Oral Argument Scheduled for March 28th at 9:30 A.M.
No. 06-1091 (Consolidated with No. 06-1092)

In the
United States Court of Appeals
For the District of Columbia Circuit

AERONAUTICAL REPAIR STATION ASSOCIATION, INC., PREMIER METAL FINISHING, INC., PACIFIC PROPELLER INTERNATIONAL LLC and TEXAS PNEUMATICS SYSTEMS, INC.,

Petitioners,

FORTNER ENGINEERING & MANUFACTURING, INC. and MINAS SEROP JILIZIAN,

Intervenors,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

SOLUTIONS MANUFACTURING, INC., and RANDALL C. HIGHSMITH,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR REVIEW OF A FINAL RULE
OF THE FEDERAL AVIATION ADMINISTRATION

BRIEF OF AIRCRAFT MECHANICS FRATERNAL ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. All parties, intervenors, and amici appearing in this court are listed in the Joint Opening Brief for Petitioners and Intervenors, and in the Brief for the Respondent.

(B) Ruling Under Review. References to the ruling at issue appear in the Joint Opening Brief for Petitioners and Intervenors, and in the Brief for the Respondent.

(C) Related Cases. We are unaware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, the Aircraft Mechanics Fraternal Association ("AMFA"), *amicus curiae*, by its undersigned counsel, states as follows:

1. AMFA is an unincorporated labor organization. AMFA has no parent companies, and there are no publicly-held companies that have any ownership interest in AMFA.

2. AMFA is the certified collective bargaining representative of the aircraft maintenance technicians and related employees who are employed by United Airlines, Northwest Airlines, Southwest Airlines, Alaska Airlines, ATA, Horizon Air, and Mesaba Airlines.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATORY MATERIALS

* Authorities upon which we chiefly rely are marked with asterisks.

FEDERAL GOVERNMENT AND AGENCY REPORTS

NEWS REPORTS AND PERIODICALS

GLOSSARY

Abbreviation	Definition
AMFA	Aircraft Mechanics Fraternal Association
ARSA	Aeronautical Repair Station Association (also, collectively, the petitioners in Nos. 06-1091 and 06-1092)
DOT	Department of Transportation
FAA	Federal Aviation Administration
FAR	Federal Aviation Regulations
J.A.	Joint Appendix
OIG	Office of Inspector General
NTSB	National Transportation Safety Board

IDENTITY OF THE AMICUS CURIAE

The Aircraft Mechanics Fraternal Association ("AMFA") is an independent labor organization subject to the Railway Labor Act. AMFA is the certified collective bargaining representative of the aircraft maintenance technicians and related employees who are employed by United Airlines, Northwest Airlines, Southwest Airlines, Alaska Airlines, ATA, Horizon Air, and Mesaba Airlines.

AMFA's INTEREST IN THE CASE

As a representative of aircraft maintenance technicians, AMFA has a vital interest in aviation safety. The importance of aviation safety to AMFA is reflected in the fact that one of its constitutional objectives as an association is to:

> Safeguard, with ceaseless vigilance, the safety of the air transportation industry in recognition of the high degree of public interest, confidence, and responsibility placed on the members of the Association and network with other people and organizations with similar interests and goals.

AMFA Constitution (2004), Art. II, Sect. 2.[1]

THE SOURCE OF AMFA's AUTHORITY TO FILE

On May 8, 2006, AMFA filed a Notice of Consent to Participate as Amicus Curiae pursuant to Circuit Rule 29(b). Counsel for all of the petitioners and counsel for the respondent, FAA, consented to AMFA's participation as amicus curiae.

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[1] AMFA's Constitution is available at www.amfanatl.org, under "Publications & Forms".

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, regulations, etc., are contained in the addendum to the petitioners' brief and the addendum to the respondent's brief:

14 C.F.R. Part 121, Appendix I (November 21, 1988), as published in 53 Fed. Reg. 47024.

SUMMARY OF ARGUMENT

Time was when your purchase of an air ticket came with the assurance of an in-flight bag of peanuts. Those days are gone.

Time was when your purchase of an air ticket came with the assurance of safety provided by the airline's direct maintenance of its own aircraft. Those days are also gone – although with considerably less public notice.

There has been a seismic change in airline maintenance practices. Five years ago, the major airlines directly performed the greater part of their maintenance and preventive maintenance. They do not anymore. This disturbing revolution does not just present a "potential" threat to safety. The quality of maintenance has already precipitously declined. Passengers have already died.

