



# Equal Access to Justice

By Kent S. Jackson

## *How much justice can you afford?*

The Equal Access to Justice Act was designed to help citizens defend themselves from unjustified governmental actions. In the context of a fight with the FAA, a pilot or mechanic who seeks to recover attorneys fees will only be paid if he or she (1) prevailed in the underlying proceeding, (2) meets certain net worth requirements, and (3) incurred the sought fees and expenses in connection with the underlying proceeding; if all those criteria are met, then the NTSB is to make an award, unless the position of the FAA is found to have been substantially justified or other factors would make an award unjust. The italicized words are elements of the Act which have been extensively litigated.

Beating the FAA at a hearing is no guarantee that the FAA will have to pay your attorney's fees. In many cases, although the FAA lost at the hearing, the NTSB finds that the FAA's position was nevertheless 'substantially justified.'

To meet the 'substantial justification' standard, the FAA must show that its decision to bring and maintain a case was 'reasonable in both fact and law,' in other words, the facts alleged must have a reasonable basis in truth, the legal theory must be reasonable, and the facts alleged must reasonably support the legal theory. The NTSB has further stated that each allegation made by the Administrator must be evaluated at each step of the proceedings when new or additional evidence indicated that her original allegations lacked substance or were in error. So, in some cases, fees will only be awarded from the point in time where the FAA was aware of all of a pilot's defenses until the matter was resolved.

According to the NTSB, in the case of conflicting evidence, the FAA is substantially justified in pursuing an action if it relied on a reasonable interpretation of the evidence. In other words, if the FAA witnesses and the pilot's witnesses present totally different versions of what happened, then, even if the pilot wins, he or she is unlikely to col-

lect attorney's fees under EAJA.

A 'stale complaint' is an example of a case where the FAA's case is not reasonable under the law. The FAA is required, with some exceptions, to notify a pilot or mechanic of a proposed certificate suspension within six months after the alleged incident occurred. Since a pilot may not know of this requirement, it may never be brought up as a defense. But, if the FAA pursues a 'stale complaint,' and the pilot properly brings the issue up as a defense, then the case was not substantially justified and fees may be paid, even though the underlying allegations may have been true.

Fortunately, the requirement that a pilot 'prevail' does not require the NTSB to completely throw out the FAA's order before fees can be paid. For instance, if the FAA seeks a 365-day suspension for a violation which normally only warrants a 30-day suspension, then the pilot may be able to recover some defense costs if he or she gets a 30-day suspension, whether the 30-day suspension was reached through settlement or was handed down by the NTSB.

The issue of whether a pilot 'incurred' attorney's fees has become more complicated. In a recent case, an NTSB Administrative Law Judge saw no problem in awarding fees to the pilot whose employer had paid the attorney's fees. The Judge found it reasonable that an employer would pay the legal costs of an employee in defending an action which arose from actions within the scope of his employment. He also believed that it is not reasonable that an employer, under such conditions, would pay its employee's legal fees and expenses, on the one hand, and not expect that the employee reimburse it for the expenses it paid on the employee's behalf, at least to the extent that the employee recovers attorney fees and expenses from the Government in an EAJA action.

The NTSB reversed the Judge and ruled that the pilot could not seek fees that he had not 'incurred,' and the employer could not

be reimbursed because it was not a 'party' to the action. The Board stated: 'A policy intended to encourage attorneys to represent persons in otherwise "unprofitable" cases therefore is not undermined by a disapproval of fees here.' The NTSB ignores the fact that it caps the hourly rate that attorneys may be reimbursed well below the market rates for attorneys with experience in aviation enforcement matters.

Clearly, this policy does discourage employers from helping their pilots or mechanics who may face unjustified FAA enforcement proceedings.

Keep in mind the fact that EAJA does not reimburse a pilot for lost income or defamation. EAJA only addresses the fees incurred in defending against a government action, and does not provide any of the many other financial and other costs 'incurred' by an unlucky pilot who is wrongfully accused.

Although the FAA provides basic information regarding appeal rights when it issues enforcement orders to pilots and mechanics, it does not provide any information regarding EAJA. Anyone who hires counsel to defend against the FAA should have their attorney review NTSB case law on application of EAJA to these proceedings, in order to make sure that the right to fees is not inadvertently lost.