



NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 821

Rules of Practice in Air Safety Proceedings

[Docket No. NTSB-GC-2011-0001]

AGENCY: National Transportation Safety Board.

ACTION: Interim final rule; request for comments.

SUMMARY: The National Transportation Safety Board (NTSB or Board) amends portions of its regulations, which set forth rules of procedure for the NTSB's review of certificate actions taken by the Federal Aviation Administration (FAA), as a result of the recent enactment of the Pilot's Bill of Rights.

DATES: This rule is effective [INSERT DATE OF PUBLICATION].

Comments must be received by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION]. Comments received after the deadline will be considered to the extent possible.

ADDRESSES: A copy of this interim final rule, published in the *Federal Register* (FR), is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza, SW, Washington, D.C. 20594-2003. Alternatively, a copy is available on the government-wide website on regulations at <http://www.regulations.gov> (Docket ID Number NTSB-GC-2011-0001).

You may send comments identified by Docket ID Number NTSB-GC-2011-0001 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, D.C. 20594-2003.

Facsimile: Fax comments to 202-314-6090.

Hand Delivery: Bring comments to 490 L'Enfant Plaza East, SW, 6th Floor, Washington, D.C., 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: David Tochen, General Counsel, (202) 314-6080.

SUPPLEMENTARY INFORMATION:

I. Background

The NTSB previously issued an advance notice of proposed rulemaking (ANPRM), 75 FR 80452 (Dec. 22, 2010), and a notice of proposed rulemaking (NPRM), 77 FR 6760 (Feb. 9, 2012), concerning 49 CFR parts 821 and 826. (Part 826 sets forth rules of procedure concerning applications for fees and expenses under the Equal Access to Justice Act of 1980.) Prior to the NTSB's

issuance of a final rule concerning parts 821 and 826, Congress enacted the Pilot's Bill of Rights, Pub. L. No. 112-53, 126 Stat. 1159 (August 3, 2012), which implemented statutory changes for, among other things: (1) the FAA to disclose its enforcement investigative report (EIR) to each respondent in an aviation certificate enforcement case; (2) the NTSB to apply the Federal Rules of Civil Procedure and Federal Rules of Evidence to each case; and (3) litigants now to have the option of appealing the Board's orders to either a Federal district court or a Federal court of appeals. The Board therefore issues this interim final rule in response to these legislative changes. Elsewhere in today's Federal Register, the NTSB published a final rule concerning those portions of its February 2012 NPRM not affected by enactment of the Pilot's Bill of Rights.

II. Rulemaking Procedure

As a result of enactment of the Pilot's Bill of Rights and to ensure compliance with it, the NTSB is immediately changing its Rules of Practice applicable to air safety proceedings. The statute is effective immediately, thus requiring the NTSB to promulgate regulatory changes without delay. As a result, the NTSB believes the statute constitutes good cause for issuance of an interim final rule. The NTSB will consider comments received during the comment period, and will alter the interim final rule issued herein if the comments warrant alteration.

III. Statutory Changes

Pursuant to subsection 2(a) of the Pilot's Bill of Rights, the Federal Rules of Evidence and Federal Rules of Civil Procedure, to the extent practicable, are applicable to all NTSB proceedings conducted under 49 CFR part 821, subparts C (rules applicable to proceedings under 49 U.S.C. 44703, which governs airman certificates), D (rules applicable to proceedings under 49 U.S.C. 44709, which governs amendments, modifications, suspensions, and revocations of certificates), and F (rules applicable to hearings conducted under 49 CFR part 821).

Subsection 2(b) of the statute requires the FAA provide "timely, written notification" to individuals who are the subject of an FAA enforcement action regarding the "nature of the investigation." The FAA must inform the individual he or she need not respond to an FAA letter of investigation and will not be adversely affected if he or she elects not to respond. The statute requires the Administrator of the FAA to make available the releasable portions of the EIR to each individual, and provide certain air traffic data. The statute further provides that the Administrator may delay this notification if the FAA determines the notification would threaten the integrity of the investigation.

