

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.

\* \* \* \* \*

Deborah A.P. Hersman,  
Chairman.

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### NATIONAL TRANSPORTATION SAFETY BOARD

#### 49 CFR Parts 821 and 826

[Docket No. NTSB–GC–2011–0001]

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

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

**ACTION:** Final rule.

**SUMMARY:** The NTSB amends its regulations which set forth rules of procedure for the NTSB's review of certificate actions taken by the Federal Aviation Administration (FAA); and its regulations which set forth rules of procedure concerning applications for fees and expenses under the Equal Access to Justice Act of 1980 (EAJA). The NTSB previously issued an advance notice of proposed rulemaking (ANPRM) and a notice of proposed rulemaking (NPRM) and has carefully considered comments submitted in response to both documents. In a separate interim final rule published elsewhere in this issue of the **Federal Register**, the NTSB is implementing regulatory changes as a result of the recently enacted Pilot's Bill of Rights. **DATES:** This final rule is effective November 15, 2012.

**ADDRESSES:** A copy of the NPRM, 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, DC 20594–2003.

Alternatively, a copy of the NPRM is available on the government-wide Web site on regulations at <http://www.regulations.gov> (Docket ID Number NTSB-GC-2011-0001).

**FOR FURTHER INFORMATION CONTACT:**  
David Tochen, General Counsel, (202) 314-6080.

**SUPPLEMENTARY INFORMATION:**

**I. Notice of Proposed Rulemaking**

On February 9, 2012, the NTSB published an NPRM inviting public comments concerning the NTSB procedural rules codified at 49 CFR parts 821 and 826. 77 FR 6760. The NPRM also addressed each of the 20 relevant comments received in response to the ANPRM, which the NTSB published on December 22, 2010. 75 FR 80452. In addition to various technical changes, the NTSB proposed in the NPRM changes to various regulations to allow for the electronic filing of certain documents; a requirement that the FAA provide a copy of the releasable portions of its enforcement investigation report (EIR) by the date on which an emergency order is issued; a statement that the law judge may consider the facts of each case and determine whether to dismiss the case with prejudice when the FAA withdraws its complaint; and a statement that the law judge will accept evidence in determining whether a case warrants emergency status. The NTSB also proposed amendments to 49 CFR part 826, governing claims brought under the EAJA, to bring the regulations up-to-date and ensure petitioners are aware of the steps necessary to obtain fees from the FAA following an order requiring the payment of fees.

Both the ANPRM and NPRM included a discussion of the Board's procedure for handling certain aspects of emergency cases. The FAA issues emergency orders when it determines the interests of aviation safety require that the order take effect immediately, and, in those cases, the certificate holder may not exercise certificate privileges during the pendency of an appeal with the NTSB. Section 716 of the Aviation Investment and Reform Act for the 21st Century ("AIR-21") amended 49 U.S.C. 44709 by granting the NTSB authority to review such emergency determinations. Public Law 106-181, section 716 (April 5, 2000) (codified at 49 U.S.C. 44709(e)(3)). The NTSB's rules governing review of the emergency status of a case have been the subject of debate in the aviation legal community in the recent past. Specifically, § 821.54(e) directs NTSB's law judges to dispose of petitions for

review of the FAA's emergency determinations by:

Consider[ing] whether, based on the acts and omissions alleged in the [Federal Aviation] 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 aspect of the standard relating to the law judges' assumption of the truth of the FAA's allegations of fact prompted much feedback.

**II. Comments Received on the NPRM and Responses Thereto**

The NTSB received nine comments in response to the NPRM, which are available at <http://www.regulations.gov> (Docket No. NTSB-GC-2011-0001). The NTSB carefully considered all comments received in response to the NPRM, as well as the preceding ANPRM.<sup>1</sup> This section contains summaries of the NPRM comments. The NTSB's responses to the comments are included in the section below entitled "Changes."

The comments primarily address the NTSB's regulations governing review of emergency determinations, but also provide feedback concerning other NTSB regulations. Most of the comments assert the current standard for review of FAA emergency determinations is fundamentally unfair because it requires the NTSB's law judges to assume the truth of the factual allegations the FAA makes in its emergency order. While the NTSB did not propose changing the standard of review in the NPRM, it did propose a requirement that the FAA provide a copy of the EIR to each respondent in emergency cases at the time the FAA issues its emergency order. Following publication of the NPRM and the comment period, Congress passed the Pilot's Bill of Rights. Pub. L. No. 112-153 (August 3, 2012). The statute requires the FAA to release the EIR in each case. *Id.* section 2(b)(2)(E). As a result, the EIR proposal in the NPRM is moot as it now is required by statute. Therefore, this final rule will not address the release of the EIR, rather the NTSB addresses that requirement in an interim final rule in response to the Pilot's Bill of Rights. This interim final rule is published elsewhere in this issue of the **Federal Register**.

<sup>1</sup> Comments submitted in response to the ANPRM are also available in Docket No. NTSB-GC-2011-0001.

In addition, the NTSB proposed a rule that the law judge may consider evidence concerning whether the case warrants emergency status when the respondent submits such evidence with his or her petition for review of the emergency order. This proposal also prompted much discussion from the commenters, as described below.

