

February 22, 2011

Gary L. Halbert, Esq., General Counsel
National Transportation Safety Board
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594-2000

Re: Advance Notice of Proposed Rulemaking (ANPRM) re Rules of Practice in Air Safety Proceedings and Implementing the Equal Access to Justice Act of 1980

Dear Mr. Halbert:

The National Business Aviation Association (NBAA) represents the interests of 8,000 Member companies who operate general aviation aircraft as a solution to some of their business travel challenges. Over NBAA's 60-year history, the Association and our Membership have been fundamental participants in the development, analysis and implementation of numerous regulatory initiatives that have impacted the business aviation community. We believe that this involvement has helped to produce sound and effective safety policy related to the operation of general aviation aircraft for business purposes.

The business aviation community's commitment to reasonable and effective safety standards and practices has led to a safety record for corporate aviation that is equal to, and sometimes better than that for the scheduled airlines. This safety record is not a product of government oversight. Rather, it results from the business aircraft operators' applying practical safety strategies to manage and mitigate risk.

The business aviation community has a long and demonstrated history of partnership with government safety and security regulatory agencies. These partnerships are based on common objectives and underscore our preference for working cooperatively with these agencies to jointly develop solutions. It is in that spirit that the NBAA offers these comments on the Advance Notice of Proposed Rulemaking ("ANPRM") on Rules of Practice in Air Safety Proceedings and implementing the Equal Access to Justice Act of 1980.

I. History with Safety Enforcement Proceedings

NBAA in the past has participated in many rulemaking efforts involving aviation safety enforcement proceedings. NBAA and our Members seek to ensure that air safety is preserved and enhanced through rigorous safety enforcement efforts and procedures that are meaningful, fair, reasonable and evenly applied to both FAA and those accused of wrongdoing. NBAA welcomes and appreciates the NTSB's current review of its regulations dealing with the rules of practice in air safety proceedings and the Equal Access to Justice Act of 1980, with a view towards insuring that they are fair and appropriate.

II. Four issues raised by the ANPRM

The ANPRM raises four issues on which the Board seeks specific comments. These issues are:

1. The standard for the NTSB's review of the FAA's "emergency" determinations;
2. Discovery and exchange of documents in air safety proceedings;
3. Suggestions concerning electronic filing of documents in such cases; and
4. Updates to the procedural rules governing EAJA claims.

The ANPRM further asks that comments include a reference to a specific section of the rules, explain the reason for any recommended change, and include supporting data or rationale. NBAA's comments are set forth in that order and format below, with the portion of the relevant rule edited in redline format to show NBAA's proposed modifications, followed by the reason for the recommended change and supporting data/rationale.

For greater detail on, and citations to, the legislative and regulatory history of the so called "Emergency Rules", please see [Appendix A](#).

III. Standard for NTSB review of the FAA's "emergency" determinations

Rule section(s) involved:

§ 821.54 Petition for review of Administrator's determination of emergency.

(e) Disposition. Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the pleadings and evidence presented, 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 law judge may consider, but shall not be required to follow, the Administrator's interpretations of the Federal Aviation Regulations.

Reason for recommended change:

The NTSB, inexplicably, and without any legislative mandate to do so, included in its current rules of practice in emergency proceedings a requirement that the NTSB Administrative Law Judge ("ALJ") hearing the matter must assume that all the facts alleged in the FAA's complaint are true, must defer to the FAA's interpretation of FAA rules, and must refuse to consider facts other than what the FAA chooses to include in its complaint. As it stands now, the certificate holder is not permitted, during consideration of the emergency nature of the FAA action, to mount a challenge to facts contained in the FAA complaint that the certificate holder believes to be untrue or inaccurate. Moreover, the certificate holder is prevented from supporting its position by pointing to facts outside the FAA's complaint that the certificate holder believes to be important. Such important facts can include the sometimes significant amount of time that the FAA was aware of the allegations prior to initiating emergency action. Congress intended that certificate holders be provided a thorough, independent and meaningful NTSB review of FAA emergency orders, and the facts and regulatory interpretations on which they are based. NBAA believes that that review should utilize a standard that permits the ALJ to fully and realistically review the determination that an emergency exists, rather than requiring the ALJ to simply rubber stamp the FAA's determination.

