Hoover Revisited - Appellate Review of FAA Emergency Certificate Actions

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HOOVER REVISITED — APPELLATE REVIEW OF FAA
EMERGENCY CERTIFICATE ACTIONS

HILARY B. MILLER*

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In the first 17 months since enactment of the “Hoover”
provisions of AIR-21, 49 U.S.C. § 44709(e),1 only one of the
69 applicants for appellate review of a Federal Aviation Adminis-
tration (“FAA”) emergency order has successfully obtained a
stay (and that one case was probably inconsistently decided).
Obtaining a stay of an emergency revocation order is practically
impossible because the standard of review requires deference to
the FAA’s factual determinations underlying the sole ground for
a stay: the existence of an “emergency.” The National Transpor-
tation Safety Board (“NTSB” or the “Board”) must amend its
interim regulations to comport with the manifest intention of
Congress that meaningful review be available. Failing NTSB ac-
tion, court mandates or additional legislative activity may be re-
quired in order to carry out the manifest intent of Congress in
enacting AIR-21. No reported court case has considered the
NTSB’s determination of an emergency review under AIR-21.

* Member of New York and Connecticut bars, Lawyer-Pilots Bar Association,
Aircraft Owners and Pilots Association legal services panel, and National
Transportation Safety Board Bar Association. The author is a commercial pilot
with instrument and multiengine ratings. Portions of this article first appeared in
the Winter 2000 edition of the Lawyer-Pilots Bar Association Journal. Copyright ©
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Significant questions exist regarding the interpretation of AIR-21 by the Board and, in particular, whether the narrowness of the Board's review and its deference to the FAA comport with Congressional intent to provide meaningful appellate review.

I. THE SAGA OF BOB HOOVER — OR, HOW THE RIGHT STUFF WENT WRONG

Robert Anderson Hoover is perhaps America's most popular and best-known air-show pilot. Chuck Yeager called him "the best pilot I ever knew." After over 25 years of performing worldwide, in April 1993, at the age of 72, Hoover was required by the Federal Air Surgeon to surrender his aviation medical certificate.

On June 19-21, 1992, Hoover performed his routine in the Air and Space Air Show in Oklahoma City. More than two months after the performances, two FAA inspectors alleged for the first time that Hoover's flying had deteriorated and that he appeared medically unfit. The FAA demanded that Hoover undergo psychiatric evaluations.

Hoover complied. He met with Dr. Garrett O'Connor, who had been selected by the FAA to conduct the testing (at Hoover's expense). Dr. O'Connor administered psychiatric tests and informed both Hoover and Hoover's personal aviation medical examiner ("AME") that Hoover had passed the exam and was "clean." However, O'Connor asked Hoover to take some additional tests.

Again, Hoover consented. Hoover took additional tests from three experts selected by the FAA and paid for by Hoover. A neurological examination found no abnormality. An EEG and an MRI scan were performed, and both were normal. The neurologist informed Hoover and Hoover's own AME that there was absolutely nothing wrong with Hoover nor could he even find anything suspicious. A SPECT scan was performed, reviewed by the FAA's designee, and deemed "borderline." After evaluating the test results, Dr. O'Connor opined that Hoover was "fit to hold a second-class medical certificate from a neuropsychological and neuropsychiatric point of view and should therefore be permitted to continue his flight activities."

2 These facts appear from the record on appeal and are recited at length in Hoover's brief to the Court of Appeals. Hoover v. NTSB, 43 F.3d 712 (D.C. Cir. 1994) (mem.).
Despite the recommendation from Dr. O'Connor and the other physicians, in April 1993, the FAA informed Hoover that he was being grounded. Hoover protested that he had complied with the FAA's testing demands, at his own expense, and had received a clean bill of health. From his first contact with the FAA in August 1992 until the April 1993 grounding, Hoover had performed aerobatic routines 33 times without incident. The FAA relented and agreed to a new, independent medical examination if Hoover would surrender his medical certificate to his AME. Again, Hoover complied, although as a consequence he was required to cancel all further performances scheduled for the remainder of 1993 and thereafter, and he earned no income for calendar year 1993.

At the FAA's instance, Hoover was examined by the UCLA Neuropsychiatric Institute. The UCLA panel recommended that Hoover's medical certificate be reinstated. The FAA once again refused. Meanwhile, Hoover underwent a third series of exams with an independent flight surgeon and a psychologist. The third set of tests also concluded that Hoover was qualified for his medical certificate.

Despite three independent tests showing that Hoover should retain his medical certificate, the FAA would not change its position. Hoover then demanded return of his medical certificate, and the FAA responded on December 14, 1993 with an Emergency Order of Revocation, alleging that Hoover did not meet the medical standards of the Federal Aviation Regulations. Only after revocation did the FAA claim, for the first time, that Hoover's purported inability to fly was unrelated to the impairment that the FAA doctors had originally suggested.

Hoover appealed to the Board from the Emergency Order of Revocation, and Administrative Law Judge ("ALJ") William R. Mullins reversed the FAA's Order, and reinstated Hoover's medical certificate in a ruling made orally from the bench after the conclusion of the hearing. 5

The FAA then appealed to the full Board, and the Board reversed the ALJ's determination and reinstated the FAA's revoca-

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tion. The Court of Appeals affirmed the revocation without opinion, and the U.S. Supreme Court denied certiorari.

II. ALPHABET SOUP AND THE HUE AND CRY

Long before the Board became involved with the revocation of Hoover's certificate — due largely to Hoover's enormous popularity and fame among pilots — aviation interest groups including the "alphabet soup" organizations (Air Line Pilots Association, Allied Pilots Association, Experimental Aircraft Association, National Air Transportation Association, NTSB Bar Association, Air Transport Association, AOPA Legislative Action, National Air Carrier Association, National Business Aircraft Association and Regional Airline Association) began lobbying for legislative limitations on the FAA's emergency revocation power. As the legislative package emerged, they all supported this legislation to "provide due process to certificate holders where none exists, without compromising aviation safety."

Sen. James M. Inhofe (R-Okla.), the principal sponsor of the legislation and himself an 8,000-hour commercial pilot, had seen first hand the FAA's use of its emergency revocation power in an increasing percentage of cases where no true "emergency" could be shown to exist. Indeed, in many such cases, the emergency revocations took place months or years after the FAA learned of the purportedly emergent circumstances and permitted the pilot to continue to exercise the privileges of his certificate. Under the law as then in effect, there was no authority for NTSB review of the "emergency" underlying an emergency revocation, and an aggrieved airman was required to pursue a plenary appeal on the merits. While practitioners and the "alphabet soup" groups

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5 Hoover, 43 F.3d at 712.
6 Hoover v. NTSB, 514 U.S. 1018 (1995). Ironically, on October 18, 1995, the FAA finally granted Hoover a restricted second-class medical certificate, allowing him to resume performing at air shows in the United States. In addition, he was granted full third-class privileges, allowing him to fly as a private pilot. The results of new tests conducted during the summer of 1995 and evaluated by outside medical specialists apparently led the FAA to conclude that Hoover's condition had "stabilized." In light of this finding, he was permitted to resume air show performances, but under more medical scrutiny than would be required of an airman with an unrestricted second-class medical certificate.
8 See infra note 16.
had long known of such abuses, the Hoover case made emergency revocation power a grassroots issue for the first time.

III. AIR-21 TO THE RESCUE

The "Hoover Bill" became law on April 6, 2000. The statute amends the appeal provisions of 49 U.S.C. § 44709 to allow a certificate holder to obtain interim review of an FAA emergency revocation order by appealing to the Board. The legislation, which was enacted as Section 716 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"), P.L. 106-181, establishes an appeal process for emergency certificate actions.9

The procedure is as follows: within 48 hours after receiving an emergency revocation order, the airman must request that the Board review the "emergency" nature of the revocation. Then, within 48 hours, the Board must entertain arguments from both sides and thereafter must render a decision within five days of the original filing. During the "emergency" review, the revocation remains in effect. If the Board determines that there is no "emergency," then the revocation order is temporarily stayed.

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9 See 49 U.S.C. § 44709 (2001). Section 44709(e) is amended to read as follows:

(e) Effectiveness of Orders Pending Appeal.

(1) In General. When a person files an appeal with the Board under subsection (d), the order of the Administrator is stayed.

(2) Exception. Notwithstanding paragraph (1), the order of the Administrator is effective immediately if the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the order to be effective immediately.

(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.
and the airman can continue flying. The revocation process against the airman continues, however, on an expedited (60-day) appeal process. The stay does not conclude the proceeding but spares the airman the effect of revocation without a hearing, and the airman must still defend the revocation on a non-emergency basis while continuing to exercise the privileges of his certificate.

If the Board decides that there is, indeed, an "emergency," then the revocation remains in effect and the pilot cannot fly while the case is decided on the merits.

