) It was not unreasonable for the FAA to argue that these advertisements made it reasonably likely that someone with a type-certificated product needing a replacement part of the type referenced in the complaint would purchase it from Pacific Sky.

Pacific Sky produced the parts referenced in the complaint. Paragraph 1 of the Joint Statement provides, "Between June 26, 1986, and July 10, 1986, Pacific Sky Supply, Inc. ("PSS") produced 62 Rev A Seats "SEATS," P/N 6809572." Paragraph 2 of the Joint Statement provides, "Between September 30, 1986, and December 30, 1986, PSS produced 100 Rev B Rings "RINGS," P/N 6892263.

The parts numbers referenced in the complaint were designated in the FAA-approved type design of type-certificated products. Paragraph 56 of the Joint Statement provides, "P/N 6809572 and P/N 6892263 are parts designated in the type design of the Allison 501-D13, 501-D13A, 501-D13D, 501-D13E, 501-D13H, 501-D22, 501-D22A, 501-D22C, and 501-D22G Series turbine engines." Paragraph 58 of the Joint Statement provides, "The Allison 501-D Series turbine engines are designated in the type design of FAA-certificated civil aircraft."

Pacific Sky was aware that the part numbers referenced in the complaint were designated in the FAA-approved type design of type-certificated products. Paragraph 59 of the Joint Statement provides, "At all times mentioned in the Complaint, Respondent knew that P/N 6809572 and P/N 6892263 are parts of the type design of the Allison 501-D Series turbine engine."

The parts at issue were important to the safety of the aircraft. The ring at issue was an air seal ring located in the engine, while the seat was an anti-icing air

valve seat that is an integral part of the anti-icing air valve assembly. (Complainant's Exhibit CX-S.) Failures in either the engine or the anti-icing equipment can be extremely dangerous.

Pacific Sky used a condition code advising its customers that special attention should be given if the parts were used on type-certificated products. Paragraphs 24 of the Joint Statement provides, "The 'Explanation of Condition Codes used by Pacific Sky, Inc." Document provides that parts identified as Condition Code 'NEW-OV' 'should be given special attention if the intended use is in an FAA type-certificated (civilian) aircraft . . ." It would be reasonable to conclude from Pacific Sky's use of condition codes that it was reasonably likely that at least some of these parts would be purchased for installation on type-certificated aircraft.

The seats sold by Pacific Sky, which comprised 18 of the 19 parts referenced in the complaint, were sold to persons authorized to install such parts on FAA-approved type-certificated aircraft. Paragraph 53 of the Joint Statement establishes that Pacific Sky sold 18 of the referenced parts to Captive Air, an FAA-certificated repair station with, among others, a Class 1 Accessories rating, as described in 14 C.F.R. § 145.31(f)(1). It was not unreasonable for the FAA to argue that it was reasonably likely that at least some of the parts would be installed on type-certificated aircraft, if not due to actual malfeasance on the part of the purchaser driven by the profit motive, then due to mere human error.

As for the nineteenth part, the ring, it was sold by Pacific Sky to GTC Gas Turbine Ltd. (Joint Statement #9, 17.) The FAA's initial investigation indicated that GTC was engaged in the maintenance of type-certificated products. (Exhibit CX-V.) The FAA had obtained a brochure from GTC indicating that it held an

approval from the United Kingdom Civil Aviation Authority (CAA) to overhaul turbine engines. *(Id.)* Thus, when the FAA filed its complaint, it did have a reasonable basis in fact to proceed against Pacific Sky.

Later, however, apparently in preparation for the hearing in this case, the FAA inspector wrote to the CAA to obtain confirmation that GTC had authority to perform maintenance on engines installed on type-certificated aircraft. (*Id.*) The CAA replied, in a letter dated May 20, 1992, that GTC had CAA approval to repair, overhaul, and modify Rolls Royce Avon and Proteus engines, but it was not authorized to perform maintenance on Allison 501 engines (the particular type of engines on which the ring referenced in the complaint would be installed) that are installed on British-registered civil aircraft. (Exhibit CX-W.) The CAA also informed the FAA inspector that GTC services a wide range of gas turbine engines in the marine, oil, and electrical generation fields, including the Allison 501. *(Id.)* Thus, even though, towards the end of these proceedings, as further facts came to light, it appeared that the FAA might not be able to prove the allegation in the complaint regarding the ring,[6] at all times during the course of the proceedings, the FAA did have a reasonable basis in fact for the allegation involving the ring. If the FAA had not withdrawn its complaint and had proceeded further with the ring allegation, it might have been otherwise, but based on the record before me, the FAA had a reasonable basis in fact for each of the complaint allegations.

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[6] Note, however, that under Section 21.303(a), it is not the end use that matters, but the producer's intent at the time of production, In the Matter of Pacific Sky Supply, Inc., FAA Order No. 93-19 at 7 (June 10, 1993), though the end use can provide circumstantial evidence as to the producer's intent at the time of production.

