

Rules on Emergency Certificate Actions Are Expected to Improve

INDUSTRY CHALLENGE:

In 2000, Congress authorized the NTSB to review emergency actions taken by the FAA. However, NTSB administrative law judges reviewing those actions were to assume the allegations presented by the FAA were correct and accurate; that assumption requirement makes it difficult for the accused party to dispute the emergency determination.

NBAA ACTION:

A coalition of aviation associations and advocates, led by NBAA, reached out to NTSB about making changes to the process. After discussing the industry's concerns, an advance notice of proposed rule making (ANPRM) was released in December 2010 seeking comment on the changes suggested by the coalition, with the assumption of truth requirement being the most contentious point. Early this year, the board issued a notice of proposed rule making (NPRM) on the matter, to which NBAA submitted formal comments on behalf of its Members.

The National Transportation Safety Board (NTSB) appears ready to revise several regulations governing the board's review of emergency certificate actions taken by the Federal Aviation Administration (FAA). Many of these changes will be welcomed by the industry, though some may not extend as far as aviation advocates had hoped. For example, an assumption of truth of the allegations presented by the FAA may remain, despite industry concerns surrounding this policy.

In 2000, Congress authorized the NTSB to review emergency actions taken by the FAA. Three years later, the board issued an interim rule governing the terms of that oversight. Among the requirements of that ruling was that NTSB administrative law judges reviewing those actions were to assume the allegations of fact presented by the FAA to support the agency's emergency action determination were correct and accurate.

Mike Nichols, NBAA's vice president of operations, education & economics, said that assumption requirement makes it difficult for the accused party to dispute the emergency determination. "This is a problem that any certificate holder could face," Nichols explained. "There isn't the opportunity during emergency certificate action situations for the respondent to have a true day in court, so to speak."

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"The FAA should certainly have emergency powers, but we believe the FAA's decisions should be subject to a meaningful review," said Paul Lange, vice chair of NBAA's Regulatory Issues Advisory Group and volunteer lead on the NTSB initiative. "We also believe the accused party should have the opportunity to see the evidence used against them in a way that allows them to challenge the FAA's actions."

In February 2012, the NTSB – after careful consideration of the comments submitted following the ANPRM – issued a notice of proposed rule making (NPRM) on the matter. While the NTSB noted that many comments to the 2010 proposal expressed concerns about the assumption requirement, the NPRM did not propose changing that language. "Although the rules provide the facts alleged in the order are assumed as true for the limited, preliminary purpose of determining whether the administrator's emergency determination was warranted in the interest of aviation safety, the law judges have always considered evidence submissions relevant to the propriety of the emergency determination itself," the board asserted.

Lange disagreed that the ability to introduce additional evidence solves the problem. "The rule still is that the law judge is supposed to assume the correctness of FAA's allegations and evidence," he said. "There's only so much you can do to counter that as a respondent. You can have all the evidence you want entered into the record, but how does that address the concern about untrue, inaccurate or incomplete FAA factual allegations if, as a matter of law, the NTSB is required to assume the FAA's allegations are true?"

Ted Ellett, a former FAA chief counsel and former special assistant to a member of the NTSB, who advocated for the coalition's concerns, said he is "disappointed" that the NTSB did not take action on the assumption matter in the NPRM. "When the Congress gave NTSB the authority to review FAA emergency action, it clearly intended that there should be an impartial, fully independent and meaningful review of the FAA's emergency determination," he said. "There was nothing in that legislation indicating the deck should be stacked in favor of one side or the other, including any requirement that the NTSB law judge should assume the truth of the FAA's allegations.

"I fully understand that it must be a truncated process, and that law judges do not have time to conduct a full evidentiary hearing when reviewing an emergency action case," Ellett continued. "However, the notion that they must automatically accept the FAA's allegations of fact, even when the respondent says that they are not accurate, does not give the reviewing agency a meaningful way to do its job."

Opponents of the assumption requirement had one final opportunity to convince the NTSB to change that language during a comment period early this year, when NBAA submitted formal comments on behalf of its Members. Should the NTSB opt to retain the assumption of truth requirement, the next step

likely is to take the fight to Capitol Hill. Both Lange and Ellett noted that the language that gives aviators greater protection during FAA enforcement actions is included in "Pilot's Bill of Rights" legislation now under consideration in the House and Senate. "Those bills ask for a more evenhanded approach," Lange said. "If any of these bills is enacted, the NTSB might well be required to move to a fairer, more meaningful review process."

There is some good news in the NPRM, as several of the coalition's other proposed changes, including allowing documents in emergency action cases to be filed electronically, appear to be on the track toward approval. "Something is going to come out of this," Ellett said. "There is no question in my mind that NTSB wouldn't go through the trouble of issuing an NPRM unless the board was aware of shortcomings in its process and comfortable with at least some of the changes argued for by the coalition."

"NTSB is taking action based on our initiative," Nichols concluded. "We appreciate that the NTSB is considering the changes we, and so many others, have advocated for." ✦

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