May 11, 2009

Exemption No. 9865

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

In the matter of the petition of

AERONAUTICAL REPAIR STATION ASSOCIATION

for an exemption from part 121 appendices I and J of Title 14, Code of Federal Regulations

Regulatory Docket No. FAA-2008-1260

DENIAL OF EXEMPTION

By letter dated November 21, 2008, Mr. Colin P. Carroll, Regulatory Counsel, Aeronautical Repair Station Association (ARSA) 121 North Henry Street, Alexandria, VA, 22314 petitioned the Federal Aviation Administration (FAA) on behalf of ARSA for an exemption from part 121 appendices I and J of Title 14, Code of Federal Regulations (14 CFR). Specifically, ARSA seeks an exemption for any person using LONG-LOK Fasteners Corporation (LONG-LOK) to accomplish Airworthiness Directive (AD) 93-05-16, for any entity called to perform required work in an AD without an existing FAA/DOT drug and alcohol program, and for any person performing alterations for a covered employer. The proposed exemption, if granted, would exempt LONG-LOK and other persons from drug and alcohol testing requirements while performing some types of maintenance or preventive maintenance on an aircraft operating under parts 121 or 135.

The petitioner requests relief from the following regulation:

> Part 121 appendices I and J of Title 14 prescribe, in pertinent part, that the drug and alcohol testing program is designed to prevent accidents and injuries that result from the use of prohibited drugs and the misuse of alcohol by any employee who performs safety-sensitive functions for a part 119 certificate holder with authority to operate under parts 121 and/or 135 or an operator as defined in § 91.147.

The petitioner supports its request with the following information:

ARSA requests an exemption on behalf of LONG-LOK and any other employer required to ensure compliance with Airworthiness Directive 93-05-16 (AD 93-05-16), and all other repair stations or contractors who perform alterations for a covered employer. The petitioner states that AD 93-05-16 (effective November 18, 1993) requires modification of the rudder power control valve on certain DC-9 and MD-88 model aircraft. The service bulletin specified in the AD requires returning the slide assembly to the manufacturer, LONG-LOK, for installation of a self-locking element.

ARSA contends the new FAA drug and alcohol testing requirements to include subcontractors, at any tier, has created a dilemma for operators. ARSA states its member repair stations have difficulty complying with an AD that requires articles to be returned to a specific manufacturer for alterations. The petitioner states a manufacturer is permitted to rebuild or alter only its own articles (as prescribed under § 43.3(j)).

The petitioner states, at the time the AD was issued, LONG-LOK (a non-certificated subcontractor) was not obligated to have a drug and alcohol testing program. ARSA states that LONG-LOK still does not have a testing program even though it is the only facility able to accomplish the modification specified in the AD.

ARSA contends that when a manufacturer (i.e., LONG-LOK) declines to implement its own testing program, the repair stations or air carriers must choose between not complying with the AD or violating part 121 appendices I and J. The petitioner argues the FAA should grant an exemption from the testing regulations for both the manufacturer and any covered employer so the unsafe condition may be properly addressed without fear of regulatory violations.

Further, ARSA states the confusion is not isolated to manufacturers and ADs. ARSA states there are numerous repair stations and other non-certificated entities that perform alterations exclusively for U.S. carriers or operators who are faced with the same dilemma. Because a repair station working for an air carrier must comply, and the petitioner states that the FAA has not provided guidance dictating whether an alteration is considered maintenance, an exemption from these requirements is warranted for any entity performing alterations (whether part of an AD requirement or independently).

The petitioner states a grant of exemption would be in the public interest. ARSA states that it is in the public interest to ensure that all unsafe conditions that give rise to an AD are corrected as required. Further, the public interest in properly correcting unsafe conditions by those technically qualified to do so outweighs the interest that the specific facility called out in the AD does not have a DOT/FAA drug and alcohol testing program.

A summary of the petition was published in the Federal Register on February 24, 2009 (74 FR 8301). No comments were received.

The FAA's analysis is as follows:

The FAA has considered fully the petitioner's request and supporting materials, and finds that a grant of exemption would not be in the public interest and would not maintain a level of safety equivalent to that provided by the current regulations.

It is not unique that LONG-LOK, and other non-certificated contractors, have to comply with drug and alcohol testing. Since the early 1990's, the FAA has required that employers who operate under part 121 or part 135 ensure that any employee performing safety-sensitive functions, directly or by contract, be subject to testing. Because of confusion and conflicting guidance about which subcontractors were subject to testing requirements, the FAA published a regulatory change to clarify the meaning of "by contract" to include a subcontract at any tier. Many operators believed this was a new requirement. It was not. After the FAA published the "Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities" final rule (71 FR 1667; January 10, 2006), ARSA (and some of its members) filed suit against the FAA challenging the requirement that all safety-sensitive employees, directly or by contract at any tier, be subjected to testing. In September 2007, the United States Court of Appeals for the District of Columbia Circuit ruled in favor of the FAA. The court agreed that the final rule addressed an aviation safety issue and was within the FAA's authority.

Furthermore, the FAA has determined that manufacturers who perform maintenance or preventive maintenance, as defined under part 43, are subject to the testing rules. Although manufacturing a part is not a safety-sensitive function, alteration of a part related to an overall repair is a safety-sensitive function as well as maintenance or preventative maintenance. Because alteration of a part related to an overall repair is maintenance or preventive maintenance, manufacturers engaged in this activity are subject to testing requirements.

The subject AD was issued in November 1993. As stated earlier, persons performing maintenance or preventive maintenance to comply with the AD were subject to drug and alcohol testing requirements prior to the clarifying rule amendments of 2006.

The FAA's Decision:

In consideration of the foregoing, I find that a grant of exemption would not be in the public interest. Therefore, pursuant to the authority contained in 49 U.S.C. §§ 40113 and 44701, delegated to me by the Administrator, the petition of Aeronautical Repair Stations Association for an exemption from part 121 appendices I and J of 14 CFR is hereby denied.

Issued in Washington, DC, on .

Dr. Frederick E. Tilton, M.D.
Federal Air Surgeon