In addition, subsection 2(c) of the statute strikes from 49 U.S.C. 44703(d)(2), 44709(d)(3), and 44710(d)(1) the phrase,

"but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." The statute also strikes from 49 U.S.C. 44709(d)(3) and 44710(d)(1) the language stating the Board is bound by FAA policy guidance concerning sanctions for violations.

Subsection 2(d) of the statute provides individuals with the option of appealing a Board order to a Federal district court or a Federal court of appeals. Previously, only the Federal courts of appeals had jurisdiction to review appeals of Board orders on certificate actions. Additionally, the statute states, absent a stay from the Board, an emergency order the Administrator issues under 49 U.S.C. 44709(e)(2) will remain in effect pending the exhaustion of the appeal to Federal district court. Regarding review of orders, the statute requires Federal district courts to give "full independent review" of the Administrator's decision; and in the case of emergency orders, the statute requires Federal district courts to give "substantive independent and expedited review" of the Administrator's decision to make the order immediately effective.

Other provisions of the Pilot's Bill of Rights involve notices to airmen (section 3) and the FAA medical certification

process (section 4). These provisions do not directly affect the Board's Rules of Practice and therefore do not require changes to the Board's rules.

IV. Regulatory Changes

As a result of these statutory provisions, the Board herein implements the following changes to 49 CFR part 821. As indicated above, the NTSB will consider all comments concerning this rulemaking received by the deadline, but will only alter any provisions implemented in this rule if the comments establish such alteration is necessary.

A. Section 821.5: Procedural Rules.

The NTSB herein adds a new section, 821.5, entitled "Procedural rules" within Subpart B of part 821. This new section will state, "In proceedings under subparts C, D, and F, for situations not covered by a specific Board rule, the Federal Rules of Civil Procedure will be followed to the extent they are consistent with sound administrative practice." The NTSB considers the phrase, "to the extent they are consistent with sound administrative practice," to preclude the application of Federal Rules of Civil Procedure that are obviously inapplicable. For example, Federal administrative agencies do not conduct jury trials. See, e.g., Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442, 455 (1977). Likewise, rules concerning class actions are inapplicable. Overall, the NTSB has reviewed

the Federal Rules of Civil Procedure and notes the inapplicability of the following rules: 5.1 ("Constitutional Challenge to a Statute—Notice, Certification, and Intervention"), 5.2 ("Privacy Protection for Filings Made with the Court"), 13 ("Counterclaim and Crossclaim"), 14 ("Third-Party Practice"), 35 ("Physical and Mental Examinations"), 38 ("Right to a Jury Trial; Demand"), 39 ("Trial by Jury or by the Court"), 47 ("Selecting Jurors"), 48 ("Number of Jurors; Verdict; Polling"), 49 ("Special Verdict; General Verdict and Questions"), 50 ("Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling"), 51 ("Instructions to the Jury; Objections; Preserving a Claim of Error"), 53 ("Masters"), and the Rules contained in Titles IV ("Parties"), VIII ("Provisional and Final Remedies"), IX ("Special Proceedings"), X ("District Courts and Clerks; Conducting Business; Issuing Orders"), and "Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions" of the Federal Rules of Civil Procedure.

Furthermore, the NTSB considers the rules contained in subpart B of 49 CFR part 821 ("General Rules Applicable to Petitions for Review, Appeals to the Board, and Appeals from Law Judges' Initial Decisions and Appealable Orders") analogous to local rules, as referenced in various parts of the Federal Rules of Civil Procedure. In this regard, the NTSB will consider its

rules in subpart B of part 821 to supplement the overarching applicable Federal Rules of Civil Procedure. To the extent the timelines for filing or responding, as well as procedural processes such as for discovery or subpoenas, differ slightly from the Federal Rules of Civil Procedure, the NTSB will consider the rules in subpart B as the local rules followed in practice before the Board.

