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February 21, 2011

NATIONAL TRANSPORTATION SAFETY BOARD
 Office of the General Counsel
 490 L'Enfant Plaza, S.W.
 Washington, D.C. 20594
 FAX: 1-202-314-6090

Re: **ANPRM Concerning 49 CFR Parts 821 and 826:
 Rules of Practice in Air Safety Proceedings and Implementing the Equal Access
 To Justice Act
 Docket No. NTSB-GC-2011-0001**

Dear Ladies and Gentlemen:

In response to the NTSB's Advanced Notice of Proposed Rulemaking (ANPRM), dated December 22, 2010 (75 Fed. Reg. 80452) concerning proposed amendments to the NTSB's rules of procedure for review of certificate actions taken by the Federal Aviation Administration (FAA), and rules of procedure for applications for fees and expenses under the Equal Access to Justice Act (EAJA) (5 U.S.C. §504), we offer the following for your consideration.

49 CFR Part 821: Rules of Practice in Air Safety Proceedings

A. Standard for Review of FAA Emergency Determinations:

We concur with the ANPRM proposal to amend Section 821.54(e) to remove the requirement that the administrative law judge assume that the acts and omissions alleged in the FAA's emergency order are true.

We additionally recommend that the petitioner seeking review of the FAA's emergency determination be allowed to concurrently submit evidence, affidavits and declarations in response to the FAA's factual allegations and/or that the Administrator's emergency determination is not appropriate under the circumstances.

We believe that these amendments are fully consistent with the legislative intent of Pub. L. 106-181, Title VII, Sec. 716 which granted certificate holders the right and opportunity to contest FAA emergency determinations.

Although FAA certification may be a privilege rather than a right, many certificate holders rely upon those certificates as a source of livelihood for themselves, their employees and their families. An emergency certificate action can have devastating effects on such persons, as the emergency action requires that the certificate holder immediately cease the certificated activity and physically surrender the certificate. Even though a certificate holder may ultimately prevail in the appeal of the certificate action, any victory is essentially illusory, as the certificate holder had been summarily deprived of its FAA certificate from the date of the emergency order and through the pendency of the appeal.

Under 821.54(e), as presently promulgated, any meaningful review of the FAA's emergency determination is almost impossible as the administrative law judge must assume that the FAA's factual allegations in support of its emergency determination are true.

Accordingly, to comply with Congressional intent underlying that legislation, the Board should amend Rule 821.54(e) to read as follows:

(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 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.

Furthermore, we recommend that the petitioner seeking review of the FAA's emergency determination be allowed to concurrently submit evidence, affidavits and/or declarations in response to the FAA's factual allegations, in order to enable the law judge to properly consider whether the Administrator's emergency determination was appropriate under the circumstances.

B. Discovery and Exchanges of Information by the Parties:

1. Incorporation of Federal Rules of Civil Procedure (F.R.C.P.) Rule 26.

Presently, 49 C.F.R. §821.19, entitled *Depositions and other discovery*, states the following, in part:

(b) Exchange of information by the parties. At any time before the hearing, at the request of any party, the parties may exchange information, such as witness lists, exhibit lists, curricula vitae and bibliographies of expert witnesses, and other pertinent data. Any party may also use written interrogatories, requests for admissions and other discovery tools. The requesting party shall set the time for compliance with the request, which shall be reasonable and give due consideration to the closeness of the hearing, especially in emergency proceedings governed by Subpart I.

On its face, Rule 821.19 appears to create an adequate structure for discovery and exchanges of information by and between the parties. However, Rule 821.19 lacks sufficient

specificity to adequately accomplish its intended goal. To that end, the NTSB incorporate the initial exchange provisions of F.R.C.P. Rule 26.

Specifically, Rule 26(a) entitled *Duty to Disclose*, provides:

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

If the Board's Rules of Practice required the parties to voluntarily and initially exchange information at the commencement of a proceeding, it would most likely result in fewer discovery disputes and potentially encourage and facilitate early settlements.

2. Emergency Proceedings.

With regard to certificate suspension and revocation actions subject to 49 C.F.R. Part 821, Subpart I, *Special Rules Applicable to Proceedings Involving Emergency and Other Immediately Effective Orders*, the FAA should be required to disclose a copy of the FAA's enforcement investigative report (EIR) along with service of the Emergency Order. If the Administrator were required to initially disclose the EIR at the initiation of the proceeding, it would most likely result in fewer discovery disputes and potentially encourage and facilitate early settlements.

3. Prehearing Orders.

The Rules of Practice should require law judges to issue prehearing orders. As there is no prehearing order requirement, each judge handles prehearing issues differently, sometimes resulting in the disparate treatment of cases.

