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

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BY E-MAIL TO: rebecca.macpherson@faa.gov
Original by Certified Mail;
Return Receipt Requested
Receipt No: 7009 1410 0001 8878 6727

Rebecca B. MacPherson,
Assistant Chief Counsel for Regulations (AGC-200)
Office of the Chief Counsel
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

RE: Legal Interpretation of 14 CFR § 121.377 – Maintenance and preventive maintenance personnel duty time limitations, dated May 18, 2010

Dear Ms. MacPherson:

The Aeronautical Repair Station Association (ARSA) is extremely disturbed by the Federal Aviation Administration (FAA) legal interpretation dated May 18, 2010 to Alexandra M. McHugh regarding the provisions of 14 CFR § 121.377. In particular, we contest the FAA's assertion that:

> Today, we would not view as compliant a schedule that provides over the course of eight weeks for four days off followed by 48 straight days of duty followed by four more days off. Such a work schedule that generally provides for an average of one day off over several weeks cannot be said to be "equivalent" to the more specific standard requiring one day off out of every seven days. *(Emphasis added)*

At best, that "interpretation" overlooks the plain language of the rule; otherwise, it impermissibly represents a clear deviation from longstanding FAA construction and application of its regulation.

As a result, ARSA respectfully asks the FAA to retract its May 18, 2010 interpretation.

The basis for our request

First, ARSA looks to the regulation itself, which provides that:

> Within the United States, each certificate holder (or person performing maintenance or preventive maintenance functions for it) shall relieve each person performing maintenance or preventive maintenance from duty for a period of at

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> least 24 consecutive hours during any seven consecutive days, or the equivalent thereof within any one calendar month. *(Emphasis added)*

Despite the clarity of the underlined phrase, the FAA's interpretation relies upon the specious contention that "[t]he tenants [sic] of statutory and regulatory interpretation suggest that the specific standard of one day off every week cannot be rendered completely inoperative by the more general equivalent standard". That argument flies in the face of the most basic tenet of statutory construction: that language is not superfluous and one must give effect to every clause and word.[1] This is not an instance of one specific rule being controlled or nullified by a general one; rather, it involves clear language *within the same rule*.

Previous FAA interpretations

In an attempt to avoid *completely* reading the phrase "or the equivalent thereof" right out of the rule, the May 18 interpretation claims that "[t]he FAA intended that the regulation allow employees to work in excess of six consecutive days in the event of a national emergency or unusual occurrence in the air carrier industry". Although a previous FAA interpretation is cited as the source of that position,[2] it is taken out of context; the full statement provided that:

> The clause "or equivalent thereof within any one calendar month" provides flexibility in the rule. It is intended to provide coverage for situations involving national emergencies as well as those unusual conditions that arise within the air carrier industry. Basically, it permits maintenance personnel to work continuously in any one calendar month, provided they are given time off and away from work in that month equal to the actual hours they would have been relieved from duty, had they worked six days with the seventh day off throughout the specific calendar month under consideration. This relief from duty must be given in increments of not less than 24 consecutive hours. *(Emphasis added)*

The FAA's earlier position does not limit application of equivalent days off to a particular circumstance and is therefore at odds with its latest interpretation.

In addition, the May 18, 2010 letter acknowledged "[a] previous interpretation allowed that a work schedule that provides for personnel to have a group of 4 days off followed by up to 24 days of work, or vice versa, would still meet the standard of being 'equivalent' to one day off in every seven within a month".[3] In arguing against the continued validity of that plain assertion, the FAA stated that the earlier interpretation "was issued prior to the findings relating fatigue to

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[1] *See, e.g.,* Duncan v. Walker, 533 US 167 (2001).
[2] Legal Interpretation 1987-15 (June 14, 1987).
[3] Legal Interpretation 1991-40 (June 21, 1991).

maintenance related errors in the air carrier industry discussed in AC 120-72”.[4] We fail to grasp the significance of updated guidance material in relation to an existing rule and interpretations of that rule. If the content of AC 120-72 revolutionized maintenance duty time limitations in the eyes of the FAA, then a change to 14 CFR § 121.377 was required to effect that view.

We are also skeptical of the agency’s new fatigue study rationale when there is no regulation prohibiting maintenance workers from being on duty for several days at a time without any minimum daily rest period. Indeed, prohibiting a certificate holder from providing four consecutive days off at the end of a calendar month does nothing to address this glaring omission in the existing rule.

The “new” interpretation required notice and comment under the APA

The May 18, 2010 letter is effectively an attempt by the FAA to make a rule change without following the notice and comment requirements of the Administrative Procedure Act (APA). Existing case law prohibits such actions. As made clear by the U.S. Court of Appeals for the D.C. circuit in a case involving the agency:

> Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking…’[r]ule making,’ as defined in the APA, includes not only the agency’s process of formulating a rule, but also the agency’s process of modifying a rule.[5]

In a similar case, that same court stated that:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its

[4] Advisory Circular (AC) 120-72 titled “Maintenance Resource Management Training”, is dated September 28, 2000.

[5] Alaska Professional Hunters v. FAA, 177 F.3d 1030 (1999) at 1033 citing Paralyzed Veterans v. D.C. Arena, 117 F.3d 579, 586 (D.C.Cir. 1997).

RE: Legal Interpretation of 14 CFR § 121.377 – Maintenance and preventive maintenance personnel duty time limitations, dated May 18, 2010

> new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. 'It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures.'[6]

In line with the court's directives, we feel strongly that the May 18, 2010 interpretation is contrary to the APA because it changes the plain language of the existing rule and longstanding agency interpretations without providing the public with notice and an opportunity to comment. We are aware of at least one major U.S. air carrier that has been informed by the FAA that, based upon the new interpretation, it must immediately change its maintenance staffing policies that have been in effect for many years. Without notice of the new requirement, such immediate changes wreak havoc on schedules, operations and result in dramatically increased costs. The APA provides industry the ability to plan for, and participate in, regulatory changes of this magnitude to alleviate those ill effects. In accord with existing case law, if the FAA desires to change a rule it must follow APA requirements.

Conclusion

The FAA's May 18, 2010 interpretation should be withdrawn immediately.

We look forward to your favorable response, and we appreciate your assistance in handling this matter.

Respectfully submitted,

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

cc:		
	Anne Bechdolt	anne.bechdolt@faa.gov
	Carol E. Giles	carol.e.giles@faa.gov
	Neil Eisner	neil.eisner@ost.dot.gov

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[6] Appalachian Power v. EPA, 208 F.3d 1015 (2000) at 1020 citing 47 ADMIN. L. REV. 59 (1995).