The Board's authority under the statute is limited to determining whether an "emergency" exists. Under the statute and the Board's own regulation, the Board does not have authority to determine at this stage whether the complaint is factually founded, or even whether the facts alleged in the complaint would constitute grounds for revocation.

IV. BOARD PROCEDURES

On July 11, 2000, the Board issued interim procedural rules, which were published at 65 Fed. Reg. 42637 and are now final and codified at 49 C.F.R. § 821.52 et seq.10 In summary, the Board has delegated the duty for handling these emergency reviews to its chief ALJ. The ALJ's decision is not appealable to the full Board. The airman is not entitled to an evidentiary hearing or to oral argument. The ALJ's review is limited to the issue of whether, based on the acts and omissions of the certificate holder as alleged in the complaint, the Administrator abused her discretion in determining that an emergency exists. The ALJ is required to accept as true all of the factual allegations of the complaint. Thus, the certificate holder is not permitted to offer evidence that the FAA's allegations are untrue or, indeed, that the facts alleged in the complaint simply could not have occurred as the FAA alleges.

V. RESULTS TO DATE

Through September 17, 2001, a total of 69 cases had been appealed to the Board under 49 U.S.C. § 44709(e)(3).11 Twenty-two of those petitions were rejected on purely procedural grounds (nine were filed after the 48-hour deadline, two

10 See infra Appendix A.
11 See infra Appendix A.
failed to include copies of the order appealed from, twelve
failed to enumerate specific grounds for the appeal, and one
was not timely served on opposing counsel (some petitions were
rejected on more than one ground)).

A significant number of these cases involve the definition of
"emergency." Surprisingly, these appeals have, with the single
exception noted below, been uniformly rejected without the
finding of urgent or emergent circumstances. Commencing in
June 2000, the Board was confronted with a number of argu-
ments that, despite the seriousness of the allegations against an
airman, there was no urgency in revoking a certificate, generally
because of the significant lapse of time between the FAA's inves-
tigation efforts and the date of revocation.

The facts of Administrator v. Esser are illustrative. Esser held an
ATP certificate and flew for Scenic Air, a Part 135 carrier. Fol-
lowing a ramp check of Scenic Air, Esser was charged with hav-
ing piloted 13 flights for hire during a single month, January
1999, following expiration of his second-class medical certificate
on December 31, 1998 (the medical certificate was apparently
renewed in January or February 1999). Esser also apparently
failed to obtain a complete weather briefing for a single trip in
January 1999 and omitted or misstated logbook entries regard-
ing the January 1999 flights.

Approximately a year and half later, based on these alleged
violations, the FAA revoked Esser's ATP certificate on an emer-
gency basis. Notably, at the time of the revocation, Esser's medi-
cal certificate was in force, and no violations occurring later
than 17 months prior to the revocation were alleged.

In his petition, Esser asserted that (1) the allegations alleged,
if true, would not warrant a certificate revocation; (2) that the
recordkeeping obligations alleged to have been violated were
imposed on Scenic Air, not on Esser personally; and (3) "how
much of an emergency can exist" when such a lapse of time has
occurred?

The FAA replied that the lapse of time, "although regretta-
ble . . . does not diminish the significance of the FAA's charges

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12 See infra Appendix A.
13 See infra Appendix A.
14 The FAA's Enforcement Sanction Guidance Table (FAA Order 2150.3A)
recommends a 30- to 180-day suspension for each violation.
or the continuing threat to public safety that underlies the FAA's allegations."\(^{16}\)

Chief Judge William E. Fowler, Jr. adopted this reasoning:

Respondent's contention that no true emergency exists, as the Administrator did not rapidly initiate a certificate action against him after commencing her investigation of this matter, has been duly noted. At first blush, such an argument would appear to be compelling, as the term "emergency" is commonly used to describe situations requiring immediate attention. The term "emergency," however, is also used to describe situations of a serious nature, without regard to time sensitivity. The Administrator's emergency authority, stemming from her duty to vindicate public safety, clearly contemplates this latter circumstance. To stop the Administrator from exercising her emergency authority here because she did not act against respondent in what he considers to be a sufficiently timely manner to reflect the existence of an emergency would be to ignore both that her allegations address critical public safety concerns which she is duty-bound to uphold and that, for reasons noted above, the serious compromises to air safety caused by respondent's alleged actions could readily be compounded but for the immediate effectiveness of her order.\(^{17}\)

Similar language appears almost verbatim in several other decisions.\(^{18}\) This definition of "emergency" is clearly not what Sen. Inhofe had in mind when he sponsored the original Hoover Bill and its ultimately enacted provisions in AIR-21.\(^{19}\)

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\(^{16}\) Id.

\(^{17}\) Id. at 8.


\(^{19}\) In his floor statement Senator Inhofe noted:

Bob Hoover's experience is just one of many. I have visited with other pilots who have had their licenses revoked on an emergency basis. Pilots such as Ted Stewart, who has been an American Airlines pilot for more than 12 years and is presently a Boeing 767 Captain. Until January 1995, Ted had no complaints registered against him or his flying. In January 1995 the FAA suspended his examining authority as part of a larger FAA effort to respond to a problem of falsified ratings. The full National Transportation Safety Board (NTSB) exonerated Ted in July 1995. In June 1996, he received a second revocation. One of the charges in this second revocation involved falsification of records for a Flight Instructor Certificate with Multiengined rating and his Air Transport Pilot (ATP) certificate dating back to 1979. Remember, an emergency revocation means you lose your certificate immediately, so in most cases this means the certificate holder loses his source of income.
Four of the cases for which review was sought under 49 U.S.C. § 44709(e)(3) arose from a series of approximately 35 certificate actions which had been initiated by the FAA following an audit of training records of aircraft dispatcher certificate holders who had attended Embry Riddle Aeronautical University ("ERAU") in 1998 and 1999.20 In these cases, the ERAU records relating to the certificate holders failed to prove that the student had completed the requisite number of hours of training, a portion of which was credit for prior training and experience.

Of these cases, the Baird petition was particularly illustrative. Baird graduated from ERAU and was thereafter employed, from September 1999 through at least August 2000, by Continental Airlines as an aircraft dispatcher. She received additional on-the-job training from Continental and was not involved in any accident or incident, nor was she alleged to have violated any applicable regulation. When apprised of the FAA's audit of ERAU in March 2000, she promptly wrote to the FAA, and she provided additional, certified details of training from ERAU, thereby demonstrating that she had in fact received the necessary instruction. Baird received no response from the FAA until the emergency order suspending her certificate was issued on August 17, 2000.

On Baird's petition for review, Judge Fowler opined:

It would seem that, upon receiving such a letter in response to its request for further information, the FAA should at least have informed respondent as to what information it deemed to be deficient and given her an opportunity to cure whatever the deficiency was before proceeding further. Instead, respondent heard absolutely nothing from the FAA during the intervening period of approximately five months prior to the issuance of the Administrator's order. The undersigned finds this quite dismaying.22

Fortunately in Ted's case, his employer put him on a desk job while the issue was adjudicated. Like most, I have questioned how an alleged 17 1/2 year old violation in the Stewart case could constitute an emergency; especially, since Ted had not been cited for any cause in the intervening years. Nonetheless, the FAA vigorously pursued this action.

22 Id. at 4-5.
Nevertheless, Judge Fowler upheld the emergency order, finding that he must accept as true the FAA’s factual assertion that Baird could not be proven to possess the full qualifications for the certificate she held, which constituted a serious safety issue.\textsuperscript{23}

Again, in light of the manifest purpose of the Hoover Bill, the denial of Baird’s petition seems quite anomalous.\textsuperscript{24}

A few days following the World Trade Center tragedy, Chief Judge Fowler granted the first emergency petition in Administrator \textit{v.} Bishop.\textsuperscript{25} Bishop, a 35,000-hour ATP-rated pilot with a previously unblemished record, had been involved in an accident on March 31, 2001. The DeHavilland Otter he was flying landed off-runway and caused substantial damage to the aircraft and injury to its occupants. Following an investigation, on September 6, 2001, the FAA revoked Bishop’s pilot and flight instructor certificates on an emergency basis, alleging several violations, most notably that the aircraft had been approximately 900 pounds over its certificated gross takeoff weight at takeoff and, secondarily, that the aircraft had been modified by the installation of unapproved bench seats.\textsuperscript{26} Bishop timely appealed on September 10.

In his appeal, Bishop contested substantially all of the FAA’s factual allegations, including the over-gross claim. He contended that he had implemented remedial measures, including a computerized weight-and-balance system, to avoid any unintentional over-gross takeoffs. He also contended that the FAA had concluded its investigation on June 15 but inexplicably waited 83 days to initiate certificate action against him.