Contrary to ARSA's clever arguments, the Federal Aviation Regulations (FAR) were never about testing individuals for substance abuse based on their legal or contractual relationship with an air carrier. The FAR tested individuals based on their performance of a specific "function" listed in section III of 14 C.F.R. Part 121 Appendix I. Flight crewmember duties and flight attendant duties are still performed, almost exclusively, by direct employees of the airlines. By contrast, the greater part of aircraft maintenance no longer is.

The FAA's effort to prevent drug and alcohol abuse by those who perform aircraft maintenance, regardless of the identity of their employer, is consistent with the intent that was always present in the regulations. It is also a first feeble step in the FAA's tardy efforts to adapt to a radical transformation in airline maintenance practices. Those who, through sophistry, succeed in further delaying the FAA's efforts will have blood on their hands.

ARGUMENT

I.

FAA-MANDATED TESTING IS BASED ON AN INDIVIDUAL'S PEFORMANCE OF DEFINED FUNCTIONS AND NOT ON HIS/HER CONTRACTUAL RELATIONSHIP WITH THE CARRIER

Since 1988, the FAA has mandated that "each person who performs" a listed safety sensitive function – including aircraft maintenance or preventive maintenance – must be tested pursuant to an FAA-approved anti-drug program. 14 C.F.R. Part 121, Appendix I, Section III(E).[2]

Petitioners and the FAA differ as to whether FAA-mandated testing requirements should apply to the employees of non-certificated subcontractors who perform safety sensitive aircraft maintenance. (Petitioners' Brief at 14). The FAA policy rationale is fairly easy to understand: the necessity of testing is based on an individual's performance of a safety sensitive aircraft maintenance function. The petitioners' rationale is much more nuanced.

The petitioners concede that FAA-mandated testing can and should extend to certificated repair stations irrespective of their contractual tier. Id. at 15, 30. The petitioners also concede that FAA-mandated testing can and should extend to non-certificated repair stations that have a

[2] The 1988 Final Rule (also referred to herein as the "original Final Rule") is attached in the addendum to this brief. (A-1-11).

contract with an air carrier. Id. Nevertheless, the petitioners argue that when the repair station is both non-certificated (meaning less FAA scrutiny) and has no direct contractual relation with an air carrier (meaning less carrier scrutiny), it makes "perfect sense" to exempt employees performing the same aircraft maintenance from any check on their abuse of illegal drugs and alcohol. Id. at 33.

The petitioners' principal line of attack is to allege that the FAA has exceeded its existing regulatory and statutory authority. Petitioners contend that the FAA's current Final Rule "carries forward the prior regulatory language," with the exception of the FAA's purported extension of the rule's coverage to employees who perform safety sensitive functions "by subcontract at any tier." Nevertheless, the FAA's determination to test employees performing safety-sensitive maintenance at non-certificated repair stations is consistent with FAA regulations and regulatory history that have always emphasized function-based testing.

From its inception in November 1988, the FAA-mandated substance abuse testing program was directed toward the testing of individuals who performed certain **functions** irrespective of their employment relationship with the air carrier. As the FAA stated in the preamble to its Final Rule:

> The critical need for properly-administered drug testing to ensure that employees in the transportation industry do not have drugs or drug metabolites in their system **while performing sensitive safety- and security-related functions** outweighs the reduced privacy interest of these employees.
>
> * * *
>
> **[I]ndividuals who wish to work in aviation activities** that involve the safety of passengers, co-workers, and others must not use illicit drugs, even while off-duty.

53 Fed. Reg. 47024, 47029 and 47030 (November 21, 1988). The FAA acted on a theory of zero tolerance, affirming that "any" drug use in the aviation industry warranted "preventive and proactive intervention by the FAA to ensure aviation safety." Id. at 47030.

The original Final Rule left no doubt that air carriers were prohibited from using individuals to perform maintenance or preventive maintenance unless they were subject to an FAA drug-testing program. Under the definition of "Employer," the 1988 Final Rule mandated that a Part 121 certificate holder "may use a person to perform a function listed in Section III of this appendix, who is not included under that employer's drug program, if that person is subject to the requirements of another employer's FAA-approved anti-drug program." 14 C.F.R. Part 121, Appendix I, Section II; 53 Fed. Reg. at 47058. (A-3). The 1988 Final Rule's preamble confirmed that the requirement applied both to Part 121/135 certificate holders and those who serviced them:

> Under the terms of the rule, a Part 121 certificate holder, a Part 135 certificate holder, or an entity or individual covered by the rule because they operate for compensation or hire **may only use the services of persons who are subject to the requirements of an FAA-approved program**. Therefore, although Part 145 was not amended, repair station employers and employees are included to the extent that they provide contract service **or** repair aircraft operated by an employer subject to the final rule.

