FLIGHTWATCH

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NTSB Publishes Notice of Proposed Rule Making Concerning Rules of Procedure and Recovery of Attorney's Fees

I.
Introduction

The National Transportation Safety Board ("NTSB" or "Board") published a Notice of Proposed Rule Making (NPRM) in the Federal Register on February 9, 2012. *See* 77 Fed. Reg. 6760 (Feb. 9, 2012). The NPRM follows an Advance Notice of Proposed Rule Making (ANPRM) published over a year earlier in 75 Fed. Reg. 80452 (Dec. 22, 2010). Both the ANPRM and the NPRM deal with proposed changes in the Rules of Procedure to be followed by the NTSB and its administrative law judges (ALJs).

The proposed amendments to the Rules of Procedure will have an impact on (1) the emergency revocation of airman's certificates, (2) the method and manner whereby the airman challenges the emergency determination made by the FAA, (3) the obligation of the FAA to provide the airman with the releasable portions of the Enforcement Investigative Report (EIR), (4) the portions of the EIR that can be withheld by the FAA, (5) remedies available to the airman in the event the FAA fails to produce the EIR, (6) the practice of the FAA in withdrawing complaints before trial and thereby eliminating the ability of the airman to recover his attorney's fees in the absence of an adjudication in his favor, and (7) the electronic filing of documents with the NTSB. This issue of Flightwatch will discuss the amendments to the Board's Rules of Practice it announced it intends to implement in the NPRM.

II.
Appearances

The Board has proposed revising subparagraphs (b) and (d) of § 821.6 so as to require the filing of a separate document indicating an attorney or representative has made an appearance in the case. The notice of appearance must be filed in accordance § 821.6(d) and must state the name, address and telephone number of the attorney or representative making an appearance in the case on behalf of a party. Furthermore, in the event an attorney intends to withdraw, he must give written notice to the Board of his withdrawal before a new attorney may participate on behalf of the party. Finally, parties, their attorneys and/or representatives must notify the Board immediately in the event there is any change in their contact information.

III.
Filing of Documents and Designation of Persons to Receive Service

Section 821.7 of the Board's Rules of Practice will be substantially revised to allow the filing of documents by email at alj@ntsb.gov. *See* proposed § 821.7(a)(1). Any documents filed by email must be signed and transmitted in a commonly acceptable format, i.e. Adobe Portable Document Format (PDF). *See* § 821.7(a)(3). Documents may still be filed in paper form or by facsimile at 202.314.6158.

If an electronic filing is to be made following the filing of a notice of appeal, then the filing must be submitted to the Office of the General Counsel of the National Transportation Safety Board either at its physical address or via facsimile transmission at 202.314.6090 or via email at enforcement@NTSB.gov. *See* proposed § 821.7(a)(2).

There are presumptions that documents have been received that can be satisfied by (1) the send date on a facsimile transmission or on an email or (2) the postmark or (3) mailing date shown by other evidence as provided in proposed § 821.7(a)(4).

As noted previously, the original of every document shall be signed by the filing party or the party's attorney or representative under § 821.7(e). Furthermore, in filing an appearance, an attorney is also making a designation of the person to receive service of pleadings under proposed § 821.7(f). Like the notice of appearance, the designation must state on the first page the name, address and telephone number of the person or persons who may be served with documents on behalf of party.

IV.
Service of Documents

When a party serves a document to be filed with the Board, the party must simultaneously serve upon all

other parties to the proceeding on the same date of filing a copy of the document. *See* proposed § 821.8 (a)(1). That section substantially specifies the language that shall appear on the certificate of service that must be dated and bear the signature of the person certifying service of the pleading. The rule does not specify whether the certificate of service must be signed by a lawyer or by his paralegal or assistant.