Chief Judge Fowler deferred—as he acknowledged he must—to the FAA’s factual determinations, including the over-gross claim. However, for the first time, he accepted a petitioner’s

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} Chief Judge William E. Fowler, Jr. has heard all cases although the Board’s regulation authorizes him to assign these cases to other judges. On October 20, 2000, the author had the privilege of discussing with Chief Judge Fowler what circumstances, if any, could ever warrant granting the stay authorized by Section 44709(e)(3). After thinking for a few moments, he said, “It would be hard to think of any, given the broad discretion granted to the Administrator and our inability to review her factual determinations.”

\textsuperscript{25} \textit{Adm’r v. Bishop}, No. SE-16400 (Sep. 14, 2001).

\textsuperscript{26} Judge Fowler apparently discredited this finding in light of an inconsistent affidavit of the supervisory aviation inspector who oversaw the investigation, but acknowledged his duty to defer resolution of the factual dispute until the Board hearing on the merits. \textit{Id.} at 3, n. 5.
argument that the delay militated against an “emergency” finding. Specifically, he found:

Such a delay of 83 days between the completion of the Administrator’s investigation and the initiation of a certificate action against respondent there—for which the Administrator provides no adequate explanation—during which time respondent was (presumably with the knowledge of FAA officials) still performing a considerable number of skydiving flights, belies the existence of an emergency. The Administrator has not shown that there is any ongoing threat to public safety which must be ameliorated by grounding respondent during the pendency of his appeal, and it does not, from the allegations of her order, appear that she cannot rely upon him to be truthful with respect to any safety sensitive matters to which he may be required to attest while his appeal is pending if the effectiveness of her order is stayed.27

These were precisely the arguments that Chief Judge Fowler had rejected on prior occasions. While the vast majority of emergency revocations appear to arise from dishonesty, falsification of records, refusal to submit to reexamination and other willful misconduct, Chief Judge Fowler had not previously hesitated to deny appeals where the underlying misconduct alleged was mere carelessness, albeit on multiple occasions.28 Moreover, the cited ERAU cases, particularly Baird, involved no carelessness, no intentional misconduct, no imminent threat to life or property, no likelihood of recurrence and a substantial delay between completion of the FAA’s investigation and the initiation of certificate action. In deciding Bishop, Chief Judge Fowler departed from his previous standard of ignoring the non-emergent nature of the circumstances if the allegations—which he was required to accept as true—were sufficiently serious, and, for the first time, he accepted an airman’s argument that post-incident remedial measures rendered recurrence unlikely. As noted above, it is particularly noteworthy that he accepted the airman’s defense that a lapse of 83 days constituted laches on the FAA’s part, while in other cases delays of nine months or more had been found no bar to an “emergency” finding.29 Of course,

27 Id. at 4.
28 Cf. Adm’r v. Kortidis, No. SE-15960 (May 25, 2000) (two gear-up landings six months apart); Adm’r v. Blose, No. SE-16301 (May 14, 2001) (four balloon flights landed in residential areas, etc.; FAA alleged to have waited nine months before revoking petitioner’s certificate).
every case is different, and Bishop’s circumstances were indeed distinguishable from most of the other cases involving substantial alleged willful misconduct. Bishop will no doubt be carefully noted by the bar and liberally cited.30

As practice under the Hoover Bill among the organized aviation bar became widespread and the difficulties of prevailing under the Board’s standard of review became obvious, a disproportionate number of cases have been pro se filings in recent months. These filings are frequently dismissed because the petitions are untimely (which is jurisdictional)31 or because they fail to enumerate specific grounds for relief.32 The FAA itself is in part responsible for the proliferation of these defective filings (and concomitant increase in Chief Judge Fowler’s workload) because the abbreviated form of notice of appeal rights which the FAA employs fails to apprise the certificate holder in no uncertain terms that he must do more than disagree with the FAA’s determination in order to perfect his appeal.

VI. CONCLUSION

Against this backdrop, serious questions remain about the efficacy of the Hoover Bill in accomplishing its intended purpose. As the foregoing analysis indicates, certificate holders are batting one-for-69 in these proceedings. It is clear that meaningful review of emergency revocations is not being afforded airmen under the new procedure. Given the language of the statute and Board regulation, which limit review to whether an “emergency” exists and all but preclude consideration of urgency, exigency or whether factual grounds exist for the revocation itself, further thought should be given to the original objectives of the Hoover Bill and whether the statute requires additional amendment to facilitate the manifest purposes of Congress.

In particular, consideration should be given to the following issues requiring revision or at least clarification:

30 Bishop ultimately settled the FAA’s charges by agreeing to pay a $1,000 fine with no suspension of his certificate.
32 “The petition shall enumerate the specific grounds on which the certificate holder challenges the Administrator’s determination that an emergency exists. In the event that the petition fails to set forth the specific grounds for the certificate holder’s challenge to the Administrator’s emergency determination, the petition shall be dismissed.” 49 C.F.R. §821.54(b).
Whether an “emergency” can exist when the FAA, with knowledge of the relevant facts, has failed to act expeditiously to revoke a certificate;

• Whether violations occurring in the past, without more, and without specific evidence to support the possibility of future recurrence or future threat to air safety, can constitute an “emergency”;

• Whether a certificate holder should be entitled to offer evidence of subsequent favorable conduct, training or remedial measures to mitigate the finding of an “emergency” with respect to limited past misconduct; and

• Whether factual evidence of any kind, which tends to rebut the FAA’s allegations, should be admissible and relevant to finding of an “emergency.”

Intended originally to “provide a workable avenue of appeal through NTSB, discourage FAA’s use of emergency revocation powers except in cases where absolutely justified, allow NTSB to use its expertise to judge the need for emergency actions, and protect the rights of pilots,” the Hoover Bill has failed of its essential purpose and must be rethought.

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## APPENDIX “A”
Compendium of Cases to Date under 49 U.S.C. § 44709(e)