The NTSB believes this new section adequately provides notice to parties of the application of the Federal Rules of Civil Procedure, yet still complies with the statutory directive in section 2(a) of the Pilot's Bill of Rights—that the Board's Rules of Practice adopt the Federal Rules of Civil Procedure "to the extent practicable." Notably, most sections within subpart B of the Board's Rules of Practice have a Federal Rule counterpart. Sections 821.7 ("Filing of documents with the Board") and 821.8 ("Service of documents") of the Board's Rules of Practice are supplemental to Federal Rules of Civil Procedure (FRCP) 5 ("Serving and Filing Pleadings and Other Papers") and 7 ("Pleadings Allowed; Form of Motions and Other Papers"), respectively. Concerning sections 821.10 ("Computation of time") and 821.11 ("Extensions of time"), FRCP 6 ("Computing and Extending Time; Time for Motion Papers") is also applicable. Similarly, section 821.12(a) will function as a supplement to FRCP 15 ("Amended and Supplemental Pleadings"), and section

821.12(b) will function as a supplement to FRCP 41(a) ("Dismissal of Actions"). The NTSB will read Title III ("Pleadings and Motions") of the FRCPs in conjunction with section 821.14, concerning motion practice before the Board. Sections 821.24 and 821.30, both entitled "[i]nitiation of proceeding," will function as supplements to FRCP 3, which simply states, "[a] civil action is commenced by filing a complaint with the court." Likewise, section 821.40, concerning the record of the proceeding before the NTSB law judge, will function as a supplement to FRCP 44 ("Proving an Official Record").

B. Section 821.19: Depositions and other discovery.

As a general matter, the Board encourages parties to resolve discovery disputes on their own. In cases where parties seek a ruling from an NTSB law judge on a discovery dispute, the NTSB encourages parties to articulate clearly their position by relying on the Federal Rules of Civil Procedure as read in conjunction with the Board's Rules of Practice.

1. Subsection (a)

Subsection 821.19(a), entitled "Depositions," will now include a reference to the Federal Rules of Civil Procedure within the second sentence, to read as follows: "Reasonable notice shall be given in writing to the other parties, stating the name of the witness and the time and place of the taking of

the deposition, in accordance with the Federal Rules of Civil Procedure." Federal Rules 30 ("Depositions by Oral Exam") and 31 ("Depositions by Written Questions") address deposition testimony, and require such written notice. The Board believes subsection 821.19(a) is fully consistent with FRCPs 30 and 31; therefore, the Board intends to retain the text of subsection (a) and simply add a reference to the Federal Rules.

2. Subsection (b)

Subsection (b), entitled "[e]xchange of information by the parties," is amended to state: "The parties must exchange information in accordance with the Federal Rules of Civil Procedure. Copies of discovery requests and responses shall be served on the law judge to whom the proceeding has been assigned or, if no law judge has been assigned, on the Case Manager. In the event of a dispute, either the assigned law judge or another law judge delegated this responsibility (if a law judge has not yet been assigned or if the assigned law judge is unavailable) may issue an appropriate order, including an order directing compliance with any ruling previously made with respect to discovery." The NTSB herein strikes the previous language at the beginning of subsection (b), which allowed parties to set their own discovery schedules, as this language is not consistent with FRCPs 26 ("Duty to Disclose; General Provisions Governing Discovery") and 34 ("Producing Documents,

Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspections and Other Purposes”).

3. Subsection (c)

Subsection 821.19(c) is entitled “[u]se of the Federal Rules of Civil Procedure,” and describes the NTSB’s use of the Federal Rules as instructive, rather than mandatory. The NTSB herein strikes that subsection, and recodifies the previous subsection (d), entitled, “Failure to provide or preserve evidence,” as new subsection (c). The text of that subsection will remain unchanged. The NTSB will read this subsection in conjunction with FRCP 11 (“Signing Pleadings, Motions, and Other papers; Representations to the Court; Sanctions”), which provides sanction for noncompliance with discovery obligations.

