

Synopsis:

U.S. Court of Appeals, District of Columbia Circuit. Decided June 8, 2010. The Federal Aviation Administration suspended the Airline Transport Pilot Certificates of Mark Turner and of Stephen Coonan for operating an "unairworthy" aircraft in violation of 14 C.F.R. § 91.7(a), the pilots appealed, and the FAA withdrew its complaints before an Administrative Law Judge could hear their appeal. The ALJ then awarded the pilots attorneys fees and expenses pursuant to the Equal Access to Justice Act (EAJA), codified as amended in relevant part at 5 U.S.C. § 504 (see also 28 U.S.C §2412), concluding each pilot was the "prevailing party" in his case.

The FAA appealed to the National Transportation Safety Board, which reversed the award. The pilots petitioned for review of the Board's order and were denied.

Citing the three-part test for determining whether party has prevailed, as distilled from the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department*

of Health and Human Resources, 532 U.S. 598 (2001), the NTSB held the pilots were not prevailing parties: They did not "prevail on any portion of the merits ... as the Administrator withdrew the charges before the [ALJ] could hold a hearing"; and the ALJ did not "issue an order akin to a court-supervised consent decree" because he "merely accepted the Administrator's withdrawal of the charges." The Board further concluded the ALJ "did not dismiss the case with prejudice or in any way alter the relationship of the parties." The NTSB also held the pilots were not entitled to fees because § 504(a)(1) of the EAJA applies only where there was "an adversarial adjudication," but the FAA did not defend

that argument in its brief to the court.

One member of the Board dissented. He maintained *Buckhannon* does not apply to this case because the Court's holding there was limited to rejecting the "catalyst theory," under which a party prevails if it "achieved the desired result because [its] lawsuit brought about a voluntary change in the defendant's conduct," 532 U.S. at 600, whereas the pilots here had not initiated proceedings but rather had successfully defended themselves against the FAA's lawsuit.

Editorial note:

For a complete copy of the Court of Appeals' holding, please email me at john@avialex.com. ■

"Disastrous" Trial Closes in France After Concorde Disaster

Hays Hettinger

NTSB Bar Association President, Tony Jobe, has authorized the revitalization of our Bar's Select Committee on Aviation Public Policy and I have agreed to serve as its Chairman. Our immediate task is to report on the legal implications of the criminal trial that opened in February and closed May 28, 2010 in Pontoise, north of Paris, probing who is to blame for the 2000 Air France Concorde crash at La Patte d'Oie in Gonesse. It is intended that this will be a critical analysis and, hopefully, accepted later for publication in a law review.

The principal issue is the criminalization of what appears to have been no more than aviation negligence, and represents a reprise to an earlier article by this Committee published as *Aviation Professionals and the Threat of Criminal Liability—How Do We Maximize Safety?*, 67 *J. Air L. & Com.* 875 (Summer 2002).

Current Committee Members include: Tony Jobe; J.E. "Sandy" Murdock, former Chief Counsel FAA; Christa Hinckley; Bill Elder; Marty Raskin; Chris Kilgore; and our Newsletter Editor-in-Chief, John Van Geffen. Others may join us.

In the 4-month criminal probe, Continental Airlines, Inc., two of its employees and three French aviation officials were tried for manslaughter in the July 25, 2000 fiery crash of the jet, which plunged into a hotel shortly after takeoff from Roissy Charles de Gaulle airport, killing all 109 people aboard and four on the ground.

The French BEA (Bureau Enquetes-Accidents), equivalent to the U.S. NTSB, had found in its Accident Report of January 2002 that during takeoff from runway 26R, shortly before rotation, the No. 2 tire of the left landing gear ran over a metal strip, fallen five minutes earlier from a Continental MD-10 departing the same runway. Debris was thrown against the wing structure leading to a rupture of fuel tank 5. A major fire, fuelled by the leak, broke out immediately under the left wing. After takeoff, the aircraft was unable to gain speed or altitude, and after the No. 1 engine lost thrust, the angle of attack and bank increased sharply, thrust fell suddenly on Nos. 3 and 4, and the aircraft crashed

continued on page 13

Increase Pilot Training...

continued from page 10

with duty hours and pilot fatigue, the AAJ stated higher wages would result in pilots living closer to their home base and thus avoiding the often ridiculous commutes, sometimes over a hundred miles.

The AAJ also took the chance to call into question the FAA's current practice of allowing academic credit in lieu of required flight hours, believing that experience in specific hazardous conditions should be mandatory, not an optional replacement for required flight hours.

AAJ President, Anthony Tarricone stated "The current level of training required for pilots is not substantial enough and has made the airways unsafe for passengers... The rigor of pilot certification should be first priority when it comes to improving flight safety." ■