



121 North Henry Street
Alexandria, VA 22314-2903
T: 703 739 9543 F: 703 739 9488
arsa@arsa.org www.arsa.org

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Docket Management Facility
Mr. Gary L. Halbert, Esq.
General Counsel
National Transportation Safety Board
490 L'Enfant Plaza East, S.W.
Washington, DC 20594-2000

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<http://www.regulations.gov>

RE: Comments to Docket No. NTSB-GC-2011-0001
Advance Notice of Proposed Rulemaking Regarding Amendments to National Transportation Safety Board Regulations

The Aeronautical Repair Station Association (ARSA) respectfully submits the following comments to the advance notice of proposed rulemaking (ANPRM) published in the Federal Register on December 22, 2010.¹

ARSA is the principal association for the international aviation maintenance industry. Its members include aircraft operators, aviation maintenance facilities and individuals certificated by the Federal Aviation Administration (FAA). As such, ARSA members are directly impacted by the regulations addressed in the ANPRM.

The ANPRM notes that the National Transportation Safety Board's (NTSB's) standard of review for the FAA's "emergency" determinations is an area of particular interest. We suggest, in addition to that topic, that the standard used in assessing motions to dismiss a stale complaint for "lack of qualification" be considered as well.

Essentially, the NTSB should remove all language directing the law judge to assume the FAA's allegations are true. Although the rationale for that assumption may have been to leave all factual determinations for the hearing, it effectively swallows the rule. Any assertion by the FAA – no matter how far-fetched – meets the threshold for a proper "emergency" or "lack of qualification" determination by the FAA.

Petition for review of Administrator's determination of emergency

The FAA's basis for issuing an "emergency" order amending, modifying, suspending or revoking a certificate² should be reserved for true emergencies. The FAA's use of that power is currently unchecked.

As noted in the ANPRM, a certificate holder may continue to exercise the privileges of its certificate(s) unless an emergency order has been issued. Because of its immediate effect, an emergency order has a severe impact on certificated persons and those

¹ 75 FR 80452

² 49 U.S.C. § 44709(e)(2)

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employed by a certificate holder. Emergency orders should therefore be used sparingly, and only when absolutely necessary in the interest of safety.

Due to the presumptive assumption of facts, challenges to the FAA's determination of an emergency are all but impossible, particularly for small business. The relevant provision in Title 49, Code of Federal Regulations (CFR)³, § 821.54(e), states that:

Disposition. Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal. (*Emphasis added*)

To correct the deficiency, we recommend removal of the underlined language.

Motion to dismiss stale complaint

Pursuant to § 821.33, except for complaints that allege lack of qualification, a motion can be made to dismiss allegations occurring more than 6 months prior to the FAA's notice of proposed action. To defend such a motion, the FAA must show good cause for the delay.

When a lack of qualification is alleged, the complaint can never be stale under the current rules. That relevant section of the rule, § 821.33(b), provides that:

In those cases where the complaint alleges lack of qualification of the respondent, the law judge shall first determine whether an issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion. If not, the law judge shall proceed as in paragraph (a) of this section. (*Emphasis added*)

Effectively, the FAA can always avoid dismissal for staleness; it only needs to allege lack of qualification. Once included in the FAA's complaint, there is no recourse for the accused before the hearing despite the fact that good cause may not exist for the delay.

³ Unless noted otherwise, all references in this document are to 49 CFR.

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Pragmatically, there can never be “good cause” for delaying actions for alleged lack of qualifications. The stale complaint rule should target those cases to ensure the government takes immediate action against certificate holders that, in essence, should not be allowed to exercise the privileges granted. Indeed, the association is aware of “emergency” cases, which were based upon a “lack of qualifications” that languished for two years from the allegation date. If there was truly an immediate threat to air safety, how did the government allow the certificate holders to exercise the privilege of maintaining and operation aircraft for so long?

The FAA’s ability to circumvent this rule should be addressed by eliminating the cited paragraph, along with the qualifying language in paragraph (a).⁴ With that change, the FAA will be required to show good cause for any delay; the FAA would surely rely upon any true instance of lack of qualification in defending the motion to dismiss.

Section 821.33 should read:

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action under 49 U.S.C. 44709(c), the respondent may move to dismiss such allegations as stale pursuant to the following provisions:

(1) The Administrator shall be required to show, by reply filed within 15 days after the date of service of the respondent's motion, that good cause existed for the delay in providing such advice, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay, or for the imposition of a sanction in the public interest notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate the remaining portion of the complaint, if any.

⁴ § 821.33(a) provides “In those cases where the complaint does not allege lack of qualification of the respondent.”

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Conclusion

The NTSB should consider the changes outlined in this letter to provide balance and prevent the potential for abuses of power. The revisions will not interfere with the spirit of the existing rules, and will not in any way jeopardize aviation safety.

Respectfully submitted,



Craig L. Fabian
Vice President Regulatory Affairs and
Assistant General Counsel