NBAA proposes that when reviewing the FAA's determination that an emergency exists, the NTSB ALJ's should not be required to assume that all the facts alleged in the FAA's complaint are true, and should be able to consider facts not alleged in the FAA's complaint that the certificate holder believes are important. One such fact in particular that the NTSB ALJ's should be able to consider, regardless of whether it is mentioned in the FAA's complaint, is the length of time the FAA was aware of the alleged facts on which it bases its determination before the FAA initiated emergency action.

Supporting data/rationale:

A complete legislative and regulatory history of the current rules on this issue is set forth in [Appendix A](#) to these comments. Congressional intent in passing the statute that mandated the development of the current rules was to afford a meaningful and independent review of FAA determinations that an emergency exists. It is difficult to imagine how any meaningful review of that FAA determination can take place when the FAA is free in its Emergency Order to choose what facts to allege and what interpretation

to apply to the relevant rules, and the ALJ is required to assume the truth of the facts the FAA prosecutor chooses to allege, to consider no other facts, and to accept without question the interpretation the FAA is applying to the relevant rules.

IV. Discovery and exchange of documents in air safety proceedings

Rule section(s) involved:

§ 821.53 Appeal.

(a) Time within which to file appeal. An appeal from an emergency or other immediately effective order of the Administrator must be filed within 10 days after the date on which the Administrator's order and related Enforcement Investigative Report, less portions thereof to which a privilege or exemption is claimed, was served on the respondent. The respondent shall simultaneously serve a copy of the appeal on the Administrator.

§ 821.55 Complaint, answer to complaint, motions and discovery.

(d) Discovery. Discovery is authorized in proceedings governed by this subpart. Given the short time available for discovery, the parties shall cooperate to ensure timely completion of the discovery process prior to the hearing. Within three (3) days of the filing of respondent's appeal, the parties shall confer and file a proposed discovery plan. The proposed discovery plan shall address the items identified in Federal Rule of Civil Procedure 26(f)(3). Within one (1) day following filing of the discovery plan, the parties shall make initial disclosures consistent with Federal Rules of Civil Procedure 26(a)(1)(A)(i) and (ii), and 26(a)(3)(A) without awaiting a discovery request. Discovery requests shall be served by the parties as soon as possible. A motion to compel discovery should be expeditiously filed where any dispute arises, and the law judge shall promptly rule on such a motion. Time limits for compliance with discovery requests shall be set by the parties so as to accommodate, and not conflict with, the accelerated adjudication schedule set forth in this subpart. The provisions of 821.19 shall apply, modified as necessary to meet the exigencies of this subpart's accelerated timeframes.

Reason for recommended change:

The NTSB's rules of practice in emergency proceedings are woefully out of date with respect to discovery. Traditional notions of basic due process contemplate that a person should have the right to see the evidence that the government relies on to support a government action taken against that person. Despite this, discovery in NTSB proceedings involving appeals of FAA determinations of an emergency is often quite limited, and the expedited nature of the proceedings unfairly permits the FAA a greater opportunity to prepare its case than the certificate holder has to defend against it. Regardless of whether the FAA believes an emergency exists, the certificate holder should have a full opportunity to view and confront the evidence that the FAA points to as justifying emergency action.

The NTSB rules of practice in emergency proceedings should be modernized "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." This quoted language is from a recommendation contained in the Advisory Committee Notes to the **1993** amendments to the Federal Rules of Civil Procedure. These 1993 amendments to the Federal Rules of Civil Procedure added requirements for automatic disclosures of certain information and a prompt, mandatory discovery planning conference between the parties in order to reach a case management plan. Because of the accelerated nature of NTSB proceedings on appeal of FAA emergency determinations, there is even more of a need for automatic disclosures of certain information and for a mandatory case planning conference between the parties in these types of proceedings. Such required automatic disclosures of information should include a requirement that the FAA's Enforcement Investigative Report ("EIR") must be served on the certificate holder when the FAA emergency order is served. Given the extremely short time period permitted for appeal, the EIR often is almost never available to the certificate holder until after the time to challenge the emergency determination has expired. The effectiveness and efficiency of NTSB proceedings on appeal of FAA emergency determinations would be greatly increased by the incorporation of these mechanisms into the process, and their incorporation would significantly lessen the amount of time that NTSB personnel must spend addressing discovery motions and disputes in such proceedings.