<table>
<thead>
<tr>
<th>Name/Docket No./Date</th>
<th>Certificate Action</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jeffrey Gerald Sipp, SE-15956 (5/23/00)</td>
<td>ATP, CFI and FE certificates revoked for alleged refusal to submit to drug test</td>
<td>Petition rejected as untimely; airman was served 5/10 and petition was filed 5/18, outside the 48-hour time limit imposed by 49 U.S.C. § 44709(e)(3), which is jurisdictional; limitation could not be extended even for good cause</td>
</tr>
<tr>
<td>Charles R. Drake, SE-15957 (5/24/00)</td>
<td>Commercial pilot and mechanic certificates revoked for alleged false entry in aircraft log book</td>
<td>Petition denied; potential for adverse safety effects from even a single episode of falsification, even though only a single entry is involved</td>
</tr>
<tr>
<td>Constantine G. Kor- tidis, SE-15960 (5/25/00)</td>
<td>CFI certificate revoked for two gear-up landings with the same student pilot six months apart</td>
<td>Petition denied; despite airman’s argument that “there is no urgent or immediate issue of aviation safety involved,” and despite FAA’s failure to revoke airman’s ATP certificate, no abuse of discretion in exercising emergency authority</td>
</tr>
<tr>
<td>J. Michael Brown, SE-15976 (6/12/00)</td>
<td>Senior parachute rigger’s certificate revoked for performing major alterations for which a master parachute rigger certificate was performed</td>
<td>Petition denied; certificate holder failed to provide any reasons why Administrator acted improperly in exercising her emergency authority</td>
</tr>
<tr>
<td>Vadim Naroditsky, SE-15974 (6/12/00)</td>
<td>Private pilot certificate revoked on ground that he landed off the end of the runway, causing collapse of nose gear, and failed to submit to FAA reexamination of competency</td>
<td>Petition denied; airman gave no reasons why Administrator acted improperly in exercising her emergency authority; although airman challenged Administrator’s factual allegations, factual disputes are relegated to ultimate hearing on the merits. Refusal to submit to reexamination gives rise to conclusion that Administrator acted properly.</td>
</tr>
<tr>
<td>Royston Wright, SE-15987 (6/28/00)</td>
<td>FE, mechanic and student pilot certificates revoked on ground that airman falsified fuel load for two DC-8 flights</td>
<td>Petition denied, despite delay of six months (demonstrating, according to airman, “absence of an emergency”); “The term 'emergency' is used to describe situations of a serious nature, without regard to time sensitivity”; alleged falsifications were sufficiently serious to warrant exercise of emergency authority</td>
</tr>
<tr>
<td>Peter Karl Esser, SE-15992 (6/29/00)</td>
<td>ATP revoked for failure to hold a valid medical certificate during January 1999, failure to obtain a complete weather briefing, and false logbook entries</td>
<td>Petition denied, despite lapse of 1.5 years since ramp check giving rise to revocation; “public interest in air safety” justifies exercise of emergency authority, and lapse of time irrelevant in view of seriousness of allegations</td>
</tr>
<tr>
<td>Name/Docket No./Date</td>
<td>Certificate Action</td>
<td>Decision</td>
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<tr>
<td>Carol Kohtz, SE-16006 (7/25/00)</td>
<td>Commercial pilot and CFI certificates revoked for allegedly false logbook entry indicating that she gave instruction to a student at night</td>
<td>Petition denied; no abuse of discretion given serious breach of trust alleged</td>
</tr>
<tr>
<td>William M. Huey, SE-16023 (8/10/00)</td>
<td>A&amp;P mechanic certificate revoked for alleged knowing failure to inspect B757 and falsification of application for airworthiness</td>
<td>Petition denied; factual assertions by certificate holder raising questions about whether his inspection methods had been approved by FAA officials prior to the conduct in question cannot be considered for purposes of emergency determination; despite prior unblemished record and lapse of seven months from incident, “emergency” is “used to denote situations of a serious nature, without regard to time sensitivity”</td>
</tr>
<tr>
<td>James Franklin Howell, Jr., NA-34 (8/15/00)</td>
<td>[Not given]</td>
<td>Petition rejected as procedurally defective; failed to include copy of order of which review was sought</td>
</tr>
<tr>
<td>Mark C. Spatz, SE-16028 (8/21/00)</td>
<td>ATP certificate revoked for alleged intentional omissions from aircraft log and flight manifest of three flight legs</td>
<td>Petition denied; arguments rejected include: omissions were unintentional and not required of an airman under Part 135; lapse of six months since ramp check</td>
</tr>
<tr>
<td>Arizona Aviation Avionics, LLC, SE-16030 (8/25/00)</td>
<td>Repair station’s certificate revoked; employees signed name of another certificate mechanic to logbook; owners did not object, then made false statements to FAA inspectors regarding the entries</td>
<td>Petition denied; argument rejected that “[t]he Administrator’s failure to proceed in revoking [its] certificate in an expedited manner . . . discredits the assertion of a lack of qualification and the need for emergency revocation” (“At first blush, such an argument might appear to be compelling, as the term “emergency” is commonly used to refer to situations requiring immediate attention.”); facts of revocation orders were legally cognizable, and repair station was not prejudiced by amendment of revocation order during pendency of emergency review</td>
</tr>
<tr>
<td>Marc Berko, SE-16032 (8/28/00)</td>
<td>Dispatcher certificate suspended on ground that inspection of records of Embry Riddle Aeronautical University (“ERAU”) failed to document that he had completed (in 1998) enough classroom hours to qualify for certificate; failed to supply additional documentation showing qualification</td>
<td>Petition dismissed, given failure to enumerate specific reasons for challenge to revocation order and in light of presumed truth of allegations of Administrator’s order</td>
</tr>
<tr>
<td>Name/Docket No./Date</td>
<td>Certificate Action</td>
<td>Decision</td>
</tr>
<tr>
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</tr>
<tr>
<td>William Colin Bobbett, SE-16091 (8/28/00)</td>
<td>Same</td>
<td>Petition denied in light of presumed truth of allegations of revocation order; petitioner’s attempt to document prior experience was rejected; certificate holder’s subsequent experience is not relevant to issue of whether he was qualified at the time certificate was issued</td>
</tr>
<tr>
<td>Penny L. Baird, SE-16033 (8/29/00)</td>
<td>Same</td>
<td>Petition denied despite lapse of time (ten months since investigation) and cooperation with FAA; certificate holder’s subsequent experience is not relevant to issue of whether she was qualified at the time certificate was issued; FAA failure to respond for over five months to certificate holder’s written inquiry regarding alleged deficiencies in her training deemed insufficient ground to find that Administrator acted arbitrarily</td>
</tr>
<tr>
<td>Janet M. Koberg, SE-16061 (9/1/00)</td>
<td>Same</td>
<td>Petition denied despite lapse of time and certificate holder’s subsequent unblemished record</td>
</tr>
<tr>
<td>Alfred Jaramillo, SE-16066 (9/7/00)</td>
<td>Control tower operator certificate revoked on ground that he had falsified application for medical certificate by denying using illegal substances after being convicted of felony possession of marijuana</td>
<td>Petition denied; although FAA investigated certificate holder in early 1999 and allowed him to continue to work operational positions despite knowledge of prior drug use, “emergency” exists due to serious nature of three separate false entries</td>
</tr>
<tr>
<td>Ian Christopher O’Malley, SE-16065 (9/7/00)</td>
<td>Commercial pilot certificate revoked on ground that airman falsified hours flown on ATP application and relied on false logbook entries to support PIC hours flown</td>
<td>Petition denied; lengthy delay (almost ten months) insufficient to rebut “emergency” nature of situation</td>
</tr>
<tr>
<td>Joseph Michael Wilen, NA-35 (9/8/00)</td>
<td>Learjet type rating suspended pending reexamination (facts not given)</td>
<td>Petition rejected as untimely and for failure to enumerate the specific grounds on which the emergency determination was challenged</td>
</tr>
<tr>
<td>Marilyn Hutchins, SE-16073 (9/14/00)</td>
<td>Commercial pilot certificate suspended pending reexamination following accident in RV-4</td>
<td>Petition denied; facts that airman no longer owns an airplane and does not plan to fly do not mitigate “emergency” finding; Administrator’s request for reexamination must be presumed reasonable for purposes of emergency review</td>
</tr>
<tr>
<td>Name/Docket No./Date</td>
<td>Certificate Action</td>
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</tr>
<tr>
<td>Pro Air, Inc., SE-16085 (9/27/00)</td>
<td>Air carrier certificate revoked based on alleged &quot;myriad&quot; of regulatory violations from organizational, safety-program monitoring and manual deficiencies</td>
<td>Petition denied; genuine safety concerns were raised, and &quot;selective prosecution&quot; allegation rejected; &quot;emergency&quot; exists despite passage of at least two months since alleged violations</td>
</tr>
<tr>
<td>Robert M. Ketcher-sid, Jr., SE-16095 (10/4/00)</td>
<td>Mechanic and private pilot certificates revoked for alleged falsification of applications for mechanic certificate and false logbook inspection entries</td>
<td>Petition rejected for failure to enumerate specific grounds on which emergency determination was challenged</td>
</tr>
<tr>
<td>Dale Alan Auer, SE-16096 (10/5/00)</td>
<td>Private pilot certificate suspended pending reexamination following altitude deviation</td>
<td>Petition denied; fact that a demonstrated autopilot malfunction resulted in the altitude deviation not relevant to show abuse of discretion by Administrator; Administrator's allegation that airman has refused to submit to reexamination of competency must be accepted as true and is presumed reasonable</td>
</tr>
<tr>
<td>Edward Wirth Broff, SE-16101 (10/16/00)</td>
<td>Private pilot certificate revoked for ten alleged FAR violations, including operation of unairworthy aircraft after being denied a ferry permit</td>
<td>Petition dismissed for failure to attach a copy of the order sought to be reviewed</td>
</tr>
<tr>
<td>Aviation Electronics, Inc., SE-16118 (11/2/00)</td>
<td>Air agency certificate revoked after chief inspector's alleged failure to supervise avionics repairs for which he had signed off and knowing falsification of a Form 337</td>
<td>Petition denied; passage of nine months no bar to &quot;emergency&quot; finding; inspector's misconduct imputed to employer</td>
</tr>
<tr>
<td>Gary Alan Bielstein, SE-16138 (11/24/00)</td>
<td>Airman's certificates revoked for alleged knowingly false maintenance logbook entries</td>
<td>Petition denied; FAA did not abuse discretion in emergency revocation based on three separate false logbook entries; disputed issues of scienter and credibility would be resolved at evidentiary hearing, not at preliminary stage</td>
</tr>
<tr>
<td>Clint R. Marley, SE-16140 (11/29/00)</td>
<td>Mechanic's inspection authorization revoked following approval for return to service of unairworthy aircraft and alleged failure to perform a required engine run and use a checklist in completing an annual inspection</td>
<td>Petition denied; lapse of five weeks no bar to &quot;emergency&quot; determination; no abuse of discretion given obvious and serious nature of discrepancies overlooked by inspector</td>
</tr>
<tr>
<td>Name/Docket No./Date</td>
<td>Certificate Action</td>
<td>Decision</td>
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<tr>
<td>Aijun Giare, SE-16144 (12/1/00)</td>
<td>Private pilot certificate revoked following alleged use of an &quot;crib sheet&quot; during a knowledge exam</td>
<td>Petition denied; lapse of three months no bar to &quot;emergency&quot; finding; factual defenses raised by respondent cannot be resolved on an emergency appeal</td>
</tr>
<tr>
<td>Flightcraft, SE-16145/16147 (12/1/00)</td>
<td>Airworthiness certificates for two King Airs suspended based on alleged discrepancies found on inspection</td>
<td>Petitions dismissed as untimely filed</td>
</tr>
<tr>
<td>Hartford Holding Corp., SE-16149 (12/4/00)</td>