4. Subsection (d)

Subsection 2(b)(2)(E) of the Pilot’s Bill of Rights requires the FAA to make available the releasable portions of its EIR concerning each individual against whose certificate it takes action. The disclosure must occur in a timely manner, unless doing so would threaten the integrity of the investigation. The FAA’s guidance to its inspectors concerning implementation of Pilot’s Bill of Rights’ provisions indicates the FAA intends to release the EIRs contemporaneously with the FAA’s letters of investigation. FAA Notice N 8900.195 (Aug. 8, 2012), available at

http://fsims.faa.gov/wdocs/notices/n8900_195.htm (to be incorporated in FAA Order 8900.1).

In order to implement this provision of the statute, the NTSB herein adds new subsection 821.19(d), entitled "Motion to dismiss for failure to include copy of releasable portion of Enforcement Investigative Report (EIR)." This new subsection states as follows: "(1) Where the FAA fails to provide the releasable portion of its EIR with its required notification to the respondent, the respondent may move to dismiss the complaint and, unless the Administrator establishes good cause for that failure, the law judge shall dismiss the complaint. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from failure to provide the releasable portions of the EIR should be deemed to occur with or without prejudice. (2) The releasable portion of the EIR shall include all information in the EIR, except for the following: (i) Information that is privileged; (ii) Information that is an internal memorandum, note or writing prepared by a person employed by the FAA or another government agency; (iii) Information that would disclose the identity of a confidential source; (iv) Information of which applicable law prohibits disclosure; (v) Information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, for good cause shown; or (vi) Sensitive

security information, as defined at 49 U.S.C. 40119 and 49 CFR 15.5. (3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR."

The NTSB will only enforce the statutory mandate for the FAA to make available the releasable portions of the EIR in cases coming within the purview of the Board's jurisdiction. Therefore, the NTSB implements this requirement by way of a motion to dismiss, rather than as a predicate to a respondent's filing of an appeal.

C. Section 821.38: Evidence.

The NTSB herein changes the text of section 821.38, concerning evidence, to read as follows: "In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act, the Federal Rules of Evidence will be applied in these proceedings." This change is consistent with section 2(a) of the Pilot's Bill of Rights, which mandates the Federal Rules of Evidence be applied to NTSB proceedings under part 821, subparts C, D, and F "to the extent practicable."

The previous version of section 821.38 permitted hearsay evidence. Under the provision in the Pilot's Bill of Rights requiring application of the Federal Rules of Evidence "to the extent practicable," the NTSB believes NTSB law judges must exclude hearsay evidence unless an exception to the hearsay rule applies. Therefore, the language from the previous rule permitting hearsay (to include hearsay within hearsay) is stricken from the rule.

D. Section 821.64: Judicial review.

Subsection 3(d), paragraph (1) of the Pilot's Bill of Rights provides for judicial review in either a Federal district court or a Federal court of appeals. Subsection 821.64(a) of the Board's Rules of Practice previously informed parties they may seek judicial review "by the filing of a petition for review with the appropriate United States Court of Appeals within 60 days of the date of entry (i.e., service date) of the Board's order." The Board herein adds "or United States District Court" to the first sentence, in accordance with the Pilot's Bill of Rights.

V. Regulatory Analysis

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of the potential costs and benefits under section 6(a)(3) of that Order. As

such, the Office of Management and Budget has not reviewed this rule under Executive Order 12866. Likewise, this rule does not require an analysis under the Unfunded Mandates Reform Act, 2 U.S.C. 1501-1571, or the National Environmental Policy Act, 42 U.S.C. 4321-4347.

In addition, the NTSB has considered whether this rule would have a significant economic impact on a substantial number of small entities, under the Regulatory Flexibility Act (5 U.S.C. 601-612). The NTSB certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. Moreover, in accordance with 5 U.S.C. 605(b), the NTSB will submit this certification to the Chief Counsel for Advocacy at the Small Business Administration.