The method of service of documents shall still be by mail unless a party waives the applicability of that right and elects to be served with documents solely by electronic mail and without receiving a hard copy of the original document. *See* proposed § 821.8(b) (1). This shall be accomplished by a party waiving his right to receive a hard copy of the pleading, the waiver expressly stating the preference to be served electronically. *Id.* The proposed Board Rules provide for a presumption of service when receipt of a pleading has been acknowledged by a person or when a properly addressed envelope has been mailed and not returned as unclaimed or when a document has been transmitted by facsimile or email and there is evidence to confirm its successful transmission to the intended recipient. *See* § 821.8(d)(1), (2), (3). The date of service shall be determined in the same manner as the date of filing under § 821.7(a)(4). *See* proposed § 821.8(e).

V.
Dismissal of Complaints Shortly Before Trial

There have been cases where the FAA has withdrawn its complaint shortly before trial and thereby deprived the airman of the ability to recover attorney's fees under the Equal Access to Justice Act ("EAJA") because there was no adjudication or on the merits of the case. *See Turner and Coonan v. NTSB,* 608 F. 3d 12 (2010). Accordingly, the Board has promulgated proposed § 821.12(b) which provides that pleadings may be withdrawn only upon the approval of the Administrative Law Judge or the Board, and the ALJ may accept arguments from the parties on the issue of whether a dismissal resulting from a withdrawal of a complaint should be deemed to occur with or without prejudice. One or more persons commenting on the ANPRM requested that the NTSB find that when the FAA withdraws its complaint, such a withdrawal should be with prejudice to trigger the ability of the airman to recover attorney's fees under EAJA. Under existing law, in order to recover attorney's fees under EAJA, there must be (1) a court-ordered change in the legal relationship of the parties, (2) the judgment must in favor of the party seeking fees, and (3) the judicial pronouncement must be accompanied by judicial relief. *District of Columbia v. Straus,* 590 F. 3d 898, 901 (C.D. Cir. 2010). A finding by the ALJ that the dismissal shall be "with prejudice" might afford the airman with an argument that he obtained judicial relief so as to satisfy the third prong of the test stated in *Straus*.

The Board, in proposing new § 821.12(b) has not adopted a bright line test that says anytime the FAA withdraws the complaint shortly before trial that this will be with prejudice. Rather, the Board has left it to the parties to argue on a case by case basis whether the withdrawal of the complaint by the FAA after the issuance of an order of suspension or order of revocation is with or without prejudice. Rather than solving the problem with a clear rule, the proposed Board Rule invites further litigation and controversy. Accordingly, the Board has failed to address this problem in proposing § 821.12(b).

VI.
Petitions for Rehearing

The Board inserted new language into § 821.50, subparagraph (c) to indicate that if a petition for rehearing filed by a party after the Board has rendered its decision fails to raise new matter, the Board will not consider the petition for Rehearing.

VII.
Emergency Challenge Petitions

For the past 8 years, the rule of law has been that a party may challenge the emergency designation made by the Administrator in an emergency order of revocation. However, the Board's Rules of Practice assume the truth of the factual allegations made by the Administrator in the emergency order of revocation. *See* § 821.54(e). Now, with the promulgation of the amended rules, the Board has stated that the ALJ in ruling an order on an emergency challenge petition contesting the emergency designation is also permitted to consider evidence submitted by the respondent to contest the emergency characterization made by the Administrator in the emergency order of revocation. Since § 821.54(e) requires the ALJ to assume the truthfulness of the FAA's factual allegations, it is unclear as to whether the airman can actually rebut them or overcome them. All proposed section 821.54(e) provides for is the right of the airman "present" evidence. The ALJ may

consider the airman's evidence in making his determination. However, the proposed section never specifically says the airman can rebut or overcome the Administrator's factual assertions in the emergency order. Accordingly, proposed section § 821.54(e) appears to more form than substance, since there is no articulable standard whereby the airman can overcome the factual "assumptions" made in favor of the Administrator by the regulation.