<td>Airworthiness certificate suspended because of an alleged series of discrepancies discovered on inspection</td>
<td>Petition dismissed for failure to timely serve FAA with a copy</td>
</tr>
<tr>
<td>James Watkins, SE-16158 (12/11/00)</td>
<td>ATP and CFI certificates of respondent, chief pilot of Sunjet, revoked for nine alleged false training certifications</td>
<td>Petition denied; factual disputes raised by respondent cannot be resolved at this stage; given serious nature of charges, no abuse of discretion by FAA</td>
</tr>
<tr>
<td>Floyd Mauch, SE-16160 (12/13/00)</td>
<td>Private pilot certificate revoked for operating aircraft while certificate had been suspended and landing aircraft on closed runway</td>
<td>Petition denied; no abuse of discretion given &quot;patent&quot; display of lack of regard for authority</td>
</tr>
<tr>
<td>Robert F. Ellison, SE-16175 (1/3/01)</td>
<td>Commercial pilot and medical certificates revoked for multiple unreported alcohol-related motor vehicle convictions</td>
<td>Petition denied; factual disputes regarding &quot;intentional&quot; nature of respondent's conduct cannot be resolved on appeal</td>
</tr>
<tr>
<td>Richard Allen Basiliere, SE-16190 (2/1/01)</td>
<td>ATP, instructor and medical certificates revoked for alleged falsification of medical application which failed to disclose psychiatric visits and anti-depression medication</td>
<td>Petition denied; factual disputes regarding whether airman was &quot;currently&quot; taking medication must be resolved at hearing on the merits</td>
</tr>
<tr>
<td>Richard Hunt Scarvie, SE-16182 (1/18/01)</td>
<td>Mechanic certificate revoked for alleged knowingly backdated logbook entries</td>
<td>Petition denied; the possibility that the logbook entries in question did not relate to a required inspection might render the falsification immaterial, but that was an issue for resolution at a hearing on the merits and falsification of any entry casts doubt on reliability of respondent</td>
</tr>
<tr>
<td>Name/Docket No./Date</td>
<td>Certificate Action</td>
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<tr>
<td>Caro Maitland, SE-16139 (11/28/00)</td>
<td>Flight instructor certificate suspended pending competency reexamination under 49 U.S.C. § 44709 based on 67% student failure rate; certificate holder denied the request for reexamination</td>
<td>Petition denied; FAA’s failure to act for three months while gathering data no bar to “emergency” determination; refusal to submit to reexamination is itself non-compliance</td>
</tr>
<tr>
<td>Estan L. Fuller, SE-16095 (2/8/01)</td>
<td>ATP certificate revoked for allegedly known false entries on certificates of training of Sunjet employees</td>
<td>Petition dismissed for failure to set forth specific grounds for challenge</td>
</tr>
<tr>
<td>William F. Schwab, SE-16212 (2/9/01)</td>
<td>ATP certificate revoked for allegedly known false entries on certificates of training of Sunjet employees</td>
<td>Petition denied; no abuse of discretion given seriousness of allegations, which cannot be tried on the merits at this stage</td>
</tr>
<tr>
<td>Robert H. Bredemeyer, SE-16195 (2/5/01)</td>
<td>Mechanic, inspection authorization and airman certificate revoked for logbook and Form 337 entries returning unairworthy aircraft to service</td>
<td>Petition denied; delay of four months insufficient to rebut “emergency” allegation; factual disputes are to be resolved at the hearing on the permits and not at the preliminary stage; respondent’s unblemished record likewise no bar to emergency revocation</td>
</tr>
<tr>
<td>Andrew John Howard, SE-16203 (2/8/01)</td>
<td>ATP and medical certificates revoked for multiple unreported alcohol-related motor vehicle convictions and conviction of marijuana possession</td>
<td>Petition denied (basis of respondent’s challenge not set forth in decision)</td>
</tr>
<tr>
<td>Timothy James Gehres, SE-16210 (2/14/01)</td>
<td>ATP certificate revoked for allegedly known false entries on certificates of training of Sunjet employees</td>
<td>Petition denied; delay of two months does not belie “emergency” finding; factual controversy cannot be resolved</td>
</tr>
<tr>
<td>Andrew R. Jones, SE-16214 (2/14/01)</td>
<td>ATP certificate revoked for allegedly known false entries on certificates of training of Sunjet employees</td>
<td>Petition denied; given nature of charges, emergency revocation is appropriate even if there is no direct challenge to respondent’s technical qualification as an airman; adverse effect on respondent’s livelihood no bar</td>
</tr>
<tr>
<td>Edward Knapp, SE-16211 (2/14/01)</td>
<td>ATP certificate revoked for allegedly known false entries on certificates of training of Sunjet employees</td>
<td>Petition denied; lapse of two months no bar to “emergency” finding; possibility that FAA revoked respondent’s certificate in retaliation for favorable testimony on behalf of a co-worker at Sunjet cannot be resolved until hearing on merits</td>
</tr>
<tr>
<td>Name/Docket No./Date</td>
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</tr>
<tr>
<td>Erik von Kaenel, SE-16220 (2/15/01)</td>
<td>Student pilot and medical certificates revoked for multiple unreported alcohol-related motor vehicle convictions</td>
<td>Petition dismissed for failure to set forth the basis of the appeal</td>
</tr>
<tr>
<td>Timothy W. Blake, SE-16247 (3/12/01)</td>
<td>First class medical certificate revoked</td>
<td>Petition dismissed as untimely</td>
</tr>
<tr>
<td>Robert Clair Burns, SE-16248 (3/14/01)</td>
<td>Private pilot, flight engineer and mechanic certificates revoked for using “crib sheet” during commercial pilot knowledge test</td>
<td>Petition denied; lapse of five months due “to the strained resources of the agency” does not negate “emergency” finding; seriousness of claims insufficient to find abuse of discretion</td>
</tr>
<tr>
<td>Henry Gurshman, SE-16251 (3/16/01)</td>
<td>Mechanic certificates revoked for improper alteration of helicopter tailboom, intentionally false logbook entries and approval of return to service of unairworthy aircraft</td>
<td>Petition denied; violation-free record does not militate against appropriate sanction for serious charges; delay of five months insufficient to rebut “emergency”</td>
</tr>
<tr>
<td>Philip Frank, SE-16272 (4/2/01)</td>
<td>Delta Air Lines mechanic’s mechanic certificate revoked for alleged adulteration of urine sample provided for random drug test</td>
<td>Petition denied; sole basis alleged for appeal, factual dispute, cannot be resolved on appeal</td>
</tr>
<tr>
<td>Ali Nickooii, SE-16288 (4/17/01)</td>
<td>Commercial pilot certificate revoked for alleged use of “crib sheet” during commercial pilot knowledge test</td>
<td>Petition dismissed as untimely filed</td>
</tr>
<tr>
<td>Christopher D. Showah, SE-16289 (4/19/01)</td>
<td>Mechanic certificate revoked for alleged series of knowingly false Forms 337</td>
<td>Petition dismissed for failure to set forth specific reasons for appeal; factual dispute cannot be resolved on appeal</td>
</tr>
<tr>
<td>Gary N Carlos, SE-16291 (4/20/01)</td>
<td>Commercial pilot certificate revoked for alleged operation by non-instrument-rated pilot in IMC</td>
<td>Petition dismissed for failure to set forth specific reasons for appeal</td>
</tr>
<tr>
<td>Thomas Carlisle Gilekson, SE-16293 (4/23/01)</td>
<td>ATP certificate revoked for eleven alleged knowingly false entries by chief pilot in Western Air Express training forms</td>
<td>Petition denied; no abuse of discretion given seriousness of offense, and hardship to employer insufficient to overcome presumed validity of revocation in light of respondent’s responsibilities</td>
</tr>
<tr>
<td>Name/Docket No./Date</td>
<td>Certificate Action</td>
<td>Decision</td>
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</tr>
<tr>
<td>Kent Dean Bryan, SE-16297</td>
<td>ATP certificate revoked for six alleged knowingly false entries by director of operations in Western Air Express training forms</td>
<td>Petition denied for same reasons set forth in <em>Cilekson, supra</em></td>
</tr>
<tr>
<td>David Wesley Webb, SE-16292</td>
<td>ATP certificate revoked for eleven alleged knowingly false entries by chief pilot in Western Air Express training forms</td>
<td>Petition denied for same reasons set forth in <em>Cilekson, supra</em></td>
</tr>
<tr>
<td>Barry M. Cornish, SE-16298</td>
<td>Kitty Hawk Air Cargo mechanic's certificate revoked for alleged adulteration of urine sample provided for random drug test</td>
<td>Petition denied; lapse of 14 months between discovery of alleged violation attributable to a detailed investigation; no abuse of discretion</td>
</tr>
<tr>
<td>Frank G. Phillips, SE-16308</td>
<td>Mechanic certificate revoked for alleged failure to provide urine sample for random drug test</td>
<td>Petition dismissed for failure to set forth specific reasons for appeal</td>
</tr>
<tr>
<td>Kevin Vinson, SE-16314</td>
<td>Revocation of private pilot certificate</td>
<td>Petition dismissed for failure to set forth specific reasons for appeal</td>
</tr>
<tr>
<td>Kevin Wayne King, SE-16315</td>
<td>Revocation of pilot certificate (unspecified grounds)</td>
<td>Petition dismissed for failure to set forth specific reasons for appeal</td>
</tr>
<tr>
<td>Gerald Thompson Blose, SE-16301</td>
<td>Commercial pilot certificate revoked for multiple careless operations of a balloon at night without position lights and at low altitude</td>
<td>Petition denied; local police animus toward respondent irrelevant</td>
</tr>
<tr>
<td>Oscar Eugene Kent, III, SE-16320</td>
<td>Commercial pilot certificate revoked (unspecified reasons)</td>
<td>Petition dismissed as untimely (discussion of doctrine of constructive receipt of revocation order)</td>
</tr>
<tr>
<td>Brian Joseph Akin, SE-16323</td>
<td>Commercial pilot certificate revoked (unspecified reasons)</td>
<td>Petition dismissed as untimely</td>
</tr>
<tr>
<td>Michael C. Putnam, D.D.S., SE-16359/40</td>
<td>Airworthiness certificates suspended pending compliance with ADs, annual inspection and accurate maintenance records</td>
<td>Petitions dismissed as untimely; although moot, petitions also failed to set forth specific grounds for appeal</td>
</tr>
<tr>
<td>Name/Docket No./Date</td>
<td>Certificate Action</td>
<td>Decision</td>
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<tr>
<td>Jerry M. Pressley, SE-16354 (6/18/01)</td>
<td>Commercial pilot certificate revoked for flying unairworthy aircraft on multiple occasions, for performing maintenance and inspections during revocation of mechanic certificate, and installing unapproved parts</td>
<td>Petition denied; two year delay in initiating action against respondent not overcome by seriousness of offenses alleged</td>
</tr>
<tr>
<td>Patrick W. Webster, SE-16359 (6/27/01)</td>
<td>Student pilot and medical certificates revoked for multiple unreported alcohol-related motor vehicle convictions</td>
<td>Petition denied; unsupported defense that no emergency exists insufficient to overcome presumption of truth of Administrator’s factual findings</td>
</tr>
<tr>
<td>Eric M. Platt, SE-16365 (7/6/01)</td>
<td>Private pilot and medical certificates revoked for multiple unreported alcohol-related motor vehicle convictions</td>
<td>Petition denied; factual disputes must be resolved at the hearing on the merits</td>
</tr>
<tr>
<td>John E. Medeau, SE-16375 (7/30/01)</td>
<td>TWA mechanic’s certificate revoked for alleged adulteration of urine sample provided for random drug test</td>
<td>Petition denied; fact that respondent is no longer employed as a mechanic insufficient to rebut &quot;emergency&quot;</td>
</tr>
<tr>
<td>Richard J. Belon, SE-16385 (8/21/01)</td>
<td>Private pilot and medical certificates revoked for multiple unreported alcohol-related motor vehicle convictions</td>
<td>Petition dismissed for failure to set forth specific reasons for appeal</td>
</tr>
<tr>
<td>Robert G. Johnson, SE-16392 (8/30/01)</td>
<td>Commercial pilot certificate revoked for multiple flights conducted for compensation without a Part 135 certificate</td>
<td>Petition dismissed as untimely filed</td>
</tr>
<tr>
<td>Thomas W. Bishop, SE-16400 (9/14/01)</td>
<td>ATP and flight instructor certificates revoked for careless and reckless operation over gross weight and flying aircraft with unapproved bench seats</td>
<td>Petition granted; delay of 83 days belies existence of emergency</td>
</tr>
</tbody>
</table>
APPENDIX “B”