*A. Section 821.54 (Disposition of Petitions for Review of Emergency Determinations of the Federal Aviation Administration)*

1. Comments Received

Regarding respondents' challenges to the emergency status of a case under section 821.54, the FAA contends the NTSB should not have used a drug testing refusal case as an example of a case where the law judge granted a respondent's petition regarding the emergency status of the case. The FAA's comment asserts the NTSB gave the impression that a respondent's opportunity to submit evidence was equivalent to a trial on the merits. The comment suggests adding the following sentence at the end of § 821.54(b): "The respondent may include attachments to the petition for review (e.g., affidavits, other records) limited to evidence the respondent believes supports the reasons enumerated in the petition for why the Administrator's emergency determination is not warranted in the interest of aviation safety."

The Air Line Pilots Association, International (ALPA), also submitted a comment concerning the emergency actions. ALPA strongly disagrees with the decision to leave the "assuming the truth" standard of review undisturbed, and proposed adding a requirement that law judges *must* consider evidence a respondent submits in his or her challenge to the emergency status of a case. ALPA's comment also states the NTSB should consider the amount of time the FAA knew of the alleged wrongdoing before issuing an emergency order, as this time period is relevant to whether the case is a legitimate emergency.

Similarly, the Aircraft Owners and Pilots Association (AOPA) disagrees with the intent to leave the emergency determination standard of review unchanged. AOPA's comment contends Congress, in authorizing us to review emergency appeals of aviation certificate actions, intended to provide each respondent with a "substantive review" of the emergency action. AOPA notes it "remains perplexed as to why the NTSB maintains that this type of review does not lend itself to evidentiary proof." AOPA states it is

mindful of the time constraints applicable to emergency cases, but contends the time limits should not be a reason to “undermine meaningful review” of the emergency status. AOPA suggests an allowance for telephonic presentations and arguments concerning whether the emergency status of a case is warranted, and argues the law judges should have discretion concerning whether to assume the truth of the factual allegations contained in the FAA’s emergency orders. AOPA agrees with the proposal that law judges may consider evidence a respondent submits in challenging an emergency order.

The National Air Transportation Association (NATA) also commented on the NPRM. As with the ANPRM, NATA is in favor of eliminating the “assuming the truth” standard of review concerning the emergency status of cases. NATA asserts no statute requires this standard of review, nor does any legislative history indicate this standard is necessary. NATA contends emergency actions, and deferential review of them, are fundamentally unfair, and asserts emergency actions must be subject to “meaningful review” by an “impartial and independent body.” NATA suggests the NTSB impose a rebuttable presumption standard concerning emergency challenges. In particular, the comment states:

[w]hile NATA strongly believes that the NTSB should create no presumption with regard to the FAA’s factual allegations, NATA believes that a rebuttable presumption standard is the absolute minimum review standard necessary to provide to the NTSB at least some argument that it is providing due process, appropriate checks and balances and the type of meaningful, impartial and independent review of FAA’s emergency determination that Congress intended.

NATA asserts the requirement to defer to the FAA’s interpretation of the Federal Aviation Regulations (as required by 49 U.S.C. 44709(d)(3)),<sup>2</sup> combined with the “assuming the truth” standard, results in too much deference to the FAA. NATA also believes the law judges would not grant a challenge to the FAA’s emergency action even when the respondent presents evidence indicating the factual allegations are not true, as a result of the deferential standard of review.

The National Business Aviation Association (NBAA) submitted a comment identical to that of NATA.

The Aeronautical Repair Station Association (ARSA) also submitted a

comment expressing disagreement with the intent not to remove the “assuming the truth” standard of review applicable to emergency cases. ARSA contends the FAA’s authority to issue an emergency order remains unchecked, and the “assuming the truth” standard “effectively swallows the rule” because it renders review of petitions challenging emergency status meaningless. ARSA asserts an emergency order should be used sparingly, because the effect of such an order is severe.

Carstens and Cahoon, LLP, submitted a brief comment concurring with the proposal to retain the “assuming the truth” standard, as it is “in full accord with 49 U.S.C. 44709(e).” The commenter also agrees with the proposed rule to permit respondents to present evidence challenging the emergency nature of the case, as this proposal “provides both sides with fairness and justice for the purpose of the limited review by the law judge of the FAA’s emergency determination.”

The Transport Workers Union of America (TWU) commented concerning the standard of review of the emergency status of cases. TWU acknowledges the need for some deference to the FAA’s factual allegations, given the fact that a challenge concerning the emergency status is limited in scope and cannot consist of litigating the merits of the case. As with its response to the ANPRM, TWU again suggests adoption of a less deferential standard of review than the current “assuming the truth” standard. TWU analogizes its proposed review of FAA emergency cases to Federal courts’ review of temporary restraining orders or preliminary injunctions to require the FAA to show a substantial likelihood of success on the merits.<sup>3</sup> TWU notes other Federal agencies apply this “substantial likelihood of success” standard when determining whether to grant a stay of a case.<sup>4</sup>

<sup>3</sup> As TWU notes in its comment, review of a “traditional stay” consists of a four-part test: (1) Likelihood that the party seeking action would prevail on the merits to any challenge sought; (2) the aggrieved party would suffer irreparable harm in the absence of a stay; (3) other interested parties would not be substantially harmed by a stay; and (4) the public interest supports the granting of a stay. *Washington Metro Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). TWU’s comment also cited a Surface Transportation Board decision for this standard: *Eighteen Thirty Group LLC—Acquisition Exemption—in Allegheny County, MD*, STB FD 35438, 2010 WL 4639505.