Moreover, the NTSB does not anticipate this rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this rule does not have implications for federalism under Executive Order 13132, Federalism. This rule also complies with all applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. In addition, the NTSB has evaluated this rule under: Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected

Property Rights; Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks; Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use; and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded that this rule does not contravene any of the requirements set forth in these Executive Orders or statutes, nor does this rule prompt further consideration with regard to such requirements.

The NTSB invites comments relating to any of the foregoing determinations and notes the most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data.

List of Subjects in 49 CFR part 821

Administrative practice and procedure, Airmen, Aviation safety.

For the reasons discussed in the preamble, the NTSB amends 49 CFR part 821 as follows:

PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

1. The authority citation for 49 CFR part 821 is revised to read as follows:

Authority: 49 U.S.C. 1101 - 1155, 44701-44723, 46301, Pub.

L. 112-153, unless otherwise noted.

2. Add § 821.5 to Subpart B to read as follows:

§ 821.5 Procedural rules.

In proceedings under subparts C, D, and F of this part, for situations not covered by a specific Board rule, the Federal Rules of Civil Procedure will be followed to the extent they are consistent with sound administrative practice.

3. Revise § 821.19 to read as follows:

§ 821.19 Depositions and other discovery.

(a) *Depositions.* After a petition for review or a complaint is filed, any party may take the testimony of any person, including a party, by deposition, upon oral examination or written questions, without seeking prior Board approval. Reasonable notice shall be given in writing to the other parties, stating the name of the witness and the time and place of the taking of the deposition, in accordance with the Federal Rules of Civil Procedure. A copy of any notice of deposition shall be served on the law judge to whom the proceeding has been assigned or, if no law judge has been assigned, on the Case Manager. In other respects, the taking of any deposition shall be compliance with the provisions of 49 U.S.C. 46104(c).

(b) *Exchange of information by the parties.* The parties must exchange information in accordance with the Federal Rules of Civil Procedure. Copies of discovery requests and responses shall be served on the law judge to whom the proceeding has been

assigned or, if no law judge has been assigned, on the Case Manager. In the event of a dispute, either the assigned law judge or another law judge delegated this responsibility (if a law judge has not yet been assigned or if the assigned law judge is unavailable) may issue an appropriate order, including an order directing compliance with any ruling previously made with respect to discovery.

(c) *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.

(d) *Motion to dismiss for failure to include copy of releasable portion of Enforcement Investigative Report (EIR).* (1) Where the FAA fails to provide the releasable portion of its EIR with its required notification to the respondent, the respondent may move to dismiss the complaint and, unless the Administrator establishes good cause for that failure, the law judge shall dismiss the complaint. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from failure to provide the releasable portions of the EIR should be deemed to occur with or without prejudice.

(2) The releasable portion of the EIR shall include all information in the EIR, except for the following:

(i) Information that is privileged;

(ii) Information that is an internal memorandum, note or writing prepared by a person employed by the FAA or another government agency;

(iii) Information that would disclose the identity of a confidential source;

(iv) Information of which applicable law prohibits disclosure;

(v) Information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, for good cause shown; or

(vi) Sensitive security information, as defined at 49 U.S.C. 40119 and 49 CFR 15.5.

(3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR.

4. Revise § 821.38 to read as follows:

§ 821.38 Evidence.

In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All

other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act, the Federal Rules of Evidence will be applied in these proceedings.

5. In § 821.64, revise paragraph (a) to read as follows:

§ 821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in 49 U.S.C. 1153 and 46110 by the filing of a petition for review with the appropriate United States Court of Appeals or United States District Court within 60 days of the date of entry (i.e., service date) of the Board's order. Under the applicable statutes, any party may appeal the Board's decision. The Board is not a party in interest in such appellate proceedings and, accordingly, does not typically participate in the judicial review of its decisions. In matters appealed by the Administrator, the other parties should anticipate the need to make their own defense.

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Deborah A.P. Hersman,
Chairman

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