NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Parts 821 and 826

Rules of Practice in Air Safety Proceedings and Implementing the Equal Access to Justice Act of 1980

AGENCY: National Transportation Safety Board (NTSB or Board).

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The NTSB seeks comments from the public regarding amendments to its regulations which set forth rules of procedure for the NTSB's review of certificate actions taken by the Federal Aviation Administration (FAA), and those which set forth rules of procedure concerning applications for fees and expenses under the Equal Access to Justice Act (EAJA). The NTSB is undertaking a review in an effort to respond to parties' suggestions for changing the rules, in order to update rules that may be outdated, in the interest of modernizing the rules to accommodate prospective electronic filing and document availability in case dockets.

DATES: Send your comments on or before February 22, 2011.

ADDRESSES: You may send comments using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to NTSB Office of General Counsel, 490 L'Enfant Plaza East, SW., Washington, DC 20594–2000.
- *Facsimile:* Fax comments to 202–314–6090.
- *Hand Delivery:* Bring comments to 490 L'Enfant Plaza East, SW., 6th Floor, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Gary Halbert, General Counsel, (202) 314–6080.

SUPPLEMENTARY INFORMATION:

Comments Invited

The NTSB invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to any economic, environmental, energy, or federalism impacts that may result in amending part 821 or part 826. The most helpful comments would reference a specific section, explain the reason for any recommended change, and include supporting data or rationale. To ensure the docket does not contain duplicative comments, please send only one copy of written comments, or, if you are filing comments electronically, please submit your comments only once.

We will file in the docket all comments we receive, as well as a report summarizing any substantive public contact with NTSB personnel concerning this proposed rulemaking. Before amending part 821 or part 826, we will consider all comments we receive on or before the closing date for comments. As described below, we are particularly interested in reviewing comments pertaining to: The standard for the NTSB's review of the FAA's "emergency" determinations; discovery and exchange of documents in air safety proceedings; suggestions concerning electronic filing of documents in such cases; and updates to the procedural rules governing EAJA claims.

Part 821: Rules of Practice in Air Safety Proceedings

Emergency Review Process: Regulatory History

The FAA is authorized, under 49 U.S.C. 44709(e)(2), to issue orders amending, modifying, suspending, or revoking certificates issued on an "emergency" basis. In non-emergency cases, the certificate holder may continue to exercise the privileges of the certificate(s) affected by such an order while an appeal of the order is pending with the NTSB. Emergency orders are issued by the FAA where it finds that the interests of safety require that the order be effective immediately, and, in those cases, certificate privileges may not be exercised during the pendency of the appeal. Section 716 of the Aviation Investment and Reform Act for the 21st Century (hereinafter, "the Act") amended 49 U.S.C. 44709 by granting the NTSB authority to review such emergency determinations. Public Law 106–181, section 716 (2000) (codified at 49 U.S.C. 44709(e)(3)).

On July 11, 2000, in order to implement that provision, the NTSB published an Interim Rule with a request for comments. 65 FR 42637. This Interim Rule amended 49 CFR part 821 by providing the NTSB's administrative law judges with the authority to issue orders affirming or denying the FAA's determination that an emergency exists under 49 U.S.C. 44709(e).

The NTSB received a number of comments in response to the Interim Rule, which it considered when drafting the Final Rule. Those comments were primarily directed at the following subjects: The standard of review of emergency determinations; the burden of proof and the evidence to be reviewed; and an intermediate appeal process to the full Board. In addition, a suggestion was made to allow electronic filings in such proceedings. On April 29, 2003, the NTSB published the Final Rule, which included one major change from the Interim Rule: It altered the standard of review for emergency determinations.

A. Standard of Review

The standard of review of emergency determinations in the Interim Rule directed NTSB law judges to decide whether the Administrator abused his or her discretion in finding that an emergency existed under the facts alleged in the Administrator's order, which the NTSB assumed to be true for the limited purpose of reviewing the emergency determination. The NTSB incorporated the abuse of discretion standard for review set forth in the Interim Rule from *Nevada Airlines* v. *Bond,* 622 F.2d 1017 (9th Cir. 1980). Subsequent to *Nevada Airlines,* the Ninth Circuit, in *Tur* v. *FAA,* 4 F.3d 766, 768 (1993), reaffirmed the "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" standard it articulated in *Nevada Airlines.* That standard was also applied in *Ickes* v. *FAA,* 299 F.3d 260 (3rd Cir. 2002) (citing *Blackman* v. *Busey,* 938 F.2d 659, 663 (6th Cir. 1991) and *Nevada Airlines,* and stating, "our standard of review when assessing an FAA response to a perceived emergency is appropriately deferential: we ask only whether the finding of an emergency 'was a clear error of judgment lacking any rational basis in fact.' "). *See also Armstrong* v. *FAA,* 515 F.3d 1294 (D.C. Cir. 2008) (implying, in dicta, that the appropriate standard for review of emergency determinations is an "arbitrary and capricious" standard).