Special Circumstances

Even if the position of the FAA was not substantially justified, fees and expenses may not be awarded under the EAJA if special circumstances make an award unjust. 5 U.S.C. § 504(a)(1); 14 C.F.R. § 14.01. The following passage from the EAJA's legislative history provides insight into the purpose of the "special circumstances" exception:

> This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4990, quoted in Devine v. Sutermeister, 733 F.2d 892, 895 (Fed. Cir. 1984). Unexplained, radical departures from precedent do not fall within the special circumstances exception. Wilkett v. Interstate Commerce Commission, 844 F.2d 867 (D.C. Cir. 1988). However, extensions or interpretations of the law that are both novel and credible do, as the legislative history quoted above makes clear.

Pacific Sky claims that for special circumstances to exist, the novel and credible interpretation or extension of the law advanced by the agency must involve an unsettled issue *on which a number of courts have reached different results*. Applicant's Brief in Response to Respondent's Appeal at 16. No case has so held, however. Pacific Sky cites to a secondary authority, What Constitutes "Special Circumstances" Precluding Award of Attorneys' Fees Under Equal Access to Justice Act, 106 A.L.R. Fed. 191, 204 (1994), for a proposition that neither that secondary authority, nor the case law on which it is based, supports. An issue may be unsettled even if different courts have not reached different results on it.

In this case, the law judge found that special circumstances were not present. He believed that the FAA's "reasonable person . . . reasonably likely" standard was not an extension of existing law, but an entirely new standard intended to supersede the existing precedent. (Initial Decision at 18.) As discussed previously, however, this finding was based on the law judge's erroneous conclusion that the FAA's standard, by failing to contain an intent requirement, radically departed from the agency's prior interpretation of the rule.

Perhaps no case fits the special circumstances exception better than this one. To award fees in a case like this would likely deter the FAA in future cases from "advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts," H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4990, which are so essential to the public's safety. As noted above, the government's enforcement role requires it to take a broad view of what it may prosecute because judicial review stands guard against an error in that direction, while an error in the opposite direction is unlikely ever to be corrected. *See* discussion of substantial justification *supra* p. 12, quoting Paisley, 957 F.2d at 1170.

In finding that no special circumstances were present, the law judge stated that several failures to act by the FAA forced Pacific Sky to incur unnecessary attorney fees and expenses. (Initial Decision at 18.) The special circumstances exception, however, is a *bar* to the imposition of fees, rather than a *vehicle* for granting them. The EAJA provides that a court shall award attorney fees "unless special circumstances make an award unjust." 5 U.S.C. § 504(a)(1).

It is true that at least one case has held that where there is unreasonable delay on the government's part, the government cannot be said to be advancing in good faith a novel but credible extension and interpretation of the law. Brinker v. Guiffrida, 798 F.2d 661, 668 (3rd Cir. 1986). However, judging from the record, there were no unreasonable delays or failures to act on the FAA's part in this case. At all times throughout the proceedings, the FAA appears to have acted in good faith.

The law judge faulted the FAA for failing to file a motion for decision asking the law judge to interpret Section 21.303(a). According to the law judge, it was not until Pacific Sky filed its motion to dismiss one year after the complaint was issued that the law judge was asked to interpret Section 21.303(a). The law judge also faulted the FAA for failing, in the FAA's request for an interlocutory appeal, to inform the law judge that the FAA could not prevail under the law judge's interpretation of the rule. However, the law judge points to nothing in the Rules of Practice or in any other legal authority that required the FAA to file a motion for decision or to state in its request for interlocutory appeal whether it could prevail under the law judge's interpretation. Assuming, for the sake of argument, that it would have been better practice for the FAA to have done what the law judge believes it should have done, the FAA's actions do not rise to a level that would negate a finding of special circumstances. In the absence of clear abuses, which are not present here, it cannot be said that the FAA caused Pacific Sky to incur needless legal expenses.

Finally, the law judge faulted the FAA for failing to withdraw its complaint soon enough after the issuance of Order No. 93-19 on June 10, 1993. According to

the law judge, the FAA caused Pacific Sky to incur unnecessary legal expenses by not filing its withdrawal of complaint until approximately 3 months later, on October 15, 1993, after the law judge issued his order of September 17, 1993, requiring the parties to submit a status report.

Nothing in the record suggests that the FAA acted unreasonably in this regard. Time would have been required for the FAA attorney to receive the decision in the mail and to re-evaluate the FAA's case carefully based on the newly enunciated standard, the likelihood of prevailing under the new standard, enforcement priorities, any change in the availability of witnesses, and other such matters. I do not find that the FAA acted unreasonably by withdrawing the complaint 3 months after the issuance of Order No. 93-19. The EAJA was enacted in part to caution agencies carefully to evaluate their cases before proceeding further. Rafter v. Hinson, NTSB Order No. EA-4313, 1995 NTSB LEXIS 11 (January 19, 1995), quoting Catskill Airways, Inc., 4 NTSB 799 (1983). The FAA should not be faulted for taking the time it needed to do so.

Conclusion

The law judge's decision awarding attorney fees is reversed because the FAA's position was substantially justified and because special circumstances make an award of attorney fees unjust. Due to this finding that an award of attorney fees is inappropriate, it is unnecessary to examine Pacific Sky's arguments that the law judge's award of fees was too low.[7]

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 4th day of August, 1995.

[7] Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1995).