

AVIATION

JANUARY

ALERT

2016

GREASING THE WHEELS OF SAFETY: NTSB UPDATES REGULATIONS GOVERNING REPORTS AND PROCEEDINGS

By Lee C. Schmeer and Jonathan M. Stern

New regulations governing National Transportation Safety Board investigative hearings, meetings, reports and petitions for reconsideration are set to go into effect on January 25, 2016. In general, the new regulations streamline the organization of Part 845 by condensing and eliminating some previous sections. By the addition of a new section on proceedings meant to address negative trends or other identified problem areas without the need for an underlying accident or incident, the thrust of these changes seems aimed at increasing both the education and involvement of the public in the NTSB's processes.

Two issues not found in the text of the new Part 845 are worth mentioning. First, the NTSB declined to adopt the current International Civil Aviation Organization ("ICAO") procedure of sharing draft investigative reports with the parties. This was suggested by Boeing and Airlines for America during the comment period. The NTSB responded that a change of this sort was better left to "internal agency procedures." The NTSB also stated in the preamble to the new regulations that dispositions of petitions for reconsideration or modification are not subject to judicial review and cited a recent D.C. Circuit case, *Joshi v. NTSB*, 791 F.3d 8, pet. for cert. filed, 2015 WL 7593160 (Nov. 17, 2015). The Court based its holding on the premise that responses to these petitions are not a reviewable final agency action because they are

merely another stage in the accident investigation procedure.

The major changes to the NTSB Rules governing investigative procedures and products are as follows:

- A section was added allowing for the possibility of holding an investigative hearing other than for determining probable cause of a specific accident when it will tend to prevent accidents and promote transportation safety.
- A new sentence was added allowing the investigative hearing officer to add witnesses up until the time of a Board hearing, provided the officer consults with the chairman of the board of inquiry and NTSB managing director.
- The hearing officer or appropriate office director is now given discretion to determine if a technical panel is needed for a hearing. The previous regulation provided that members of the technical staff shall be designated to participate in the hearing and develop testimony of witnesses.

Proceedings that are in the public interest, including symposiums, forums, and conferences, may be convened. While these proceedings

may have a relationship to a previous or ongoing investigation, they are not intended as a means of obtaining evidence for a specific investigation. Attendance is voluntary for all invited participants.

- The regulations added detail on products generated for accidents or incidents involving common factors or other relationships.
- The time period for establishing a public docket was changed from “as soon as practicable” after an accident to simply “following” the accident or incident. Also, a provision was added allowing the NTSB to open a public docket for a safety study, special investigation, or other product following the issuance of the study or report.
- Finally, the NTSB changed the rules for parties able to participate in the reconsideration process. The new regulations mandate that the Board must now accept petitions for reconsideration or modification even from parties that failed to submit initial proposed findings. This expands the pool of parties that can challenge agency findings to any interested party, even if that interested party gets involved after a final report has been released.

Although the new rules reflect an increased emphasis on promoting public involvement and access to the investigation process, as well as the creation of new products meant to enhance overall transportation safety, there are substantive changes that may impact the interaction between a party to an investigation and the NTSB. Assistance of counsel is critical in harnessing these new regulations to a party’s best interests. ♦

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should

obtain professional legal advice before taking any legal action.

For more information about Schnader’s Aviation Group or to speak with a member of the firm, please contact:

Robert J. Williams
Chair, Aviation Group
412-577-5291
rwilliams@schnader.com

Barry S. Alexander
Vice Chair, Aviation Group
212-973-8099
balexander@schnader.com

Lee C. Schmeer
215-751-2506
lschmeer@schnader.com

Jonathan M. Stern
202-419-4202
jsstern@schnader.com