53 Fed. Reg. at 47049. Petitioners complain that the FAA has engaged in "over-reaching" because of its current effort to ensure that "any person who performs maintenance or preventive maintenance for an employer must be ... tested." (Petitioners' Brief at 10, quoting J.A. at 61). But, this is precisely what the original Final Rule always provided for.

Consistent with its function-based approach, the original Final Rule recognized only the narrowest emergency-based exceptions to its function-based testing requirements:

> The proposed rule would have prohibited commercial operators from using the services of employees who work for fixed based operators and repair stations that

> service only general aviation if the employees of these entities **were not subject to an FAA-approved comprehensive anti-drug program.** In an effort to relieve this unintended burden, the FAA has included a new provision in the final rule directed solely at those individuals or entities. This provision states, in essence, that an individual who is otherwise authorized may perform maintenance and repair work on a commercial operator's aircraft, even if that individual is not covered by a comprehensive anti-drug program, in **two specific instances. First,** an individual who is not covered by the final rule can perform **emergency repairs** on an aircraft if the aircraft could not be operated safely to a location where a covered employee could perform the repairs. **Second, an individual who is not covered by the final rule** can perform aircraft maintenance and preventive maintenance repairs on an aircraft if the operator would be required to transport the aircraft **more than 50 nautical miles** further than the **closest available repair point from the operator's principal base of operations in order to have the work performed by a covered employee.**

53 Fed. Reg. 47024, 47043.

Nor is the petitioners' insistent characterization of the sporadic nature of their employees' performance of safety-sensitive functions a valid argument against testing these employees. (Petitioners' Brief at 9-10). The FAA original rule decidedly rejected efforts to limit the testing obligation based on the quantum of covered work performed:

> The FAA has not revised the rule to require drug testing of supervisory or managerial employees. However, the FAA notes that under the proposed rule and final rule, supervisory and managerial employees who perform sensitive safety- or security-related functions for an employer are not permitted to perform these functions, either on a permanent **or temporary basis**, unless those employees are subject to the requirements of the employer's anti-drug program.

53 Fed. Reg. 47024, 47049. Thus, the petitioners' complaint that the FAA's program is unconstitutional because it applies to individuals who perform "any amount" of safety sensitive work is to no avail, since that concept has been a critical element of the FAA's court-sanctioned program for almost twenty years. (Petitioners' Brief at 45).

The original Final Rule's clear authorization of function-based testing nullifies the petitioners' argument that the Omnibus Transportation Employee Testing Act ("OTETA") somehow proscribes the testing of non-certificated repair station employees. (Petitioners' Brief

at 8). In the first instance, OTETA's intent was to reinforce and broaden the testing authority of the several federal agencies. Second, the statute specifically provided that it would **not** have the effect of reducing the scope of existing regulations:

> This section does **not prevent** the Administrator from **continuing in effect, amending, or further supplementing a regulation prescribed before October 28, 1991**, governing the use of alcohol or a controlled substance by airmen, crewmembers, airport security screening employees, air carrier employees responsible for safety sensitive functions (as decided by the Administrator), or employees of the Administration with responsibility for safety-sensitive functions.

49 U.S.C. § 45106(c).

In a chilling display of legal sophistry, the petitioners argue that, even if uncertificated repair station employees are deemed air carrier employees, they are not "responsible" for the aircraft maintenance they perform. (Petitioners' Brief at 18). Obviously, on a moral and practical level, if an individual refuses to accept responsibility for his performance of safety sensitive aircraft maintenance, he should not be permitted to perform it. Fortunately, the petitioners' argument is not only morally abhorrent, it is also legally wrong. The scope of all forms of FAA-mandated testing – preemployment, periodic, random, reasonable cause and return to duty – is defined in terms of those individuals "who perform a function listed in Section III." 14 C.F.R. Part 121, Appendix I § V(A-F). (A-4-5). Under petitioners' twisted logic, testing at the air carrier itself could be limited to the position of aircraft inspectors instead of the far greater number of technicians who actually perform the work. The regulatory program has never been applied in this fashion.[3]

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[3] Contrary to the petitioners' allegations at page 13 of their brief, the FAA has demonstrated the appropriate self-restraint in terms of the scope of its regulatory program. The FAA has never tried to extend its function-based testing authority to "other air carrier employees" who are not engaged in safety sensitive work (e.g., reservation workers and ticket agents).