VIII.
Motion to Dismiss for Failure of the FAA to Produce the Releasable Portions of the Enforcement of the Enforcement Investigative Report with the Emergency order

The Board in an attempt to instill some degree of fairness in emergency cases has now given the airman the ability to move to dismiss the complaint if the FAA does not produce the Enforcement Investigative Report with the emergency order of revocation or other immediately effective order. *See* proposed § 821.55(d). If the FAA does not produce the releasable portions of the EIR with the emergency order, then the judge shall dismiss the complaint unless the FAA establishes good cause for the failure to provide the releasable portions of the EIR to the airman. *See* proposed § 821.55(d)(1). Even if the FAA's Complaint is dismissed for failing to provide the releasable portions of the EIR with the Emergency order, the ALJ can still accept arguments from the parties as to whether the dismissal resulting from the failure should be deemed to occur with or without prejudice. *Id.* If "without prejudice," presumably the FAA can bring the charges again. If "with prejudice," one would surmise the dismissal would be final, save for the ability of the FAA to get the finding reversed on appeal.

As part of this new rule giving airmen a remedy in the event the releasable portions of the EIR are not produced with the Emergency order, the Board has undertaken to define the releasable portions of the EIR. The releasable portions of the EIR do not include information that is privileged. *See* § 821.55(d)(2)(i). It does not include an internal memorandum, note or writing prepared by a person employed by the FAA or other government agency. *See* § 821.55(d)(2)(ii). It does not include information that would disclose the identity of a confidential source. *See* § 821.55(d)(2)(iii). It does not include information that the law prohibits from disclosure. *See* § 821.55(d)(2)(iv). It does not include information "which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, otherwise, for good cause shown." *See* § 821.55(d)(2)(v). It does not include sensitive security information as defined in 49 U.S.C. § 40119 and 49 C.F.R. § 15.5. *See* § 821.55(d)(2)(vi). Nothing in this new rule prevents the Administrator from releasing information in addition to the information contained in the releasable portions of the EIR. *See* proposed § 821.55(d)(3).

If proposed § 821.55(d) is adopted, it is not clear how the ALJ would sanction the withholding of evidence contained in the EIR for "good cause" or "as not relevant." *See* proposed § 821.55(d)(2)(v). Also, because of national security implications, it is not clear the airman will have any meaningful rights to challenge a finding that the withheld evidence contains "sensitive security information." *See* proposed § 821.55(d)(2)(vi).

IX.
Procedures on Appeal in Emergency Cases

Section 821.57(b) requires that the appealing party serve its appeal brief within five days of the date on which its notice of appeal was filed. The party opposing the appeal must file its brief within seven days after the date on which the appellant's appeal brief was served. *Id.* All briefs in emergency cases must be served by overnight delivery or by facsimile transmission or by electronic mail. *Id.* The filing of briefs by electronic mail is included in a proposed amendment to Section 821.57(b).

X.
Stays Pending an Appeal to a United States Circuit Court of Appeals

An airman who has appealed to the five members of the NTSB and whose appeal has been rejected, still has the right to petition for review to a United States Circuit Court of Appeals. The Petition for Review must be filed within sixty days of the Board's Order. 49 U.S.C. § 46110(a). However, if the case is not an emergency case and if the airman desires to continue exercising the privileges of his certificate while his appeal is pending before a United States Circuit Court of Appeals, then the airman must file a motion to stay the Board's decision pending the outcome of the appeal. The proposed amendment to Section 821.64(b) will require that an airman who moves to stay the Board's order must do so within twenty days after the date of service of the Board's order. The Administrator has two days after service of the motion to stay to file a reply. *Id.*

XI.
Revisions to the Board's Rules Implementing EAJA

Under § 826.1, the Administrator of the FAA is to pay attorney fees and other expenses of eligible individuals who prevail over the FAA in an adjudication unless the FAA's position in the proceeding was substantially justified or special circumstances make an award unjust. Under proposed § 826.40, within five days of the Board's service of a final decision granting an award of attorney's fees, the Administrator is required to transmit to the airman instructions explaining how the airman may obtain payment of the award. The instructions will include a statement that the airman will not seek review of the decision to a United States Circuit Court of Appeals, and the airman shall provide his bank routing number together with his tax identification number or social security number. The Administrator is required to pay the airman within sixty days after receiving the necessary information unless judicial review of the award has been sought by the airman or any other party to the proceeding.