NTSB Regulations for Petitions for Review under
49 U.S.C. § 44709(e)(3)

[Federal Register: July 11, 2000 (Volume 65, Number 133)]
[Rules and Regulations] [Page 42637-42641]

From the Federal NATIONAL TRANSPORTATION SAFETY
BOARD49 CFR Part 821

Rules of Practice Governing Board Review of Federal Aviation
Administration Emergency Determinations in Air Safety En-
forcement Proceedings

AGENCY: National Transportation Safety Board.

ACTION: Interim rule with request for comments.

SUMMARY: The Administrator of the Federal Aviation Adminis-
tration (FAA) has the statutory authority to issue orders amend-
ing, modifying, suspending, or revoking certain FAA-issued
certificates, in the interest of safety in air commerce or air trans-
portation. Such actions are appealable to the Board, and the
filing of an appeal by the affected certificate holder stays the
effectiveness of the Administrator's order, unless the Adminis-
trator determines that an emergency, requiring the order to be
effective immediately, exists. Section 716 of the Aviation Invest-
ment and Reform Act for the 21st Century confers on the Board
the authority to review such emergency determinations, which
were not previously subject to administrative review, and these
interim rules provide procedures for that review. Comments are
invited and will be considered in the formulation of final rules.

DATES: These interim rules are effective on July 11, 2000. Com-
ments are invited by July 26, 2000. Reply comments may be filed

ADDRESSES: An original and two copies of any comments must
be submitted to: Office of General Counsel, National Transpor-
tation Safety Board, Room 6401, 490 L'Enfant Plaza East, S.W.,
Washington, D.C. 20594, Attention: Emergency Procedure
Rules.

FOR FURTHER INFORMATION CONTACT: Ronald S. Bat-
tocchi, General Counsel, (202) 314-6080.
SUPPLEMENTARY INFORMATION:

Background

The National Transportation Safety Board (NTSB) currently has rules, at 49 CFR part 821, that govern practice and procedure in certain air safety proceedings, including proceedings in which the FAA Administrator seeks to amend, modify, suspend or revoke various FAA-issued certificates or privileges. Under 49 U.S.C. 44709(d), such certificate actions are reviewable on appeal to the Board by the affected certificate holder. 49 U.S.C. 44709(e) provides that the filing of such an appeal stays the effectiveness of the Administrator's order, pending disposition of the appeal by the Board, unless the Administrator determines that an emergency exists and that safety in air commerce or air transportation requires the order to be effective immediately. Prior to the enactment of the Aviation Investment and Reform Act for the 21st Century (Pub. L. 106-181, signed into law April 5, 2000), the Administrator's emergency determinations were not subject to administrative review. Section 716 of Public Law 106-181 expands the Board's jurisdiction, by amending 49 U.S.C. 44709(e) to provide that a person affected by the immediate effectiveness of an order, based on the Administrator's finding of the existence of an emergency, may, not later than 48 hours after receiving the order, petition the Board to review that emergency determination, under procedures promulgated by the Board. 49 U.S.C. 44709(e), as amended, further provides that the Board shall dispose of the certificate holder's request for review of the Administrator's emergency determination no later than five days after the request is filed, and that, if the Board finds that an emergency does not exist, the immediate applicability of the Administrator's order shall be stayed. In light of the immediate effectiveness of Public Law 106-181, the Board is issuing interim rules to establish procedures for its review of the Administrator's emergency determinations, without notice and comment. Public Law 106-181 also amends the time period for the Board to make final dispositions of appeals in all emergency cases. Under 49 U.S.C. 44709(e) prior to amendment, the Board had 60 days from the time the Administrator advised it of the existence of an emergency (by filing a complaint in response to the certificate holder's appeal) to make its final disposition of the appeal, whereas 49 U.S.C. 44709(e), as amended, requires a final disposition not later than 60 days after the date
on which the appeal is filed. The interim rules include amendments to part 821 that were necessitated by this change.