Supporting data/rationale:

In 1993, Rule 26 of the Federal Rules of Civil Procedure modernized discovery proceedings in civil litigation, and eighteen (18) years of practice have proven their worth. Having the benefit of automatic disclosures in NTSB emergency proceedings would provide not only for a meaningful review of FAA action, but minimize the time and expense associated with discovery for both Respondent and the Board. Respondents inevitably obtain the FAA's Enforcement Investigative Report (EIR) prior to a hearing, but that production is typically delayed by FAA as long as possible and to varying degrees to Respondent's disadvantage. Requiring automatic disclosures at the very outset of the matter, preferably in digital format, would eliminate the need for the Board to waste time with discovery disputes regarding production of the EIR, and allow Respondents a meaningful opportunity to see the evidence that FAA gathered against them, and do so in a manner that requires neither additional work nor costs for the FAA.

V. Suggestions concerning electronic filing of documents in such cases

Rule section(s) involved:

§ 821.7(a)(3) and (4) [Filing of Documents with the Board]; and § 821, Subpart I generally

Various portions of the above-referenced rules provide for service and filing via overnight delivery and/or facsimile. Should an electronic docket management system be implemented, these provisions should add references to also permit filing and service by electronic means.

§ 821.57 Procedure on appeal.

(a) Time within which to file notice of appeal. A party may appeal from a law judge's initial decision or appealable order by filing with the Board, and simultaneously serving on the other parties, a notice of appeal, within 2 days after the date on which the initial decision was orally rendered or the appealable order was served.

(b) Briefs and oral argument. Each appeal in proceedings governed by this subpart must be perfected, within 5 days after the date on which the hearing transcript was provided by the Board to respondent via electronic means. Perfecting the appeal shall be accomplished by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. Any other party to the proceeding may file a brief in reply to the appeal brief within 7 days after the date on which the appeal brief was served on that party. A copy of the reply brief shall simultaneously be served on the appealing party and any other parties to the proceeding. Unless otherwise authorized by the Board, all briefs in connection with appeals governed by this subpart must be filed and served by overnight delivery service, or by facsimile confirmed by personal or first-class mail delivery of the original. Aside from the time limits and methods of filing and service specifically mandated by this paragraph, the provisions of 821.48 shall apply.

Reason for recommended change:

Time is of the essence in emergency proceedings, and an electronic docket management system would be a significant step forward in the meaningful review of emergency certificate actions. Not only would it permit Respondents to view FAA discovery responses sooner, but it would also eliminate the time and effort associated with faxing, which is heavily utilized by the Board in emergency cases out of necessity. The Board would similarly save significant postage associated with mailing, particularly with respect to heavy hearing transcripts. Lastly, a tried and true mechanism is already in place for an electronic docket management system through the use of PACER. Even if logistical impediments materialize, other transportation matters already use an electronic docket management system that is publicly accessible.

Supporting data/rationale:

Many years ago, the United States Courts created an electronic docketing system called Public Access to Court Electronic Records, commonly known as PACER. A portion of the PACER system is electronic court filing, or ECF. PACER has been in existence for many years, and is a tried and true system that has revolutionized the practice of law and drastically increased the ability of litigants to obtain information, communicate with one another, and ultimately to have a full, fair and meaningful opportunity to be heard by the Court. NTSB would similarly benefit from modernizing its docket control system in similar fashion.