Among petitioners' back-up equitable arguments is that additional testing of third-party maintenance providers is unjustified because there has not yet been a "documented" aviation accident directly attributed to the misuse or abuse of drug and alcohol. (Petitioners' Brief at 34). Nevertheless, the Ninth Circuit Court of Appeals upheld the original Final Rule based on its finding that the FAA had obtained "concrete evidence of drug use in the commercial aviation sector." Bluestein v. Federal Aviation Administration, 908 F.2d 451, 453 (9th Cir. 1990), cert. denied, 498 U.S. 1083 (1991), *citing* 53 Fed. Reg. at 47030. The FAA's concrete evidence included reports of substance abuse by in-house and third-party maintenance personnel.

The original Final Rule's preamble records a report from one airline that four percent of its mechanics tested positive for illegal drugs. 53 Fed. Reg. at 47030. Alarmingly worse, however, was the report received from a preeminent third-party repair station:

> Tramco, Inc., is a certificated repair station employing over 600 individuals and repairing over 100 aircraft per year . . . Tramco estimates that, consistent with general statistics, 20 percent of its workforce has had some involvement with controlled substances. As of the time of its comment to the NPRM, Tramco identified 10 percent of its employees as individuals who had used drugs.

Id. at 47025. The record reviewed and approved by the Ninth Circuit also included the following FAA finding:

> In light of data regarding drug use by mechanics and repairmen submitted in response to the ANPRM, the FAA also is concerned about the potential for aviation accidents attributable to drug use by commercial aviation maintenance personnel.

Id. at 47054. What ensued was a comprehensive testing program that was so successful in expelling substance abusers from direct employment with the air carriers that the current random drug test positive rate has fallen to 0.58%. 71 Fed. Reg. 65167 (November 7, 2006). The individuals expelled, however, could be expected to fly, like iron filings to a magnet, to those industry segments that had evaded compliance with the FAA's drug-testing program.

As a last resort, the petitioners bemoan that the cost of monitoring the drug and alcohol use of employees might discourage these obscure subcontractors from performing safety sensitive aircraft maintenance. (Petitioners' Brief at 37, 40). So be it. As discussed in Section II below, such cost differentials have fueled the airlines' disturbingly rapid abandonment of direct performance of aircraft maintenance. Thus, the FAA's past failure to enforce its substance abuse rules have jeopardized safety in two ways: 1) it allows drug-addled individuals to continue performing aircraft maintenance, and 2) it has created an artificial cost incentive for the airlines to distance themselves from the maintenance of their own aircraft. If petitioners accurately predict that substance abuse testing requirements "will inevitably drive away many ... noncertificated entities that previously served the industry as subcontractors," the welcome consequence may be the airlines' return to the direct performance of maintenance on the aircraft they operate. Id. at 37.

II.

PETITIONERS' CRAMPED DEFINTION OF THE FAA'S TESTING REGULATIONS WILL ACCELERATE THE DECLINE OF AVIATION SAFETY

Air carriers have historically performed most of their maintenance in their own in-house facilities. Today, most of this maintenance is contracted out to domestic and foreign repair stations.

In June 2005, the FAA reported that network air carriers had made "unprecedented changes to restructure their operations in response to record-breaking monetary losses." Office of Inspector General (OIG) Report Number AV-2005-062, "Safety Oversight of an Air Carrier

System in Transition" (June 3, 2005) at 1.[4] Salient among these changes was the elimination of 12,873 maintenance personnel and the closure of 42 maintenance facilities between 2001 and 2003. The June 2005 report noted that the carriers now outsourced an average of 53 percent of their maintenance expense, as compared to 37 percent in 1996. Id. at 1-2. By the close of 2005, the percentage of outsourced maintenance had increased to 62 percent. U.S. DOT Form 41 Reports, cited in Statement of Department of Transportation Acting Inspector General Todd J. Zinzer before the Subcommittee on Aviation, United States House of Representatives, CC-2006-074 (September 20, 2006) at 4.