<sup>4</sup> TWU cited a Surface Transportation Board (STB) case, *Eighteen Thirty Group LLC—Acquisition Exemption in Allegheny County, MD*, STB FD 35438, 2010 WL 4639505, in which the STB determined whether to grant a motion to stay their

The Aviation Law Firm submitted a comment discussing the proposed changes regarding emergency cases. The commenter recommends the NTSB change the permissive language of “should permit evidence, if appropriate” within § 821.54(e) to say “shall permit evidence.” The Aviation Law Firm contends such a change would provide sufficient clarity that law judges will consider evidence a petitioner submits.

The FAA Whistleblowers Alliance submitted a brief comment stating the FAA misuses its authority to issue emergency orders. The comment indicates the organization agrees with this rulemaking activity concerning review of emergency orders.

## 2. Changes

The NTSB carefully reviewed all comments regarding procedures applicable to emergency cases. As indicated above, 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 2000, AIR–21 amended 49 U.S.C. 44709 to grant the NTSB authority to review such emergency determinations. In particular, section 44709(e)(3) and (4) states:

(3) 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.

(4) Final disposition.—The Board shall make a final disposition of an appeal under subsection (d) not later than 60 days after the date on which the appeal is filed.

In order to implement these statutory provisions, on July 11, 2000, the NTSB published an interim rule with a request for comments. 65 FR 42637. This interim rule amended 49 CFR part 821 by providing NTSB’s law judges with the authority to issue orders affirming or denying the FAA’s emergency determination under 49 U.S.C. 44709(e). The interim rule directed NTSB law judges to determine whether the

decision. TWU’s comment also included citations to two cases from the District of Columbia Court of Appeals that addressed organizations’ petitions to agencies for injunctions.

<sup>2</sup> The Pilot’s Bill of Rights removes the requirement that the Board defer to the FAA’s interpretation of the Federal Aviation Regulations.

Administrator abused his or her discretion in finding an emergency existed under the facts alleged in the Administrator's order. The NTSB assumed the facts to be true for the limited purpose of reviewing the emergency determination. The NTSB incorporated the abuse of discretion standard of review that had been set forth in *Nevada Airlines v. Bond*, 622 F.2d 1017 (9th Cir. 1980).<sup>5</sup> Courts have since upheld the "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" standard in other cases. See *Ickes v. FAA*, 299 F.3d 260 (3d Cir. 2002) (citing *Blackman v. Busey*, 938 F.2d 659, 663 (6th Cir. 1991)); *Armstrong v. FAA*, 515 F.3d 1294 (D.C. Cir. 2008).

On April 29, 2003, the NTSB published the final rule altering the standard of review for emergency determinations. 58 FR 22623. Since 2003, § 821.54(e) has provided:

[w]ithin 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.

This standard, therefore, was a departure from the more stringent standard the courts affirmed.

In the 2010 ANPRM, the NTSB revisited this standard of review, requesting comments. 75 FR 80452-01 (Dec. 22, 2010). In the ANPRM, the NTSB reminded parties § 821.54(e) does not explicitly state 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.

In the 2012 NPRM, the NTSB did not propose changing this "assuming the truth" standard of review. The NTSB concluded that a challenge to an emergency determination should not be an opportunity to contest the factual allegations underlying the certificate action. This determination simply is the

result of the statutory time constraints applicable to emergency cases.

If the NTSB held a hearing for every petition challenging the emergency status of a case, it could not fulfill its obligation to rule on the merits of the case within the statutorily required 60-day time frame. A commenter's suggestion to utilize telephonic hearings for emergency cases demonstrates an understanding of this predicament. The NTSB carefully considered alternatives to the "assuming the truth" standard, especially in light of the comments received in response to both the ANPRM and the NPRM, and determined it simply cannot issue a ruling on a petition challenging the emergency status of a case within 5 days if the NTSB holds a hearing.

The NTSB currently does not have the resources to hold hearings on petitions contesting emergency determinations, given the expedited time frame. Scheduling a time in which the parties are available to participate in a hearing, securing a space for the hearing, and ensuring a law judge is available for the hearing, would all be difficult to accomplish within 5 days. These considerations are only applicable to the scheduling of the hearing. Issuing a well-reasoned decision following the receipt of evidence and testimony from a hearing would require additional time.

Moreover, the NTSB only has four administrative law judges, all of whom are responsible for holding hearings across all 50 states, the District of Columbia, and Puerto Rico. Consistent with § 821.37(a), the NTSB holds hearings at the most convenient locations for the parties. The NTSB generally refrains from conducting telephonic hearings at which the NTSB's law judges must make factual determinations, because the law judges' ability to assess the credibility of witnesses at such hearings is greatly diminished.

