UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: March 25, 1993

FAA Order No. 93-9

In the Matter of:	
MICHAEL EDWARD WENDT	Docket No. CP92GL0418 EAJA No. 92EAJAGL0008

DECISION AND ORDER

Michael Edward Wendt appeals the law judge's denial of attorney fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 et seq.[1/] Because the FAA was substantially justified in bringing and maintaining its civil penalty action against Wendt, the law judge's decision is affirmed.

Wendt, acting as pilot in command of a commercial, passenger-carrying flight, crossed an active runway at Indianapolis International Airport, contrary to air traffic control instructions.[2/] The FAA initiated a civil penalty action against Wendt, and after a hearing, the law judge found

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

2/ For a more detailed discussion of the underlying facts, see In the Matter of Wendt, FAA Order No. 92-40 (June 15, 1992).

that Wendt violated the regulations alleged in the complaint. On appeal, however, the Acting Administrator reversed. In the Matter of Wendt, FAA Order No. 92-40 (June 15, 1992). In his decision, the Acting Administrator pointed out that a number of the usual visual cues enabling a pilot to identify an intersecting runway, including certain runway markings and a sign, were not present. He also noted that poor air traffic control coordination and technique may have been a factor, although no specific air traffic control procedure was violated.

As the prevailing party, Wendt filed an application for attorney fees and other expenses under the EAJA and the FAA's implementing regulations.[3/] The law judge found that the agency's litigation position was substantially justified and denied Wendt's EAJA claim.

The EAJA requires an agency conducting an adversary adjudication to award fees and other expenses to a prevailing party unless the position of the agency was substantially justified. 5 U.S.C. § 504(a)(1); 14 C.F.R. § 14.04. Each stage of the prosecution must be substantially justified, or a party may recover its expenses for the unnecessary proceedings. Natchez Coca-Cola Bottling Co., Inc. v. N.L.R.B., 750 F.2d 1350, 1352 (5th Cir. 1985), citing Tyler Business Services, Inc. v. N.L.R.B., 695 F.2d 73, 75-76 (4th Cir. 1982). The agency attorney bears the burden of proving

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3/ 14 C.F.R. Part 14.

substantial justification. 14 C.F.R. § 14.04(a); In the Matter of KDS Aviation Corporation, FAA Order No. 91-52 at 5, 6 (October 28, 1991).

The United States Supreme Court has held that the term "substantially justified" in the EAJA means:

> "justified in substance or in the main"--that is, justified to a degree that could satisfy a reasonable person. This is no different from the "reasonable basis both in law and in fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.4/ To be "substantially justified" ... means more than merely undeserving of sanctions for frivolousness ....

Pierce v. Underwood, 487 U.S. 552, 565-566 (1988) (citations omitted).5/

Failure to prevail does not raise a presumption of lack of substantial justification. Bay Area Peace Navy v. United States, 914 F.2d 1224, 1231 n.4 (9th Cir. 1990). The agency could take a position which was substantially justified, and

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4/ The "reasonable in law and fact" formulation is also used in the FAA regulations implementing the EAJA:

> The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, who may avoid an award by showing that the agency's position was reasonable in law and fact.

14 C.F.R. § 14.04(a).

5/ As the law judge noted, although Pierce actually interprets "substantially justified" as used in 28 U.S.C. § 2412(d)(1)(A) rather than 5 U.S.C. § 504, the two statutes, both created by the EAJA, embody virtually identical rights and obligations. The difference is that the former is applicable to certain civil judicial proceedings, and the latter to federal agency adjudications.

still lose. Id. Furthermore, the agency need not show that it had a substantial likelihood of prevailing. Id. at 1230, citing United States v. First National Bank of Circle, 732 F.2d 1444, 1447 (9th Cir. 1984).