After issuing the Interim Rule, the NTSB received two comments asserting that the abuse of discretion standard is not appropriate for the NTSB to apply to its reviews of emergency determinations. Both commenters stated that the abuse of discretion standard used in *Nevada Airlines* was a standard for judicial review and was not suitable for administrative review by the NTSB.

However, based on the comments, the standard of review provided for in the Final Rule at section 821.54(e) provides: "Within 5 days after the Board's receipt of [a petition for review of the FAA's emergency determination], the * * * law judge * * * shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal."

The NTSB adopted a standard that requires a law judge to ascertain whether the Administrator's emergency determination was appropriate under the circumstances, given the potential threat to aviation safety, rather than merely deciding whether the Administrator's emergency determination was rationally supportable under an abuse of discretion standard. Thus, the standard adopted in the Final Rule represented a substantive departure from the more stringent standard that had been generally accepted by the courts.

B. Burden of Proof and Evidence

Related to the standard of review in emergency determination cases, some commenters objected to the provision in the Interim Rule that reviews of emergency determinations be undertaken under the assumption that facts alleged by the Administrator are true. That assumption remained unchanged in the Final Rule. Note: Section 821.54(e) does not explicitly state that the allegations of the FAA's complaint are "deemed true," but instead uses the word "assum[ed]." The NTSB modeled this language after subsection (b) of the Board's Stale Complaint Rule, codified at 49 CFR 821.33. The NTSB concluded that the right to challenge an emergency determination should not be an opportunity to contest the factual allegations underlying the certificate action. The Board believed its rules already provided an opportunity for contesting those factual allegations in emergency cases via an expedited review process, which must be completed within 60 days, and the NTSB determined that it would be impractical to accomplish that expedited review process within the preliminary 5-day emergency determination review process.

The NTSB also received several comments concerning the review of evidence during the emergency determination review phase; most commenters asserted that certificate holders need more evidence from the FAA in order to contest the determination that an emergency exists. After carefully considering the comments concerning the presentation of evidence during the emergency review determination phase, the NTSB included the following provision in section 821.54(d) of its Final Rule: "No hearing shall be held on a petition for review of an emergency determination. However, the law judge may, on his or her own initiative, and strictly in keeping with the prohibition on ex parte communications * * * solicit from the parties additional information to supplement that previously provided by the parties."

C. Appeals Process

Several commenters were also concerned with the Interim Rule's provision, in section 821.54(f), that the law judge's determination concerning an emergency review petition would be considered final. The commenters provided various suggestions for an appeal process, in which a certificate holder could appeal the law judge's determination that an emergency exists to the Board. In the Final Rule, the NTSB decided not to institute such an intermediate appellate procedure for review of the law judges' decisions in reviewing emergency determinations. The NTSB determined that it was not necessary and would prove infeasible given the 5-day statutory period in which the Board must act on a petition. In order to address concerns of inconsistency and lack of precedent, the NTSB provided in the Final Rule that it would, in those cases that are appealed to the Board for a decision on the merits of an emergency or other immediately effective order of the Administrator, state the Board's concurrence or disagreement with the law judge's ruling on a petition challenging the emergency determination whenever it would be beneficial to address the issues raised, and that such views of the Board would serve as binding precedent in future cases.

D. Electronic Filings

Finally, one commenter suggested that the NTSB consider permitting electronic filing in emergency proceedings. The NTSB declined to adopt such a provision in the Final Rule.

Request for Comments

A. Standard for NTSB Review of FAA Emergency Determinations

Recently, the NTSB has received requests from outside organizations to further alter the standard of review for emergency determinations. In particular, parties have asked the NTSB to consider removing the language of section 821.54(e) that provides that the law judge should assume that the acts and omissions alleged in the FAA's emergency order are true. Because of such interest, the NTSB specifically invites written comments concerning this issue along with support for the position.