Interim Rules

The Board believes that its current rules require certain immediate changes to accommodate these amendments to 49 U.S.C. 44709(e). These interim rules should permit the processing of any petitions for review of the Administrator's exercise of emergency authority that are instituted by affected certificate holders pursuant to the statutory amendments, while the Board has final rules under consideration. Under the interim rules, the authority to review emergency determinations of the Administrator has been delegated to the Board's administrative law judges. The interim rules permit the Administrator to file a written reply to the certificate holder's petition for review of the emergency determination, and require the law judge to issue a written order granting or denying the petition, based upon such written submissions by the parties. In view of the short five-day period which Public Law 106-181 mandates for the disposition of this issue, the interim rules provide that the law judge's decision on the issue is final, and not appealable to the Board. The placement of such review authority in the law judges is a matter subject to revisitation in the future, and the Board is particularly interested in comments on this. The Board is also interested in comments on the practicality and/or advisability of putting in place an appeal process that would permit a review of the law judge's ruling on the emergency issue by the Board, which would, of necessity, occur during the running of the 30-day period in which the case must proceed to hearing. Aside from minor changes to 49 CFR 821.10, the general provision relating to computations of time in air safety proceedings before the Board, all of the revisions to part 821 necessitated by the amendments to 49 U.S.C. 44709(e) created by Public Law 106-181 appear in subpart I, which sets forth special rules applicable to appeals of emergency and other immediately effective orders issued by the Administrator. The addition and logical placement of rules specifically relating to the disposition of petitions for review of the Administrator's emergency determinations have necessitated a restructuring of subpart I. Section 821.54, which contained general provisions relating to emergency cases, has been redesignated as Sec. 821.52, with minor changes. Paragraphs (a) and (b) of Sec. 821.55 have been removed from
that section and recodified, with revisions, at Sec. 821.53. Paragraph (b) of Sec. 821.53 amends former paragraph (b) of Sec. 821.55, by requiring appeals of emergency or other immediately effective orders to include a copy of the appealed order. Previously, it was sufficient for the certificate holder to indicate in the appeal that an emergency or other immediately effective order was the subject of the appeal. Former paragraphs (c) through (f) of Sec. 821.55 have been redesignated as paragraphs (a) through (d) of that section. A new Sec. 821.54 sets forth the rules and procedures governing the Board’s review of the Administrator’s emergency determinations. Paragraph (a) of that section provides that a certificate holder has 2 days from the date on which he or she receives the Administrator’s emergency or other immediately effective order to file with the Board a petition for review of the emergency determination. The Board believes the interim rule’s 2 day time limit is a reasonable application of the new legislation’s requirement that review of the Administrator’s emergency determination “shall be requested not later than 48 hours after the order is received” by the affected certificate holder, and that the rule’s use of a 2 day time frame, rather than one of 48 hours, avoids the possibility of having cases turn on inquiries as to the precise hour and minute the order was received and/or the petition was filed. Paragraph (a) further provides that, as the time limit for filing a petition for review of the emergency determination has been created by statute, the Board has no authority to extend it (whereas time limits created by the Board’s rules may, for good cause shown, be extended pursuant to Sec. 821.11). Similar language appears in the Board’s rule relating to the filing of an application for fees and expenses under the Equal Access to Justice Act (see 49 CFR 826.24(a)). Finally, paragraph (a) provides that, in those cases where a certificate holder files a petition for review of an emergency determination, but has not previously submitted an appeal from the emergency or other immediately effective order, the petition will also be regarded as a simultaneously-filed appeal from the order. In the remainder of Sec. 821.54, paragraph (b) provides rules as to the form, content, and service of the certificate holder’s petition, and requires that the petition include a copy of the Administrator’s order. Paragraph (c) provides for the submission of a reply to the petition by the Administrator. Rules governing the law judge’s disposition of the petition are set forth in paragraphs (d) and (e), and the effects of the law judge’s ruling are enumerated in paragraph (f).
Under paragraph (e), the petition is to be disposed of by written order, and the standard to be applied is whether, based on the acts and omissions of the certificate holder as alleged in the complaint, the Administrator abused his or her discretion in determining that an emergency exists, requiring the order to be effective immediately. Since issues of fact are properly resolved at an evidentiary hearing, challenges to the truthfulness of the factual allegations appearing in the Administrator's order are not appropriate for this preliminary inquiry; thus, paragraph (e) provides that, for purposes of deciding this emergency issue, the law judge is to assume the truth of the factual allegations stated in the order. The abuse of discretion standard set forth in paragraph (e) is adopted from the United States Court of Appeals for the Ninth Circuit, which used that criteria when presented with a challenge to the Administrator's exercise of emergency authority in Nevada Airlines v. Bond, 622 F.2d 1017 (1980). In paragraph (f), it is provided that, if the petition is granted, the effectiveness of the Administrator's order will be stayed until the Board makes a final disposition of the certificate holder's appeal. Since, in that instance, the certificate holder will not be deprived of the use of the certificate(s) affected by the order while the appeal is pending, the certificate holder will not be permitted to waive the applicability of the expedited appeals process of subpart I, unless the Administrator consents to such a waiver. Paragraph (a) of Sec. 821.55 (formerly paragraph (c) of that section), which provides rules for the filing and service of the Administrator's complaint, has been revised to include rules as to when the complaint is to be filed in those cases where there has been a challenge to the Administrator's emergency determination. In addition, paragraph (a) now requires that the complaint be filed with the Board by overnight delivery or facsimile, with service on the respondent by the same means. Minor changes have been made to paragraph (b) (formerly paragraph (d)) of Sec. 821.55, and no substantive changes were made to paragraphs (c) and (d) (formerly paragraphs (e) and (f)) of that section. Paragraph (a) of Sec. 821.56, which sets forth rules and procedures regarding the issuance of notices of hearing in emergency cases, has been amended to take into account the new legislation's shortening of the time frame for the Board to make a final disposition of an appeal in an emergency case to 60 days after the date on which the certificate holder's appeal is filed (as opposed to 60 days from the date on which the Board is advised by the Administrator of the existence of an
emergency, which was accomplished when the Administrator filed a complaint in response to the appeal). Paragraph (a) has also been amended to provide rules for the issuance of notices of hearing in those cases where the certificate holder has challenged the Administrator's determination as to the existence of an emergency, upon the disposition of that preliminary issue. There are no substantive changes to the remaining provisions of Sec. 821.56. Section 821.57 has not been amended.

Related Matters

Since our part 821 rules were last amended, the statutes referred to in that

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part—i.e., the Independent Safety Board Act of 1974; the Federal Aviation Act of 1958, as amended; and the FAA Civil Penalties Assessment Act of 1992—have been recodified, without substantive change, at 49 U.S.C. Chapters 11 (Sections 1101 et seq.), 447 (Sections 44701 et seq.), and 463 (Sections 46301 et seq.), respectively. Thus, the Board will, solely for "housekeeping" purposes, amend part 821, where necessary, to reflect the current statutory designations. In addition, Section 821.38(b), as currently written, contains a reference to "Sec. 556(d) of the Administrative Procedure Act," while Sec. 821.41 refers to another section of Administrative Procedure Act by its United States Code citation. For purposes of consistency, and to follow the preferred convention of using United States Code citations to reference statutory authority in agency rules, the statutory reference in Sec. 821.38(b) will be amended to reflect the appropriate United States Code citation. The rules, as currently written, also contain references to parties involved in these proceedings, and actions taken by them, with the designations "he," "him," and "his." The Board believes that such terms should be changed to the more proper "he or she," "him or her," and "his or hers," and these changes will be made in the housekeeping amendments, as well. Because such housekeeping amendments do not substantively change the Board's part 821 rules, comments on these matters are not solicited.

List of Subjects in 49 CFR Part 821

Administrative practice and procedure, Airmen, Aviation safety.

For the reasons set forth in the preamble, part 821 of title 49 of the Code of Federal Regulations is amended as follows:
PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

1. The authority citation for part 821 is revised to read as follows: Authority: 49 U.S.C. 1101-1155, 44701-44723, 46301; unless otherwise noted.

2. In part 821, revise all references to "he," "him," and "his," to read "he or she," "him or her," and "his or her," respectively.

3. In part 821, revise all references to "section 602(b) of the Act" to read "49 U.S.C. 44703(c)," and revise all references to "section 609 of the Act" to read "49 U.S.C. 44709."

Sec. 821.1 [Amended]

4. In Sec. 821.1, remove the paragraph defining the term "Act;" amend the paragraph defining the term "Certificate" by removing the words "Title VI of the Act" and inserting in their place the words "49 U.S.C. Chapter 447;" and amend the last sentence of Sec. 821.1 by removing the words "the Act" and inserting in their place the words "49 U.S.C. Chapters 11, 447, and 463."

Sec. 821.3 [Amended]

5. In Sec. 821.3, remove the words "a new."

Sec. 821.8 [Amended]

6. Amend paragraph (c) of Sec. 821.8 by removing the words "section 1005(b) of the Act" and inserting in their place the words "49 U.S.C. 46103(a)."

7. Revise Sec. 821.10 to read as follows:

Sec. 821.10 Computation of time.

In computing any period of time prescribed or allowed by this part, by notice or order of the Board or a law judge, or by any applicable statute, the date of the act, event, or default after which the designated period of time begins to run is not to be included in the computation. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or legal holiday for the Board, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor legal holiday. In all cases, Saturdays, Sundays, and legal holidays for the Board shall be included in the computation of time, except they shall not be included in computations of time respecting petitions for review of determinations as to the existence of emergencies under Sec. 821.54 in subpart I of this part.

Sec. 821.19 [Amended]
8. Amend paragraph (a) of Sec. 821.19 by removing the words "section 1004 of the Act" and inserting in their place the words "49 U.S.C. 46104."