In determining whether the government was substantially justified, the courts have often looked to the clarity of the governing law.[6/] The courts have based findings of substantial justification on such factors as "the complexity, uniqueness, and newness of the issues,"[7/] their novelty and difficulty,[8/] and the fact that the case was one of "first impression."[9/]

On appeal, Wendt argues that the agency should have realized the error of its position in the litigation against him. Wendt faults the agency attorney for not accepting his offer to settle the case at the informal conference with a civil penalty of $1,000 and no finding of violation on his record. He is seeking attorney fees, he says, due to the agency's:

> stubborn litigious posture which it has taken in continuing to pursue this matter even once it learned

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6/ See, e.g., Jones v. Lujan, 887 F.2d 1096, 1099 (D.C. Cir. 1989).

7/ Luciano Pisoni Fabbrica Accessori Instruments Musicali v. United States, 837 F.2d 465, 467 (Fed. Cir. 1988), cert. den. 109 S.Ct. 60.

8/ Health and Human Services of State of California v. Secretary of Health and Human Services, 823 F.2d 323, 328 (9th Cir. 1987).

9/ See, e.g., Griffon v. United States Department of Health and Human Services, 832 F.2d 51, 52-53 (5th Cir. 1987).

> the mitigating circumstances of this incident and the large part played by the air traffic controllers in causing the incident.

Wendt's Appeal Brief at 9. The agency argues in response that its position was substantially justified at each stage of the litigation.

Wendt is correct in asserting that the EAJA does not preclude attorney fees merely because the initial actions taken by the agency were legitimate. The agency's position must be substantially justified at all stages in the proceedings. Natchez, 750 F.2d at 1352. Nevertheless, the law judge's conclusion that the agency was substantially justified in initiating and maintaining the action against Wendt is supported by the record.

The issues in this case were novel and difficult. When the case against Wendt was initiated, no other case presenting the same situation (alleged controller error combined with allegedly inadequate visual cues) had been decided by the Administrator.[10/] During the course of the civil penalty proceedings against Wendt, the Administrator issued two decisions involving allegations of controller error. In the first such case, In the Matter of Terry & Menne, FAA Order No. 91-12 at 3 n.6 (April 12, 1991), petition for reconsideration

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10/ Indeed, the Administrator had issued few decisions on any subject at the time this case was brought because the Administrator's authority to decide civil penalty cases was still relatively new.

denied, FAA Order No. 91-31 (August 2, 1991), aff'd, Terry & Menne v. Busey, 976 F.2d 1445 (D.C. Cir. 1992), the Administrator stated that if controller error had occurred, it would not exonerate the pilots but would serve only to mitigate an otherwise appropriate sanction. In the second decision, In the Matter of Watkins, FAA Order No. 92-8 (January 31, 1992), the Administrator rejected the pilot's claim that the sanction should be reduced because of allegedly ambiguous clearances from the controller. Arguably, these decisions lent support to the agency's position in its case against Wendt.

Likewise, the pertinent case law of the National Transportation Safety Board (NTSB) supported the agency's position. Although the decisions of the NTSB are not binding on the Administrator, they do provide guidance.[11/] Here, Wendt was contesting only the finding of violation on his record, because the $1,000 civil penalty sought in the complaint had been waived under the Aviation Safety Reporting Program. NTSB precedent available at the time indicated that while controller contribution to an incident might lead to reduction or even elimination of the sanction, it would not normally absolve the

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11/ See Terry & Menne, FAA Order No. 91-12 at 3 n.6 (stating that although the Administrator was not bound by NTSB precedent, he had taken the NTSB cases cited into consideration in making his decision).

pilot of the regulatory violations.[12/] Only in "unique circumstances" had the NTSB relieved pilots of a finding of violation.[13/] The NTSB had also held that evidence showing penetration of an active runway without a clearance warrants a finding of violations of Sections 91.9 and 91.75.[14/]

The agency's case was strong on the facts. As the law judge pointed out:

> The evidence showed (and Respondent acknowledged) that he crossed an active runway against instructions, a prima facie violation of § 91.75(b) [now 91.123(b)]. Additionally, four witnesses, including his own expert, characterized Wendt's incursion as "pilot deviation." The record also shows that the agency had reasonable cause to believe that the crossing was "careless" within the meaning of § 91.9 [now 91.13(a)]. An FAA witness credibly asserted that it was careless. Further, crossing an active runway is hazardous by nature--and twenty-year old aviation law holds that any careless practice in which danger is inherent contravenes section 91.9 (citation omitted). In this proceeding, moreover, the danger was more than theoretical, contributing to the strength of the government's case. An aircraft had begun its takeoff on the intersecting runway as Respondent crossed it.

12/ See Administrator v. McElroy, 2 NTSB 444, 447 (1973) (sanction reduced because of controller contribution, but finding of violation affirmed); Administrator v. Snead, 2 NTSB 262, 264 (1973) (no sanction imposed because of controller contribution, but finding of violation affirmed); Administrator v. Alvord, 1 NTSB 1647, 1660 (1972) (no sanction imposed, violation affirmed); Administrator v. Ryan, 1 NTSB 1439, 1442 (1972) (no sanction imposed, violation affirmed).

13/ Administrator v. Holstein, NTSB Order No. EA-2782 at 8 (1989); and Administrator v. Finley, 3 NTSB 2840 (1980).

14/ See, e.g., Administrator v. Hinkle and Foster, 5 NTSB 2423 (1987).

Law Judge's Decision at 3, 4. Indeed, on the transcript of the tape recording of the air traffic control transmissions, the pilot of the other aircraft can be heard to say, "Ah, what's that guy doing on the runway at (sic) I'm taking off?" Wendt, FAA Order No. 92-40 at 5, n.6. There was little doubt that the evidence would and did show that Wendt had violated Sections 91.75 and 91.9. The only real question was whether there were any exonerating circumstances in this case, and based on FAA and NTSB precedent, it was reasonable for the agency to argue that there were none.

The unique facts of this case led Acting Administrator Harris to reverse the law judge[15/] and to find no violation. As the Acting Administrator stated in his decision, "safety normally requires that pilots be held strictly accountable for their mistakes." Wendt, FAA Order No. 92-40 at 7. Although the airport signs and markings, combined with what may have been confusing air traffic control communications, ultimately led to a finding of no violation, existing visual cues at the airport met FAA standards and no specific air traffic control procedure was violated. Id. at 6-7.

15/ One court has cautioned: "though success at a preliminary stage in the proceedings may be some evidence of justification, it does not, by itself, catapult the government over the hurdle." Sierra Club v. Secretary of Army 820 F.2d 513, 520 (1st Cir. 1987). Here, however, the agency's success before the law judge is just one of a number of indicators of substantial justification.

This was an exceedingly close case. The FAA has a statutory duty "to promote safety of flight of civil aircraft in air commerce,"[16/] and to ensure that air carriers and their pilots perform their duties with "the highest possible degree of safety in the public interest."[17/] In a good faith attempt to fulfill this duty, the agency reasonably sought, and continued to seek throughout these proceedings, a finding of violation against Wendt. Substantial justification has been shown in this case because the agency's position was reasonable in fact and law. The law judge's decision denying Wendt's application for EAJA fees is affirmed.[18/]

JOSEPH DEL BALZO
Acting Administrator
Federal Aviation Administration

Issued this 24 day of March, 1993.

16/ 49 U.S.C. App. § 1421(a).

17/ 49 U.S.C. App. § 1421(b).

18/ The amount of attorney fees is not discussed in light of my finding that the government was substantially justified. Note, however, that several of the motions and papers that Wendt filed in these proceedings could have been avoided through a reasonably attentive reading of the applicable statutes and the Rules of Practice, 14 C.F.R. § 13.16 and Subpart G of 14 C.F.R. Part 13.