XII.
Conclusion

The Board's NPRM is both good news and bad news for the pilot population. On the positive side, the airman may submit evidence which the judge may consider before ruling on the airman's petition challenging the Administrator's emergency determination. On the negative side, the judge is to consider all the facts alleged by the Administrator to be true. If the facts alleged by the Administrator are required by regulation to be deemed true, then does the proposed regulation really permit the airman to challenge the Administrator's facts? In litigation, no party has a monopoly on the truth. Rather than Section 821.54(e) providing that the Administrator's allegations are assumed to be true, a more balanced approach to addressing alleged emergencies would be to require that Administrator to make a showing under oath and allow the airman to challenge that sworn testimony either with his affidavit, the affidavit of another or by way of exhibits or documents. The Board has no more obligation to accept as true the allegations of the Administrator than it has to accept as true the allegations of the airman.

In addition to continuing the practice of giving the Administrator an advantage in emergency proceedings, the Board missed an opportunity to adopt a bright line standard that would put an end to the FAA gaming the system. The current practice of dismissing a complaint shortly before trial to avoid paying the airman's attorney's fees is not significantly discouraged by proposed § 821.12(b) that merely permits the parties to argue about whether the dismissal should be with or without prejudice. A bright line standard with clear criteria would have been preferable to this proposed rule that fails to address the problem and invites further litigation. For example, if the FAA seeks to withdraw its complaint within 5 days of trial, there should be an adverse presumption against the Administrator that the dismissal was made to avoid an adjudication on the merits (i.e., to avoid losing the case). In such circumstances, the judge should dismiss the complaint with prejudice and with a finding the FAA moved to dismiss to avoid losing the case at trial.

With regard to proposed § 821.55(d)(1) requiring dismissal of the complaint when the FAA fails to show good cause existed for failing to provide the releasable portions of the EIR with the emergency order, even if the FAA's complaint is dismissed, the parties merely become embroiled in another argument about whether the ALJ's dismissal of the complaint should be "with" or "without" prejudice.

Like proposed Section 821.12(b) dealing with dismissals before trial, proposed Section 821.55(d)(1) requiring dismissal if the releasable portions of the EIR are not produced provides no standards to guide the judge in deciding if the dismissal should be with prejudice or without prejudice. If the dismissal of the complaint is to be a meaningful sanction for withholding or failing to produce evidence, there must be some realistic prospect of the judge actually making the dismissal "with prejudice." Otherwise, the FAA can, following dismissal, simply bring a renewed or subsequent emergency action and start the process all over again. Allowing the complaint to be dismissed without prejudice dilutes the effectiveness of the sanction for the FAA's misconduct.

Respectfully, proposed Section 821.55(d)(1) should be simplified. If the FAA fails to produce the non-exempt portions with the emergency order, this should give rise to an adverse presumption against the FAA requiring dismissal with prejudice. After all, the FAA can only avoid dismissal upon a showing of "good cause." *See* proposed Section 821.55(d)(1). If the FAA cannot demonstrate "good cause" for its misconduct why should

the dismissal not be with prejudice? The FAA may argue air safety interests militate against dismissal with prejudice. However, if the case were so serious as to validate that argument, how could the FAA be so careless as to fail to disclose the non-exempt portions of the EIR with the emergency order?

In summary, the Board's proposed rules continue to foster uncertainty in the administration of justice. However, as Oliver Wendell Holmes noted: "[T]he tendency of the law must always be to narrow the field of uncertainty." O.W. Holmes, *The Common Law* 127 (1881). The Board could benefit from the declaration of Justice Holms by imparting standards and clarity to the proposed Rules of Practice. Without articulated standards to govern the administrative law judges and Board in rendering their decisions, there can be no meaningful standard of review to an appellate court. *See* 5 U.S.C. § 706(2) requiring reversal of agency action that is (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or (B) contrary to constitutional right, power, privilege, or immunity.

Anyone who wishes to comment on the Board's proposed amendments to its Rules of Practice may do so before April 9, 2012. Go to http://www.regulations.gov and follow the instructions. Alternately, comments may be delivered via facsimile to (202) 314-6090 or by mail to: NTSB Office of General Counsel, 490 L'Enfant Plaza East, SW, Washington, DC 20594-2003.