Electronic docketing would not only assist with discovery at the hearing level, but would also assist at the appellate level. Certificate holders who do not prevail at a hearing before an NTSB ALJ on an FAA emergency determination, and who appeal the ALJ's ruling to the full NTSB, should have the same right

to the hearing transcript as the FAA enjoys when it opposes the appeal. Instead, 49 C.F.R. Section 821.57(a) of the NTSB's rules of practice in emergency proceedings currently states in pertinent part: "The time limitations for the filing of documents respecting appeals governed by this subpart will not be extended by reason of the unavailability of the hearing transcript." While time is certainly of the essence in emergency proceedings, forcing a certificate holder to appeal without the benefit of the transcript places that certificate holder at a distinct disadvantage. This is particularly so given that the FAA virtually always has access to the transcript by the time the FAA is required to file its opposition to the appeal. 49 C.F.R. Section 821.57 was last updated prior to the advent of electronic mail. Given the NTSB's ability to forward a copy of the hearing transcript to a certificate holder via e-mail in literally seconds, the time has come for certificate holders to be treated equally with the FAA with regard to having access to the transcript to support their position on appeal. In short, when a certificate holder appeals from an NTSB ALJ's ruling after a hearing, the certificate holder should have the same right to the hearing transcript as is enjoyed by the FAA when it opposes the appeal.

VI. Updates to the procedural rules governing EAJA claims

Rule section(s) involved:

§ 826.40 Payment of Award

Reason for recommended change:

The responsible FAA office information contained therein is outdated.

Supporting data/rationale:

The ANPRM sets forth the NTSB's intent to update that information so that it remains current. NBAA supports that effort and proposed change.

VII. Summary and Conclusion

NBAA appreciates the NTSB's willingness to revisit the accuracy and currency of its regulations dealing with the rules of practice in air safety proceedings and the Equal Access to Justice Act of 1980, as well as having the opportunity to comment on those regulations. We stand ready to support any NTSB efforts to update and improve these regulations, including participating in a rulemaking committee should the Board see fit to establish one. Please contact us if you require any additional information.

Sincerely,



Ed Bolen
President and CEO

Appendix A

Legislative and Regulatory History of the so called "Emergency Rules"

The Federal Aviation Administration (FAA) has the authority to amend, modify, suspend, or revoke certificates issued by the FAA. 49 U.S.C §44709(b). Certificate holders have the right to challenge such an FAA action by appealing to the National Transportation Safety Board (NTSB). 49 U.S.C §44709(d). Ordinarily, such an appeal automatically stays the effect of the FAA's certificate action until after the matter is fully adjudicated by the NTSB. 49 U.S.C §44709(e)(1). In appropriate cases, the FAA has the authority to declare that an emergency exists, in which event, an appeal to the NTSB does not stay the effect of the FAA's certificate action. 49 U.S.C §44709(e)(2). When the FAA declares an emergency and the certificate holder appeals to the NTSB, the NTSB is required to make a final disposition of the appeal within 60 days. 49 U.S.C §44709(e)(4).

The FAA has always had the authority to take certificate action and to declare such actions emergencies. Certificate holders affected by an FAA declaration of an emergency have always had a right to challenge the emergency declaration. In 2000, however, there was a change in the mechanism by which such challenges can be made.

Prior to 2000, a declaration of an emergency by the FAA was not a determination which was reviewable by the NTSB. While the NTSB had the authority to review the merits of the FAA's certificate actions, the NTSB had no authority to review the propriety of a decision by the FAA to declare an emergency. As such, the FAA's decision to declare an emergency was a final agency determination which was subject to review by the United States Courts of Appeal. See e.g. Nevada Airlines, Inc. v. FAA, 622 F.2d 1017 (9th Cir. 1980). In connection with a petition for judicial review such as that in Nevada Airlines, a petitioner had the right to raise all of the issues set out in 5 U.S.C §709. The available issues included whether or not the FAA's finding was supported by substantial evidence and whether or not the finding was an abuse of discretion.

While judicial review was always available, it was not a very practical remedy. It was extremely difficult for the affected certificate holder to litigate the propriety of the emergency determination in court while simultaneously litigating the merits of the certificate action before the NTSB. This was especially true since the NTSB adjudication is required to be completed within 60 days. Due to the cumbersomeness of litigating simultaneously in two different forums, relief was beyond the means of most certificate holders. Consequently, few judicial challenges of FAA determinations of emergencies were brought and fewer were successful.