Additionally, the four-prong standard applicable to preliminary injunctions or temporary restraining orders is similar to the manner in which NTSB law judges currently handle emergency challenges. By policy, the FAA attaches to each emergency order a document outlining the reason the FAA believes emergency treatment of the case is necessary. Under the Pilot's Bill of Rights, the FAA is now required to also provide a copy of releasable portions of the EIR to each respondent. In the document providing the FAA's justification for pursuing the case as an emergency, the FAA articulates the public interest at stake, which is akin to a showing of how irreparable harm would ensue if it could not proceed

with the case as an emergency. The FAA's statement also contains a factual summary as to why the FAA would prevail on the merits, and why the FAA believes the public interest supports proceeding under our emergency rules. Federal courts, in applying the four-part preliminary injunction or temporary stay standard, must weigh the facts in a similar manner. For example, in such cases, they do not have time for a trial on the merits of the case wherein they apply a preponderance of the evidence standard. Instead, the courts must weigh the facts in favor of the party seeking action in analyzing the four prongs to determine whether short-term, immediate legal action is appropriate. The NTSB law judges' review of emergency challenges is similar to this analysis.

For the reasons set forth above, the NTSB retains the "assuming the truth" standard of review in § 821.54(e). However, the NTSB will also consider this analysis anew in light of any petition for rulemaking, that includes novel suggestions or points not previously articulated.

Finally, the NTSB adopts the suggestion from the Aviation Law Firm, recommending a change in the language of § 821.54(e) to state the law judge "shall" consider evidence a respondent submits in challenging the FAA's decision to proceed with a case as an emergency. The NTSB also adds the phrase "if appropriate" to the sentence, to ensure parties are aware the law judge ultimately makes the determination as to whether the evidence the respondent submits is relevant to the emergency determination. Therefore, this portion of § 821.54(e) will now read, "\* \* \* the law judge is not so limited to the order's factual allegations themselves, but also shall permit evidence, if appropriate, pertaining to the propriety of the emergency determination \* \* \*."

## B. Electronic Filing of Documents

### 1. Comments Received

Several parties commented on the proposed changes to allow for electronic submission of documents. All commenters generally concur with permitting electronic submission. AOPA agrees with the move toward an electronic filing system by accepting documents via electronic mail, and stated it also agrees with the proposal to continue receiving documents by facsimile or postal mail, as not all respondents may have access to electronic mail. NBAA and NATA, however, both suggest creation of an electronic docketing system, such as the

<sup>5</sup>In *Nevada Airlines*, the Ninth Circuit stated as follows concerning review of the emergency status of cases: "[w]ithout an administrative record or agency hearing at this stage of the proceedings and in light of the Administrator's broad discretion, we limit our review to determining whether the Administrator's finding of an emergency was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 1020.

Federal courts' Public Access to Court Electronic Records (PACER) system. They indicate electronic docketing would provide for the timeliest and most efficient means of allowing parties to receive documents, and therefore provide a "level playing field" for both parties. ALPA's comment states it agrees with the proposed changes to allow for electronic submission of documents.

The Aviation Law Firm suggests an allowance for electronic submission of documents in emergency cases. Therefore, it proposes an amendment to § 821.54(b), to provide a respondent challenging the emergency status of an emergency order to file his or her petition via electronic mail.

The FAA also agrees with the proposal to allow for electronic submission of documents, and offered several suggestions. With regard to § 821.7, the FAA suggests adding the following sentence to subsections (a)(1) and (a)(2) of the regulation, to simplify it: "Paragraph (3) provides the acceptable methods for filing documents under this provision." As for subsection (a)(3), the FAA suggests the NTSB not adopt the proposed rule stating, "Documents filed by electronic mail must be signed and transmitted in a commonly accepted format, such as Adobe Portable Document Format (PDF)," and instead adopt the following language: "Documents filed by electronic mail must be signed and transmitted in accordance with the procedures established by the Board for accepting electronically filed documents, which can be found at [reference Web site where procedures can be found]." The FAA suggests this amendment to provide the NTSB with flexibility in the future to alter the procedures as technology changes. The FAA's comment states that if the NTSB adopts this approach, the language in § 821.52 could be changed to clarify whether parties may submit documents in emergency cases via electronic mail.

The FAA also suggests clarification as to whether parties must file the "originally signed document" in addition to the copy received via facsimile or electronic mail. The FAA states, "[a]s currently drafted, it appears that no hard copy needs to follow if a document is filed by facsimile or email." The FAA suggests requiring a hard copy submission in addition to facsimile or electronic mail submission, to "ensure the NTSB is aware of the filing and that technical glitches do not undermine an otherwise timely and intended filing." The FAA also recommends establishing an automatic receipt to be transmitted in response to electronic mail filings.

With regard to the proposed change to § 821.8(b), which would require a party serve any other party by any method prescribed in § 821.7(a)(3), and allow a party the option of receiving service via electronic mail only, the FAA recommends clarifying this section by stating whether parties must also serve a hard copy of the document. The FAA states the reference to § 821.7(a)(3) creates this ambiguity. In response, the FAA recommends explicitly requiring, "as a general matter," that any party serving a document by electronic mail or facsimile also serve a hard copy, to ensure the other party receives the document.

Finally, the FAA, like the Aviation Law Firm, questions why service via electronic mail is not permitted for emergency cases. The FAA recommends allowing electronic service of documents in the initial proceedings before the law judges. Several other commenters also recommend allowing electronic submission of documents in emergency cases.