We believe that a simple amendment to the Rules of Practice to adopt a standardized prehearing order, will ensure uniformity and fairness to the parties. This prehearing order would specify, at a minimum:

- Federal Rules of Evidence and Civil Procedure will be followed, as modified for Administrative proceedings under the Administrative Procedure Act (APA);

- hearsay evidence: the proponent shall provide a statement of reliability in support of the hearsay statement;

- provision for a mandatory settlement conference held at least thirty (30) days prior to the hearing in all non-emergency cases;

- sanctions for noncompliance with the order;

- sanctions for noncompliance with initial disclosures and discovery;

Other matters which could be covered by a uniform prehearing order are as follows:

- joint statement of stipulated facts;

- proposed findings of fact and conclusions of law

- limitation to the numbers of interrogatories

4. Sanctions for Failure to Cooperate in Discovery.

Presently, Rule 821.19(d) provides:

(d) Failure to provide or preserve evidence. The failure of any party to comply with a law judge's order compelling discovery, or to cooperate with a timely request for the preservation of evidence, may result in a negative inference against that party with respect to the matter sought and not provided or preserved, a preclusion order, dismissal or other relief deemed appropriate by the law judge.

In theory, this provision would encourage the parties to comply with the Rules of Practice

concerning discovery. However, Rule 821.19(d) is rarely, if ever, enforced by the law judges or the Board, oftentimes resulting in prejudice to the party seeking discovery.

Accordingly, we recommend that Rule 821.19(d) be amended to read as follows:

(d) Failure to provide or preserve evidence. The failure of any party to comply with a law judge's order compelling discovery, or to cooperate with a timely request for the preservation of evidence, *will result in the imposition of sanctions, which may include, but not be limited to* a negative inference against that party with respect to the matter sought and not provided or preserved, a preclusion order, dismissal or other relief deemed appropriate by the law judge.

C. *Electronic Filing of Documents.*

The NTSB should adopt and incorporate Electronic Case Filing (ECF), similar to the ECF system currently in use by the Federal Court System. The procedure has already been established and the system would substantially reduce the workload of the NTSB staff. The NTSB could do this either as a mandatory or as an optional means for the filing and service of documents.

49 CFR Part 826: EAJA Procedural Rules

1. Amendment to Rule 826.40.

Rule 826.40 states that Applications for award grants in cases involving the FAA shall be sent to the FAA's Office of Accounting and Audit, AAA-1 800 Independence Avenue, SW., Washington, DC 20591. Rule 826.40 further states that the agency will pay the amount awarded to the applicant within 60 days.

As the FAA Office of Accounting and Audit, AAA-1, no longer exists, Rule 826.40 should be amended to reflect the appropriate FAA office and to further provide for sanctions against the FAA if payment is not timely made within 60 days.

2. The Rules of Practice Should Address Situations in which the FAA Voluntarily Withdraws Charges Prior to Hearing.

The Advanced Notice of Proposed Rulemaking (ANPRM) states that “the NTSB is receptive to considering suggestions concerning the promulgation of new sections regarding subjects not presently addressed in Part 826.” We recommend that the NTSB specifically address situations in which the FAA voluntarily withdraws charges prior to hearing.

Pursuant to 5 U.S.C. §504, an agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

When the FAA conducts an adversary adjudication against a certificate holder under the Board’s Rules of Practice and voluntarily withdraws the charges prior to a hearing pursuant to 49 C.F.R. 821.12¹, the administrative law judge is not required to dismiss the case with prejudice. As a result, the certificate holder is not considered to be a prevailing party under the circumstances and therefore, no fees and expenses will be awarded under EAJA. See *Turner v. NTSB*, 608 F.3d 12 (D.C. Cir. 2010).

However, when the FAA conducts an adversary adjudication against a certificate holder under the Rules of Practice for FAA Hearings (14 C.F.R. Part 13), and voluntarily withdraws the

¹ 49 C.F.R. §821.12 - Amendment and withdrawal of pleadings.

(a) Amendment. At any time more than 15 days prior to the hearing, a party may amend its pleadings by filing an amended pleading with the Board and serving copies thereof on all other parties. After that time, amendment shall be allowed only at the discretion of the law judge. In the case of amendment of an answerable pleading, the law judge shall allow any adverse party a reasonable time to object or answer. Amendments to complaints shall be consistent with the requirements of 49 U.S.C. 44709(c) and 44710(c).

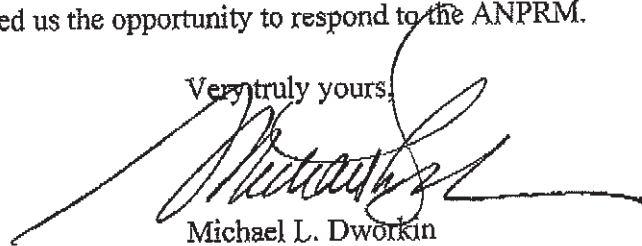
(b) Withdrawal. Except in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from a law judge's initial decision or appealable order, pleadings may be withdrawn only upon approval of the law judge or the Board.

charges prior to a hearing pursuant to 14 C.F.R. §13.215, the administrative law judge "shall" dismiss the case with prejudice. As a result, the certificate holder is considered to be a prevailing party under the circumstances and fees and expenses may be awarded pursuant to the Equal Access to Justice Act (5 U.S.C. §504).

We therefore recommend that 49 C.F.R. §821.12 be amended to be consistent with 14 C.F.R. §13.215 so that a voluntary withdrawal of an adversary adjudication by the FAA under 49 C.F.R. Part 821 or 14 C.F.R. Part 13 will be treated similarly, thereby avoiding arbitrary and capricious application of the EAJA under 5 U.S.C. §504.

We thank you for your having afforded us the opportunity to respond to the ANPRM.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael L. Dworkin", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael L. Dworkin