In recognition of the need to provide certificate holders with a more meaningful way to challenge FAA emergency determinations, Congress acted in 2000. On April 6, 2000, Section 716 of the Aviation Investment and Reform Act for the 21st Century ("AIR 21"), Public Law 106-181, amended 49 U.S.C §44709 to add subsection (e)(3) which provides as follows:

Review of emergency order. — A person affected by the immediate effectiveness of the Administrator's order under paragraph (2) may petition for a review by the Board, under procedures promulgated by the Board, of the Administrator's determination that an emergency exists. Any such review shall be requested not later than 48 hours after the order is received by the person. If the Board finds that an emergency does not exist that requires the immediate application of the order in the interest of safety in air commerce or air transportation, the order shall be stayed, notwithstanding paragraph (2). The Board shall dispose of a review request under this paragraph not later than 5 days after the date on which the request is filed.

The NTSB issued interim procedural rules to implement its new review authority on July 11, 2000 which were published at 65 Fed. Reg. 42637. The procedural rules are in 49 C.F.R. §821.52 et. seq. The interim rules contained a surprising restriction on the review process mandated by Congress. 49 C.F.R. §821.54(e) of the interim rules provided as follows:

Disposition. Within 5 days after receipt of the petition, the chief judge (or, if the case has been assigned, the law judge to whom the case is assigned) shall dispose of the petition by written order, finding whether the Administrator abused his or her discretion in determining that there exists an emergency requiring the order to be immediately effective, based on the acts and omissions alleged in the Administrator's order, **assuming the truth of such factual allegations**. (emphasis added).

It is not clear why the NTSB chose to severely restrict the right to challenge emergency determinations by requiring that the NTSB judge assume all of the FAA factual allegations to be true. The only clue provided by the NTSB is found in the preamble to the interim rules where the NTSB stated as follows:

Since issues of fact are properly resolved at an evidentiary hearing, challenges to the truthfulness of the factual allegations appearing in the Administrator's order are not appropriate for this preliminary inquiry; thus, paragraph (e) provides that, for purposes of deciding this emergency issue, the law judge is to assume the truth of the factual allegations stated in the order. 65 Fed. Reg. at 42638.

This cavalier pronouncement by the NTSB as to what is appropriate during the review of the propriety of an emergency determination is not supported by the legislative history. The restriction imposed by the NTSB greatly diminishes the effectiveness of the review process envisioned by Congress.

The NTSB received public comments on its interim rules and then published its final rules at 68 Fed. Reg. 22623(April 29, 2003). In the final rules, 49 C.F.R. §821.54(e) provides as follows:

Disposition. Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge, the law judge to whom the case is assigned) 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. (emphasis added).

In the final rules, the language of 49 C.F.R. §821.54(e) differs from that in the interim rules. In the preamble to the final rules, the NTSB explained that the change was intended to broaden the scope of the NTSB's review of emergency determinations. The interim rules provided that the standard of review was whether or not the FAA abused its discretion by declaring an emergency. In the final rules, the "abuse of discretion" standard has been replaced by an "appropriateness" standard, i.e. "whether...the...determination was appropriate under circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay..." The discussion in the preamble of the NTSB's rationale for this change is at 68 Fed. Reg. 22623 to 22624.

While the NTSB's language change was purportedly intended to broaden the scope of review, the NTSB did not achieve its goal because the final rules still contain the requirement that the NTSB must assume all of the FAA factual allegations to be true. Nothing in the preamble to the final rules sheds any further light on why the NTSB thinks such a requirement is necessary or appropriate except the following statement by the NTSB.

An emergency determination is not, as we see it, a finding or conclusion that easily lends itself to evidentiary proof. And the right to challenge an emergency determination before the Board should neither be seen as, nor be allowed to become, an opportunity to contest the factual predicate underlying the Administrator's judgment that considerations of aviation safety require an individual or an entity to be deprived of certificate privileges pending adjudication of the charges. 68 Fed. Reg. at 22624.

The use by the NTSB of a phrase like "as we see it," shows that the NTSB substituted its own views for the will of Congress. It was Congress' intent that there be a meaningful right of review. It is difficult for

there to be any meaningful review if the NTSB Administrative Law Judge's hands are tied by a requirement that all of the FAA's factual allegation be taken as true.