## 2. Changes

As stated above, all commenters approve of the concept of permitting electronic filing in emergency cases. Given the time constraints applicable to emergency cases, the NTSB has determined adopting such a requirement would be advantageous to all parties. For this reason, the NTSB herein adopts the requirement for emergency cases as well as cases that proceed on the normal case disposition timeline. This change involves deleting references to expedited filing in §§ 821.54(b) and (c), and 821.57(b). Additionally, the change requires adding a new subsection within § 821.52 to clarify electronic submission of documents is permissible in emergency cases.

The NTSB has determined the FAA's suggestion to provide a reference to the NTSB public Web site for a listing of procedures for electronic filing is advantageous. Such an approach will provide the NTSB with the flexibility to accommodate technological changes. In addition, listing procedures on the NTSB public Web site will be helpful as the NTSB seeks to design, build and utilize a robust electronic docketing system for enforcement cases. As a result, the NTSB adopts this change, and notes these procedures will be available on the NTSB Web site after publication of this final rule, but before its effective date.

Finally, the NTSB intends to provide in its online electronic filing procedures additional clarifications concerning § 821.8(d)(3), in which the following

language was proposed: "[We will presume lawful service] when a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient." By this change, the NTSB encourages parties filing via electronic mail to keep a copy of the transmission from their "sent mail" file. With an electronic docketing system, the NTSB may have the ability in the future to provide a fill-able electronic Web page that automatically generates an electronic "receipt" for documents.

Some commenters urge the NTSB to implement a robust electronic docketing system, such as the Federal courts' PACER system. The NTSB is currently in the process of gathering requirements and working with a contractor to design a system for the NTSB's docketing and electronic filing needs. The NTSB intends to develop and implement such a docketing system; however, this process may take some time, due to resource and fiscal constraints.

## C. Rules Concerning the EAJA (49 CFR part 826)

### 1. Comments Received

Several commenters address the proposed change to § 821.12(b), which addressed the FAA's voluntary withdrawal of a complaint. The proposed language stated: "The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from the withdrawal of a complaint should be deemed to occur with or without prejudice." As explained in the preamble of the NPRM, the issue of dismissal with or without prejudice is directly relevant to whether a party has achieved "prevailing party" status under the EAJA.

Some commenters, such as NATA and NBAA, indicate they have "no objection" to the proposed change in § 821.12(b). The Aviation Law Firm suggests changing the word "may" to "shall," to require law judges to accept arguments on the issue of dismissal with or without prejudice. The comment from the Aviation Law Firm includes a summary of recent cases concerning the EAJA. In particular, in the case of *Green Aviation Management Co., LLC v. Federal Aviation Administration*, 676 F.3d 200 (DC Cir. 2012), the DC Circuit indicated the with-or-without-prejudice prong of the three-prong test articulated in *District of Columbia v. Straus*, 590 F.3d 898 (DC Cir. 2010), is indeed an important consideration. In *Green*, the District of Columbia Circuit Court of Appeals held the applicant was the prevailing party because the law judge dismissed the

complaint with prejudice. *Green*, 676 F.3d at 204–205. Because this prong is such an important consideration, the Aviation Law Firm suggests the NTSB rules state law judges “shall” consider arguments concerning whether they should dismiss a case with prejudice when the FAA withdraws the complaint.

The FAA’s comment states the proposed addition to § 821.12(b) lacks clarity, because the rule also states the law judge’s approval is not necessary “in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from the law judge’s initial decision or appealable order.” Therefore, the FAA indicates the proposed change implies approval from a law judge is necessary to allow the FAA to withdraw a complaint. The FAA’s comment suggests if this implication is correct, then the NTSB should specify “such withdrawal must be by motion of the party.” The FAA suggests the following concerning such a motion: (1) The motion state why the moving party is requesting withdrawal; (2) the motion state whether the moving party is requesting dismissal with prejudice; and (3) the motion state whether the non-moving party consents to the motion. The FAA also suggests stating that the law judges will summarily grant uncontested motions to withdraw without prejudice.

The FAA also suggests a change to part 826. The comment recommends changing the formula in § 826.6(b)(1) to the following:  $X/\$125 \text{ per hour} = \text{CPI}_{\text{NEW}}/\text{CPI}_{1996}$ . The FAA states the formula in the current rule is outdated and results in a higher cap on fees.

AOPA agrees with the proposed change to § 821.12(b). AOPA’s comment, however, addresses a different aspect of the EAJA: the time for which an EAJA applicant may recover fees. With an extensive amount of research cited in its comment, AOPA contends the NTSB should allow an applicant to petition for fees and expenses incurred prior to the commencement of the applicant’s appeal. AOPA states applicants and their representatives often expend time and resources in preparation for a defense prior to filing an appeal.

## 2. Changes

The majority of the comments regarding the EAJA focused on § 821.12(b), involving dismissal of the complaint with or without prejudice. As stated in the NPRM, this issue is a critical consideration in determining whether a party is the “prevailing party” for purposes of the EAJA. The

NTSB understands the comment from the Aviation Law Firm, wherein it suggests inclusion of the word “shall,” to require the law judges to consider parties’ arguments concerning whether to dismiss a case with prejudice. The NTSB initially chose to include the word “may” in the proposed language to acknowledge parties were not required to make such arguments. If parties are silent on the issue, then the law judges would not consider such arguments. The NTSB does not want to penalize parties who do not present any arguments on the issue of whether the law judge should dismiss with prejudice. As a result, the NTSB amends the proposed language to include the word “shall,” in conjunction with the phrase, “if offered.”