Sec. 821.38 [Amended]

9. Amend paragraph (b) of Sec. 821.38 by removing the words "Sec. 556(d) of the Administrative Procedure Act" and inserting in their place the words "5 U.S.C. 556(d) (Administrative Procedure)."

10. Revise subpart I to read as follows:

Subpart I—Rules Applicable to Emergency Proceedings and Other Immediately Effective Orders

Sec. 821.52 General. 821.53 Appeal. 821.54 Review of Administrator’s determination of emergency. 821.55 Answer to complaint, motions, and discovery. 821.56 Hearing and initial decision. 821.57 Procedure on appeal.

Sec. 821.52 General.

(a) Applicability. This subpart shall apply to any order issued by the Administrator under 49 U.S.C. 44709: as an emergency order; as an order not designated as an emergency order, but later amended to be an emergency order; and any order designated as immediately effective or effective immediately. (b) Effective date of emergency. The procedure set forth herein shall apply as of the date when written advice of the emergency character of the Administrator’s order is first received and docketed by the Office of Administrative Law Judges or the Board. (c) Computation of time. Time shall be computed in accordance with the provisions of Sec. 821.10.

Sec. 821.53 Appeal.

(a) Time within which to appeal. The certificate holder may appeal within 10 days after the service of the Administrator’s emergency or other immediately effective order. The certificate holder shall file an original and 3 copies of the appeal with the Office of Administrative Law Judges, and shall serve a copy of the appeal on the Administrator.

(b) Form and content of appeal. The appeal may be in letter form. It shall identify the Administrator’s order and the certificate affected, shall recite the Administrator’s action and indicate that an emergency or other immediately effective order is being appealed, and shall identify the issues of fact or law on which the appeal is based, and the relief sought. A copy of the order shall be attached to the appeal.
Sec. 821.54 Review of Administrator’s determination of emergency.

(a) Time within which to file petition. The certificate holder may, within 2 days after receipt of the Administrator’s emergency or other immediately effective order, petition the Board for review of the Administrator’s determination that an emergency, requiring the issuance of an immediately effective order, exists. This 2 day deadline is statutory and the Board has no authority to extend it. If the certificate holder has not previously filed an appeal from the emergency or other immediately effective order, the petition shall also be considered a simultaneously filed appeal from the order under Sec. 821.53.

(b) Form, content, and service of petition. The petition may be in letter form. It shall identify the order from which review of the Administrator’s exercise of emergency authority is sought, and a copy of the order shall be attached to the petition. The petition shall enumerate the specific grounds on which the certificate holder challenges the Administrator’s determination that an emergency exists. In the event that the petition fails to set forth the specific grounds for the certificate holder’s challenge to the Administrator’s emergency determination, the petition shall be dismissed. The petition shall be served on both the Board and the Administrator via overnight delivery or facsimile.

(c) Reply to petition. Within 2 days after service of the petition, the Administrator may file a reply to the petition in support of his or her determination as to the existence of an emergency requiring the order to be effective immediately. Such reply shall be served on both the Board and the certificate holder via overnight delivery or facsimile. No written submissions other than the petition and reply shall be filed, except in accordance with paragraph (d) of this section.

(d) Hearing. No hearing shall be held on a petition for review of an emergency determination. However, a law judge may, on his or her own initiative, solicit from the parties additional information to supplement that provided in the petition and reply.

(e) Disposition. Within 5 days after receipt of the petition, the chief judge (or, if the case has been assigned, the law judge to whom the case is assigned) shall dispose of the petition by written order, finding whether the Administrator abused his or her discretion in determining that there exists an emergency requir-
ing the order to be immediately effective, based on the acts and omissions alleged in the Administrator's order, assuming the truth of such factual allegations.

(f) Effect of law judge's ruling. If the law judge grants the petition, the effectiveness of the Administrator's order will be stayed until final disposition of the respondent's appeal by the law judge or the Board. In such cases, the remaining provisions of this subpart (Secs. 821.55-821.57) shall continue to apply, and their applicability may not be waived by the respondent without the consent of the Administrator. If the petition is denied, the Administrator's order shall remain in effect, and the remaining provisions of this subpart shall continue to apply, unless respondent waives their applicability. The law judge's ruling on the petition shall be final, and is not appealable to the Board.

Sec. 821.55 Complaint, answer to complaint, motions, and discovery.

(a) Complaint. Within 3 days after receipt of the appeal, or within 3 days after service of a law judge's order disposing of a petition for review of the Administrator's emergency determination, whichever is later, the Administrator shall file with the Board via overnight delivery or facsimile, an original and 3 copies of the emergency or other immediately effective order as the complaint, and serve a copy on the respondent by the same means. (b) Answer to the complaint. Within 5 days after service of the complaint upon respondent, he or she shall file an answer thereto, and serve a copy of the answer on the Administrator. Failure to deny any allegation or allegations of the complaint may be deemed an admission of the allegation or allegations not answered. (c) Motion to dismiss and motion for more definite statement. No motion to dismiss or for a more definite statement shall be made, but the substance thereof may be stated in the respondent's answer. The law judge may permit or require a more definite statement or other amendment to any pleading at the hearing, upon good cause shown and upon just and reasonable terms. (d) Discovery. Discovery is authorized in emergency or other immediately effective proceedings, and, given the short time available, parties are directed to cooperate to ensure timely completion prior to the hearing. Discovery requests shall be served as soon as possible after initiation of the proceeding. Motions to compel production shall be expeditiously filed, and will be promptly decided. Time limits for compliance with discovery requests shall accommodate and not
conflict with the schedule set forth in this subpart. The provisions at Sec. 821.19 shall apply, modified as necessary to reflect applicable deadlines.

Sec. 821.56 Hearing and initial decision.

(a) Notice of hearing. Within 5 days of the receipt of respondent's appeal, or immediately upon the issuance of a law judge's order disposing of a petition for review of the Administrator's emergency determination (if later), the parties will be notified of the date, time and place of the hearing. The hearing shall be set for a date no later than 30 days after the filing of the appeal. To the extent not inconsistent with this section, the provisions of Sec. 821.37(a) also apply. (b) Initial decision. The initial decision shall be made orally on the record at the termination of the hearing and after opportunity for oral argument. The provisions of Sec. 821.42(b) and (d) shall be applicable (covering content, furnishing a copy of the initial decision excerpted from the record, and issuance date). (c) Conduct of hearing. The provisions of Secs. 821.38, 821.39, and 821.40, covering evidence, argument and submissions, and record, shall be applicable. (d) Effect of law judge's initial decision. If no appeal to the Board by either party, by motion or otherwise, is filed within the time allowed, the law judge's initial decision shall become final but shall not be deemed to be a precedent binding on the Board.

Sec. 821.57 Procedure on appeal.

(a) Time within which to file a notice of appeal and content. Within 2 days after the initial decision has been orally rendered, either party to the proceeding may appeal therefrom by filing with the Board and serving upon the other parties a notice of appeal. The time limitations for the filing of documents are not extended by the unavailability of the hearing transcript. (b) Briefs and oral argument. Unless otherwise authorized by the Board, all briefs in emergency cases shall be served via overnight delivery or facsimile confirmed by first-class mail. Within 5 days after the filing of the notice of appeal, the appellant shall file a brief with the Board and serve a copy on the other parties. Within 7 days after service of the appeal brief, a reply brief may be filed, with copies served (as provided above) on other parties. The briefs shall comply with the requirements of Sec. 821.48 (b) through (g). Appeals may be dismissed by the Board on its own initiative or on motion of a party, notably in cases where a party fails to perfect the notice of appeal by filing a timely brief. When a request for oral argument is granted, the Board will give no-
tice of such argument. (c) Issues on appeal. The provisions of Sec. 821.49 shall apply to issues on appeal. However, the Board may upon its own initiative raise any issue, the resolution of which it deems important to a proper disposition of the proceeding. If necessary or appropriate, the parties shall be afforded a reasonable opportunity to comment. (d) Petitions for reconsideration, rehearing, reargument, or modification of order. The only petitions for reconsideration, rehearing, reargument,

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or modification of an order which the Board will entertain are petitions based on the ground that new matter has been discovered. Such petitions must set forth the following: (1) The new matter;

(2) Affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and (3) A statement that such new matter could not have been discovered by the exercise of due diligence prior to the date the case was submitted to the Board.

Sec. 821.64 [Amended]

11. Amend paragraph (a) of Sec. 821.64 by removing the words "section 1006 of the Act (49 U.S.C. 46110) and section 304(d) of the Independent Safety Board Act of 1974 (49 U.S.C. 1153)" and inserting in their place the words "49 U.S.C. 1153 and 46110."

Dated: July 5, 2000. Jim Hall, Chairman. [FR Doc. 00-17417 Filed 7-10-00; 8:45 am]