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Pilot Counsel: The Equal Access to Justice Act

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There is a relatively little known federal law called the Equal Access To Justice Act (EAJA) that benefits, and should continue to benefit, aircraft owners and pilots. It was enacted in 1980 to help persons who fight the government to recover attorneys' fees and other costs if the government was not justified in taking action against them in the first place. It applies government-wide. For our purposes, it has particular applicability to the suspension or revocation of an FAA pilot or other certificate that is appealable to the National Transportation Safety Board. There have been significant awards made by NTSB law judges, and hopefully there will continue to be. But faithful readers of the this column will not be surprised to learn that the NTSB, while not able to eliminate all awards, has been inclined to restrict awards to pilots and others in favor of the FAA. It's a sad history. What brings the act to mind is a recent decision that continues this sad history.

In this 2009 case, the FAA ordered the suspension of two pilots' airline transport pilot certificates, one for 120 days and the other for 30 days. The FAA charged them with operating a Learjet on three occasions while it was not in airworthy condition. The pilots, vigorously denying the charges, filed an appeal of the suspensions to the NTSB. The cases were assigned to an NTSB law judge who consolidated the two appeals and set them for hearing. While the pilots and their lawyer were preparing for the hearing, the FAA filed a notice of withdrawal of the consolidated cases. As a result, the law judge then issued an order terminating the cases. The pilots, believing that the FAA was not justified in taking these actions, filed an application for attorneys' fees and expenses under the EAJA. The law judge, in granting the request for fees and expenses in the amount of \$12,475, said that the FAA "proceeded on a weak and tenuous basis with a

flawed investigation bereft of any meaningful evidence against applicants." The FAA appealed the judge's award to the full NTSB. The board reversed the law judge, denying the application for an EAJA award.

Incredibly, the board decided the case on the narrow ground that the pilots did not "win" their cases. They were not "prevailing parties" as required by the act. Quoting liberally from a United States Supreme Court decision that had nothing to do with FAA enforcement appeals to the NTSB, and extracting language that clearly was inapplicable to such proceedings, the NTSB said: "Applicants do not satisfy the prevailing party standard, because they did not receive an enforceable judgment on the merits of this case, nor did they obtain a court-ordered consent decree that resulted in a change in the legal relationship between the parties."

At the time the board issued this decision, there were four board members. There was one vacancy. The only pilot member of the four filed a lengthy and stinging dissenting opinion. Not only had he been a pilot for 32 years, including 24 years as an airline pilot with Piedmont Airlines and USAirways logging more than 14,000 flight hours, but he had extensive executive experience in accident investigation and aviation safety, the prime missions of the NTSB. He had a clear understanding and empathy for what the board was deciding.

His dissent takes the majority to task for rejecting the obvious intent of the EAJA—to encourage persons to challenge unwarranted government action against them and to discourage unwarranted government action. He chides the majority for making an overbroad application of a Supreme Court decision that was never intended to have application in a case such as this one. He also faults the majority for ignoring the board's own rules implementing the act, which recognize that a "voluntary dismissal" may be a basis for an EAJA award.

This case does not stand alone. As I said, the history of the board's interpretation of the act is sadly one-sided, favoring the FAA and disfavoring pilots. For example, a very hurtful precedent is that the board will not allow recovery for legal fees necessarily incurred in connection with the FAA investigation

that led to the certificate suspension or revocation, or attendance at the usual informal conference with the FAA attorney prosecuting the case, or the considerable legal services required to review the FAA investigative report and conduct an independent investigation. It is only after an appeal is filed—and the FAA files its complaint with the NTSB—that the legal services rendered thereafter may be recoverable. From my experience with the AOPA Legal Services Plan, a considerable amount of the usual and required legal services cannot be recovered under this precedent. Another very hurtful precedent is that no recovery will be allowed if a pilot is successful in getting the sanction significantly reduced. The pilot may believe that he or she prevailed to a significant extent. Not the NTSB. To the same effect, no recovery will be allowed if the FAA argues that it relied on the credibility of its witnesses, even if the judge does not believe them and decides in favor of the pilot. Even an application for an award that was one day late was held to be too out of time to be considered.

Can it be that these precedents, all one-sided and all after a pilot has “won” the case, are consistent with the purposes of the EAJA?