The FAA’s comment on the issue of dismissal with prejudice was helpful. The NTSB believes the clearest way to address the issue of dismissal with prejudice is to require a motion to dismiss in light of the FAA’s withdrawal of a complaint. As a result, the NTSB changes the language in § 821.12(b) to require dismissals based on withdrawals of complaints to occur only on oral or written motion.

The FAA’s comment also recommends updating the formula for the calculation of the cap on the maximum hourly rate for attorney’s fees under the EAJA, found at 49 CFR 826.6(b)(1). The NTSB did not propose such a change or solicit comments concerning this calculation in either the ANPRM or the NPRM. As a result, the NTSB declines to consider this change in the current rulemaking.

Likewise, AOPA submitted a comment urging the NTSB to change the EAJA rules to allow a respondent to recover fees from the time he or she begins preparing the defense (*i.e.*, once the respondent becomes aware of the investigation). As with the FAA’s suggestion regarding the calculation for the cap of fees under the EAJA, the NTSB did not propose a change or solicit comments regarding when to permit recovery of fees to commence. As a result, the NTSB declines to consider this change in the current rulemaking.

If the FAA, AOPA, or any other commenter wishes the NTSB to consider making changes to these rules under the EAJA, they may petition for a new rulemaking.

## D. Miscellaneous Technical Changes

### 1. Comments Received

The majority of the comments concur with the miscellaneous technical changes. The FAA provided several suggested changes to the proposed

language in this category. Concerning § 821.8(d) (entitled “service of documents”), the NTSB proposed to add a new subsection (3), to presume lawful service “[w]hen a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient.”

With regard to § 821.64(b) (entitled “judicial review”), the NTSB proposed adding the following language: “[n]o request for a stay pending judicial review will be entertained unless it is served on the Board within 20 days after the date of service of the Board’s order. The Administrator may, within 2 days after the date of service of such a motion, file a reply thereto.” The FAA’s comment notes the NTSB based this change on the incorrect presumption that only a respondent would seek a stay. The FAA contends there may be times when the FAA needs to file a motion for a stay, and therefore recommends adopting party-neutral language in the rule (such as “moving party” and “non-moving party”). The FAA also believes it is unreasonable to allow the non-moving party only 2 days to file a reply to the motion for stay, when the moving party has 20 days. In this regard, the FAA suggests permitting the moving party 10 days from the date of service of the Board’s order to file a motion for stay, and allow the non-moving party 10 days to submit a reply to the motion.

### 2. Changes

In response to the FAA’s suggestions regarding motions for stays, the NTSB herein amends the language in 821.64(b) to ensure it is party-neutral. The FAA also suggests altering the timeframe to allow the moving party 10 days to file a motion for stay, and the non-moving party an additional 10 days to reply to the motion. The NTSB considered this suggestion, and believes the most reasonable and fair filing timeframe is as follows: a party may file a motion for stay within 15 days of the date of service of the Board’s order, and the non-moving party may reply to the motion within 5 days of the date of service of the motion for stay. The NTSB adopts this change, as it will ensure the NTSB does not encounter a situation in which a party files a motion for stay on the 29th day following service of the Board’s order, but still provides sufficient time for a party to submit the motion. Likewise, the NTSB believes a 5-day timeframe to reply following service of the motion is reasonable.

Finally, ARSA suggests an alteration to the language in the stale complaint rule (codified at 49 CFR 821.33), to shift

the burden to the FAA in response to a respondent's motion to dismiss based on the stale complaint rule. Specifically, ARSA suggests changing the rule to require the FAA to reply within 15 days of a motion to dismiss based on the stale complaint rule, and to require the reply show good cause existed for the FAA's delay, or that public interest warrants imposition of the sanction, notwithstanding the delay. The NTSB did not propose a change or request comments concerning the stale complaint rule. Therefore, as indicated above, the NTSB will not attempt to issue such a change herein.

For the foregoing reasons, the NTSB finalizes the language of 49 CFR parts 821 and 826 as set forth below.

### III. Regulatory Analyses

In the NPRM, the NTSB included a regulatory analyses section concerning various Executive Orders and statutory provisions. The NTSB did not receive any comments concerning the results of these analyses. The NTSB again notes the following concerning such Executive Orders and statutory provisions.

This final rule is not a significant regulatory action under Executive Order 12866. Therefore, Executive Order 12866 does not require a Regulatory Assessment. As such, the Office of Management and Budget (OMB) has not reviewed this proposed rule under Executive Order 12866. In addition, on July 11, 2011, the President issued Executive Order 13579, "Regulation and Independent Regulatory Agencies," 76 FR 41587, July 14, 2011). Section 2(a) of the Executive Order states:

Independent regulatory agencies "should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."

76 FR at 41587.

Consistent with Executive Order 13579, the NTSB's amendments to 49 CFR parts 821 and 826 reflect its judgment that these rules should be updated and streamlined.

This rule does not require an analysis under the Unfunded Mandates Reform Act, 2 United States Code (U.S.C.) 1501–1571, or the National Environmental Policy Act, 42 U.S.C. 4321–4347.

As stated in the NPRM, the NTSB has also analyzed these amendments 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.

The NTSB is also aware that 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 certifies this final rule will not have a significant economic impact on a substantial number of small entities.