B. Discovery and Exchanges of Information by the Parties

The NTSB has also received requests for amendments to its rules governing the discovery process and exchanges of information by the parties in air safety enforcement proceedings, and would like to invite written comments concerning discovery obligations in cases on appeal. For example, in the interest of ensuring that parties understand their discovery obligations, should the Rules of Practice require law judges routinely to issue prehearing orders? In addition, should the Rules impose any specific sanctions for a party's failure to provide information requested in discovery? The NTSB specifically invites comments on these issues along with the reasoning for any recommendation to make changes, as well as general concerns regarding pre-hearing exchanges of information by the parties.

C. Electronic Filing of Documents

The NTSB is committed to creating an electronic filing system for cases involving certificate actions at some point in the future. Currently, the NTSB is in the initial stages of exploring options for such a system. The NTSB is nevertheless interested in obtaining ideas and suggestions at this juncture from commenters. The NTSB notes that many certificate-holders proceed *pro se* (without representation by legal counsel), and encourages comments that suggest means by which parties acting *pro se* may avail themselves of the electronic filing process.

Part 826: EAJA Procedural Rules

Background Information

The NTSB promulgated part 826 on October 1, 1981, in light of the need for procedural rules to govern cases arising out of the EAJA, codified at 5 U.S.C. 504. In the Final Rule that the NTSB published promulgating part 826

(published at 46 FR 48208 (Oct. 1, 1981)), the NTSB organized part 826 into three subparts: Subpart A contains general provisions, such as the purpose of part 826, which proceedings are covered and which applicants are eligible, and which fees and expenses are allowable, among other subjects; subpart B contains provisions concerning the required information that applicants must furnish the NTSB in order to receive an award; and subpart C sets forth the NTSB's procedures for considering EAJA applications. In 1989, the NTSB published a Final Rule amending the authority citation for part 826, and revising section 826.4, which addresses the eligibility of applicants (published at 54 FR 10332–01 (Mar. 13, 1989)). Specifically, the NTSB revised three subsections of section 826.4(b) to provide limitations on which applicants may be eligible for an award. The NTSB has not amended part 826 since the March 1989 Final Rule.

Request for Comments

Recently, the NTSB Office of General Counsel received an inquiry from an attorney who advised that section 826.40, which provides instructions for receiving payment of an award from the FAA, was outdated, in that it provides an incorrect address and contact information for the FAA office responsible for managing payments of awards under the EAJA. The NTSB seeks to ensure that its regulations are current, accurate, legally enforceable, and helpful to individuals to whom they apply. Therefore, the NTSB plans to update section 826.40, as well as any other sections within part 826 that may also be inaccurate.

The NTSB invites written comments from any individuals interested in this rulemaking. As stated above, comments should specify the section needing amendment, and provide clear recommendations of the proposed changes along with supporting data and rationale.

The NTSB reminds potential commenters that 5 U.S.C. 504 governs the applicability of the EAJA, and the NTSB will not attempt to expand this applicability in amending part 826. The NTSB also will observe and respect courts' interpretations of 5 U.S.C. 504, and, in general, will not adopt suggestions that are contrary to the Federal Courts of Appeals' interpretations.

In general, the NTSB is receptive to considering suggestions concerning the promulgation of new sections regarding subjects not presently addressed in part 826. The NTSB does not intend to enact proposed provisions that it believes would not be helpful, would impose an undue burden on the FAA or the EAJA applicant, or would be contrary to any law, regulation, or executive order. The NTSB invites comments concerning proposed amendments to part 826 in light of these proclamations.

Regulatory Notices

1. Executive Order 12866 (Regulatory Planning and Review)

This advance notice of proposed rulemaking is not a significant regulatory action under Executive Order 12866. Therefore, Executive Order 12866 does not require a Regulatory Assessment.

2. Executive Order 13132 (Federalism)

The NTSB has analyzed this ANPRM in accordance with the principles and criteria contained in Executive Order 13132. Any rulemaking proposal resulting from this notice would not propose any regulations that would: (1) Have a substantial direct effect on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government; (2) impose substantial direct compliance costs on state and local governments; or (3) preempt state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

3. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires each agency to review its rulemaking to assess the potential impact on small entities, unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. The NTSB does not believe that any proposal resulting from this ANPRM will have a significant economic impact on a substantial number of small entities. However, the NTSB invites comments to facilitate any further analysis on this issue.

Dated: December 15, 2010.

Deborah A.P. Hersman,

Chairman.

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