

examining the validity of decisions committed by law to agency discretion, is more deferential to the Administrator's emergency determination judgments than is warranted under our new authority, given, among other things, the Board's own expertise in assessing matters involving aviation safety. However, we disagree with the view that a "preponderance of the evidence" standard should, or could, be substituted in its place. An emergency determination is not, as we see it, a finding or conclusion that easily lends itself to evidentiary proof. And the right to challenge an emergency determination before the Board should neither be seen as, nor be allowed to become, an opportunity to contest the factual predicate underlying the Administrator's judgment that considerations of aviation safety require an individual or an entity to be deprived of certificate privileges pending adjudication of the charges. The Board's rules provide a contemporaneous, expedited review process designed for that very purpose which must, by statute, be fully completed within 60 days. We are aware of no Congressional desire to supplant that process with the 5-day emergency determination review process mandated under the Board's new authority.

An emergency determination is essentially a judgment call, whose necessity in the interest of aviation safety should be more or less self-evident in light of the nature or seriousness of the accompanying allegations. Air safety depends on, among other things, both the competence and trustworthiness of certificate holders. In fact, certificate holders who choose to disregard or defy regulations or safe operating practices may well pose a greater risk to the lives and property of others than those who inadvertently breach such conventions, or lack the knowledge or ability to avoid breaches, for the former arguably create a higher degree of uncertainty in a system that cannot function safely if the actions of all users cannot be confidently predicted. Thus, in addition to conduct reflecting seriously sub-par operating competence or grossly inferior technical qualifications, behaviors such as refusing a drug test, or operating an aircraft while impaired or during a certificate suspension, reveal the kind of lawlessness or deficient judgment that ordinarily compels the conclusion that the effectiveness of a certificate action should not be delayed pending the adjudication of the resulting charges. The same conclusion may also be

justified in the face of flagrant or repeated intentional falsification and cases involving a drug conviction, while the appropriateness of the exercise of emergency authority in other kinds of actions, such as those in which the Administrator concludes that a commercial operator should not be given any more time to fulfill past assurances that deficiencies in its operations will be promptly corrected, rests on a more individualized assessment of the threat to the public safety represented by the specific putative circumstances identified by the Administrator.

As noted above, the "abuse of discretion" standard set out in the interim rules subjugates the Board's own capacity to judge for itself the need for affecting the immediate forfeiture of certificate rights to the presumed correctness of decisions the Administrator has already made. Because we believe that the exercise of our authority to reverse an emergency determination should not be limited to situations where the Administrator's judgment cannot be said to be rationally supportable, but should, in addition, be applied where we do not agree, for example, that the potential risks to air safety apparent in the Administrator's charges demand the immediate imposition of a sanction before the charges have been fully adjudicated, we will not include the "abuse of discretion" standard in the final rule. Rather, we will entrust to the sound judgment and discretion of the law judge the task, and the somber responsibility, of determining in each specific case whether the Administrator's emergency determination was appropriate under the circumstances. The law judge may so find either because the determination is seen to have fairly or correctly balanced the certificate holder's interest in the uninterrupted enjoyment of certificate privileges in the face of as-yet unproved charges with the need to protect the public from those individuals or entities whose suspected misconduct or lack of qualification establishes or convincingly suggests that they cannot or will not exercise their certificate privileges pending the completion of the Board's appellate review process in accordance with all applicable standards and requirements, or because the allegations disclose such contempt for the rule of law or for considerations of aviation safety that they cannot or should not be trusted to exercise the care, judgment and responsibility expected of a certificate holder while adjudication of their

appeal from the Administrator's order is pending.

Burden of Proof (see §§ 821.54(b)-(e)). Consistent with our view that an emergency determination is more a matter of judgment than evidence, we do not believe that either the Administrator or the certificate holder has a burden of proof, in the traditional sense.¹ At the same time, we do not believe that a certificate holder can reasonably be expected to be able to challenge an emergency determination, or that our law judges can effectively review one, unless the Administrator first provides his or her reasons for believing that an emergency exists. In this connection, some commenters urge us to require the Administrator to attach to the emergency order a copy of the FAA's Enforcement Investigative Report, since it would presumably supply the information needed to evaluate the propriety of the emergency determination. We find it unnecessary to consider the several arguments the Administrator has advanced against the imposition of such a requirement, including the suggestion that we lack the authority to direct the release of any information in advance of an appeal to us. It seems to us that the absence of an "abuse of discretion" standard in the final rule will encourage the Administrator to explain in the order the basis for the emergency determination, in order to avoid having a law judge assess the issue without the benefit of the Administrator's views.² In this latter connection, we note that a frequent contention in emergency challenge petitions is the assertion that, if a genuine emergency existed, the Administrator would have taken less time to issue the order. While this circumstance may occasionally be relevant to the evaluation a law judge must make, it should not be allowed to obscure the proper focus of the inquiry. In other words, an arguably dilatory prosecution does not vitiate an otherwise proper judgment as to the necessity, in the interest of aviation

¹ We are not persuaded by the Administrator's suggestion that a petitioner for relief from an emergency determination is essentially a proponent of a rule who, under the Administrative Procedures Act (APA), bears a burden of proof. See 5 U.S.C. 556. It seems to us that a more consistent reading of that statutory provision would make the Administrator the proponent of a rule, by virtue of his or her issuance of a certificate order. We would point out, moreover, that the APA does not contemplate a process in which a sanction can be imposed before the relevant charges have been established on a hearing record.

² So as to afford the Administrator ample transition time to adapt her orders accordingly, and avoid impeding her expeditious processing of matters already under investigation, the final rule will become effective 60 days from this date.