Regarding other Executive Orders and statutory provisions, this final 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.

#### List of Subjects

##### 49 CFR Part 821

Administrative practice and procedure, Airmen, Aviation safety.

##### 49 CFR Part 826

Claims, Equal access to justice, Lawyers.

For the reasons discussed in the preamble, the NTSB amends 49 CFR parts 821 and 826 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. In § 821.6, revise paragraphs (b) and (d) to read as follows:

#### § 821.6 Appearances and rights of witnesses.

\* \* \* \* \*

(b) Any person appearing in any proceeding governed by this part may be accompanied, represented and advised, and may be examined by, his or her own counsel or representative.

\* \* \* \* \*

(d) Any party to a proceeding who is represented by an attorney or representative shall, in a separate written document, notify the Board of the name, address and telephone number of that attorney or representative. In the event of a change in representation or a withdrawal of representation, the party shall immediately, in a separate written document, notify the Board (in the manner provided in § 821.7) and the other parties to the proceeding (pursuant to § 821.8), before the new attorney or representative may participate in the proceeding in any way. Parties, and their attorneys and representatives, must notify the Board immediately of any changes in their contact information.

■ 3. In § 821.7, revise paragraphs (a), (e), and (f) to read as follows:

#### § 821.7 Filing of documents with the Board.

(a) *Filing address, method and date of filing.* (1) Except as provided in paragraph (a)(2) of this section, documents are to be filed with the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East SW., Washington, DC 20594, and addressed to the assigned law judge, if any. If the proceeding has not yet been assigned to a law judge, documents shall be addressed to the Case Manager. Paragraph (a)(3) of this section provides the acceptable methods for filing documents under this provision.

(2) Subsequent to the filing of a notice of appeal with the Office of Administrative Law Judges from a law judge's initial decision or appealable order, the issuance of a decision permitting an interlocutory appeal, or the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, all documents are to be filed with the Office of General Counsel, National Transportation Safety Board, 490 L'Enfant Plaza East SW., Washington, DC 20594. Paragraph (a)(3)

of this section provides the acceptable methods for filing documents under this provision.

(3) Documents shall be filed: By personal delivery, by U.S. Postal Service first-class mail, by overnight delivery service, by facsimile or by electronic mail as specified on the "Administrative Law Judges" Web page on the NTSB's public Web site. Documents filed by electronic mail must be signed and transmitted as specified on the "Administrative Law Judges" Web page on the NTSB's public Web site.

(4) Documents shall be deemed filed on the date of personal delivery; on the send date shown on the facsimile or the item of electronic mail; and, for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evidence if there is no certificate of service and no postmark. Where the document bears a postmark that cannot reasonably be reconciled with the mailing date shown on the certificate of service, the document will be deemed filed on the date of the postmark.

\* \* \* \* \*

(e) *Subscription.* The original of every document filed shall be signed by the filing party, or by that party's attorney or representative.

(f) *Designation of person to receive service.* The initial document filed by a party in a proceeding governed by this part, and any subsequent document advising the Board of any representation or change in representation of a party that is filed pursuant to § 821.6(d), shall show on the first page the name, address and telephone number of the person or persons who may be served with documents on that party's behalf.

\* \* \* \* \*

■ 4. In § 821.8, revise paragraphs (a), (b)(1), (c), (d), and (e) to read as follows:

**§ 821.8 Service of documents.**

(a) *Who must be served.* (1) Copies of all documents filed with the Board must be simultaneously served on (i.e., sent to) all other parties to the proceeding, on the date of filing, by the person filing them. A certificate of service shall be a part of each document and any copy or copies thereof tendered for filing, and shall certify concurrent service on the Board and the parties. A certificate of service shall be in substantially the following form:

I hereby certify that I have this day served the foregoing [specify document] on the following party's counsel or designated representatives [or party, if without counsel or representative], at the address indicated,

by [specify the method of service (e.g., first-class mail, electronic mail, personal service, etc.)] [List names and addresses of all persons served] Dated at \_\_\_\_\_ this \_\_\_\_ day of \_\_\_\_\_ 20\_\_ (Signature) \_\_\_\_\_ For (on behalf of) \_\_\_\_\_

(2) Service shall be made on the person designated in accordance with § 821.7(f) to receive service. If no such person has been designated, service shall be made directly on the party. (b) *Method of Service.* (1) Service of documents by any party on any other party shall be accomplished by any method prescribed in § 821.7(a)(3) for the filing of documents with the Board. A party may waive the applicability of this paragraph, and elect to be served with documents by the other parties to the proceeding solely by electronic mail, by filing a written document with the Board (with copies to the other parties) expressly stating such a preference.

\* \* \* \* \*

(c) *Where service shall be made.* Except for electronic mail, personal service, parties shall be served at the address appearing in the official record, which the Board must receive under §§ 821.6(d) and 821.7(f). In the case of an agent designated by an air carrier under 49 U.S.C. 46103, service may be accomplished only at the agent's office or usual place of residence.

(d) *Presumption of service.* There shall be a presumption of lawful service:

(1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under § 821.7(f);

(2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered or certified mail, has been returned as unclaimed or refused; or

(3) When a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient.

(e) *Date of service.* The date of service shall be determined in the same manner as the filing date is determined under § 821.7(a)(4).

■ 5. In § 821.12, revise paragraph (b) to read as follows:

**§ 821.12 Amendment and withdrawal of pleadings.**

\* \* \* \* \*

(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. The law judge

may dismiss the case after receiving a motion to dismiss based on withdrawal of the complaint. The law judge shall accept arguments or motions, oral or written, from the parties, if offered, on the issue of whether a dismissal resulting from the withdrawal of a complaint should be deemed to occur with or without prejudice.

■ 6. In § 821.35, revise paragraph (b)(10) to read as follows:

**§ 821.35 Assignment, duties and powers.**

\* \* \* \* \*

(b) \* \* \*

(10) To issue initial decisions and dispositional orders.

\* \* \* \* \*

■ 7. In § 821.50, revise paragraph (c) to read as follows:

**§ 821.50 Petition for rehearing, reargument, reconsideration or modification of an order of the Board.**

\* \* \* \* \*

(c) *Content.* The petition shall state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon. If the petition is based, in whole or in part, upon new matter, it shall set forth such new matter and shall contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable, and shall explain why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed. To the extent the petition is not based upon new matter, the Board will not consider arguments that could have been made in the appeal or reply briefs received prior to the Board's decision.

\* \* \* \* \*

■ 8. In § 821.52, add paragraph (e) to read as follows:

**§ 821.52 General.**

\* \* \* \* \*

(e) Acceptable methods of filing and service. All documents submitted by a party in a proceeding governed by this subpart must be filed with the Board by overnight delivery, facsimile or electronic mail, and simultaneously served on all other parties by the same means. If filing by electronic mail, parties must adhere to the requirements in § 821.7(a)(3).

■ 9. In § 821.54, paragraphs (b), (c), and (e) to read as follows:

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

\* \* \* \* \*

(b) *Form, content and service of petition.* The petition may be in letter form. A copy of the Administrator's order, from which review of the emergency determination is sought, must be attached to the petition. If a copy of the order is not attached, the petition will be dismissed. While the petition need only request that the Board review the Administrator's determination as to the existence of an emergency requiring the order be effective immediately, it may also enumerate the respondent's reasons for believing that the Administrator's emergency determination is not warranted in the interest of aviation safety. The respondent may include attachments to the petition for review (e.g., affidavits, other documents or records) limited to evidence the respondent believes supports the reasons enumerated in the petition for why the Administrator's emergency determination is not warranted in the interest of aviation safety.

(c) *Reply to petition.* If the petition enumerates the respondent's reasons for believing that the Administrator's emergency determination is unwarranted, the Administrator may, within 2 days after the date of service of the petition, file a reply, which shall be strictly limited to matters of rebuttal. No submissions other than the respondent's petition and the Administrator's reply in rebuttal will be accepted, except in accordance with paragraph (d) of this section.

(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 other than the chief 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. In making this determination, however, the law judge is not so limited to the order's factual allegations themselves, but also shall permit evidence, if appropriate, pertaining to the propriety of the emergency determination, presented by the respondent with the petition and the

Administrator with the reply to the petition. This evidence can include affidavits or other such records.

■ 10. In § 821.55, revise paragraph (a) to read as follows:

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

(a) *Complaint.* In proceedings governed by this subpart, the Administrator's complaint shall be filed and simultaneously served on the respondent within 3 days after the date on which the Administrator received the respondent's appeal, or within 3 days after the date of service of an order disposing of a petition for review of an emergency determination, whichever is later.

■ 11. In § 821.57, revise paragraphs (b) and (c) to read as follows:

**§ 821.57 Procedure on appeal.**

(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 notice of appeal was filed, 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. Aside from the time limits specifically mandated by this paragraph, the provisions of §§ 821.7(a)(3) and 821.48 shall apply.

(c) *Issues on appeal.* The provisions of § 821.49(a) and (b) shall apply in proceedings governed by this subpart.

■ 12. In § 821.64, revise paragraph (b) to read as follows:

**§ 821.64 Judicial Review.**

(b) *Stay pending judicial review.* No request for a stay pending judicial review will be entertained unless it is served on the Board within 15 days after the date of service of the Board's order. The non-moving party may, within 5 days after the date of service of such a motion, file a reply thereto.

**PART 826—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980**

■ 13. The authority citation for 49 CFR part 826 continues read as follows:

**Authority:** Section 203(a)(1) Pub. L. 99–80, 99 Stat. 186 (5 U.S.C. 504).

■ 14. Revise § 826.1 to read as follows:

**§ 826.1 Purpose of these rules.**

The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the National Transportation Safety Board. An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the FAA's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards this Board will use to make them. As used hereinafter, the term "Administrator" refers to the Administrator of the FAA.

■ 15. Revise § 826.40 to read as follows:

**§ 826.40 Payment of award.**

Within 5 days of the Board's service of a final decision granting an award of fees and expenses to an applicant, the Administrator shall transmit to the applicant instructions explaining how the applicant may obtain the award. These instructions may require, but are not limited to, the submission of the following information to the Administrator: a statement that the applicant will not seek review of the decision in the United States courts, bank routing numbers to which the Administrator may transmit payment, and the applicant's tax identification or Social Security number. The Administrator will pay the applicant the amount awarded within 60 days of receiving the necessary information from the applicant, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

**Deborah A.P. Hersman,**  
Chairman.

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