The outsourcing trend has not only continued, but accelerated, notwithstanding tragic accidents linked to air carriers' reduction of in-house maintenance. On January 31, 2000, Alaska Airlines flight #261 crashed, killing 88 people. The accident was attributable to insufficient maintenance of the horizontal stabilizer's jackscrew assembly. The National Transportation Safety Board criticized Alaska for having extended the time interval of the necessary maintenance check and the FAA for having approved the extended interval. NTSB DCA00MA023 File No. 13648. Nevertheless, instead of increasing its investment in in-house maintenance, Alaska subsequently laid off hundreds of its technicians in order to further reduce costs. As early as 2004, Alaska was outsourcing 80 percent of its maintenance. OIG Report Number AV-2005-062, *supra*, at 8.[5]

On January 8, 2003, US Airways Express Flight #5481 crashed, killing 21 people. The National Transportation Safety Board attributed the accident, in part, to sub-standard

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[4] OIG reports are published at www.oig.dot.gov.

[5] In 2005, Alaska outsourced 92% of its maintenance. *An Accident Waiting to Happen?* CONSUMER REPORTS, March 2007, at 18.

maintenance performed by a third-party contractor and insufficient oversight by both the carrier and the FAA. NTSB DCA03MA022 File No. 15962.

The NTSB's view that FAA has failed to sufficiently oversee maintenance subcontractors is shared by the United States Department of Transportation. In 2003, the DOT found that "FAA oversight had not shifted to where the maintenance was actually being performed." Zinzer Testimony, *supra*, at 5, citing OIG Report Number AV-2003-047. Two years later, an entire section of the DOT's annual audit of FAA practices was entitled: "FAA Needs To Place More Emphasis on Oversight of Outsourced Maintenance." OIG Report Number AV-2005-062, *supra*, at 7. The DOT specifically cited a lack of FAA **and** air carrier oversight of third party maintenance providers. Id. at 8-9. Obviously, the petitioners' vaunted claim that certificated repair stations are "closely evaluated, carefully regulated, and continuously monitored by the FAA"[6] is more opinion than fact. This reality highlights the almost total obscurity in which non-certificated repair stations perform their safety sensitive aircraft maintenance.

Since the time of the report, this disturbing outsourcing trend has continued to accelerate. The most jaw-slackening example is Northwest Airlines. As recently as 1999, Northwest employed over 9,500 maintenance personnel. Northwest Airlines, 26 N.M.B. 269 (1999). Today the figure is approximately 900. *An Accident Waiting to Happen*? CONSUMER REPORTS, March 2007, at 18.[7] The overall safety impact of cutting in-house maintenance to a whisper of its former self can be read in the daily news:

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[6] Petitioners' Brief at 15.

[7] In January 2006, Northwest represented to the Bankruptcy Court that it employed 918 maintenance personnel. Northwest Airlines' Exhibit 49, "Labor Costs—Group/Oct. 2005 Actual Physical Heads," entered at January 2006 trial on Northwest's Application to Reject Collective Bargaining Agreements Pursuant to 11 U.S.C. § 1113(c), In re Northwest Airlines Corp., Case No. 05-17930 (Bankr. S.D.N.Y.).

- On April 2, 2006, irate passengers finally returned home from Jamaica after Northwest cancelled their flights two days in a row due to equipment problems.

  "Stranded Minnesotans Arrive Home After being Stuck in Jamaica," KSTP – 5 Eyewitness News, April 2, 2006, http://www.kstp.com/article/Pstories/S15259.html.

- On April 10, 2006, Northwest Airlines Flight 1876, from Memphis to Indianapolis, made an emergency landing after a tire from one of its landing gear plummeted to the ground during take-off.

  Andy Wise, "Emergency Landing at Memphis International," WREG-TV Memphis, April 10, 2006, http://www.wreg.com.

- On April 12, 2006, Northwest Airlines Flight 1946, bound for Minneapolis, made an emergency landing after a tire blew shortly after take-off.

  "MSP-bound Plane Makes Emergency Landing," KSTP – 5 Eyewitness News, April 12, 2006, http://www.kstp.com/article/Pstories/S15497.html.

- On April 24, 2006, Northwest Flight 880, en route from Miami to Tampa, made an emergency landing after the pilot reported "major electrical problems." The plane was carrying 108 passengers.

  "Northwest Jet Makes Emergency Landing at TIA," Tampa Bay's 10 News, April 24, 2006, http://www.tampabays10.com.

- On May 19, 2006, Northwest Airlines Flight 11, from Detroit to Tokyo, experienced difficulty retracting one of its five landing gears after take-off and had to return to the airport. The jet, too heavy for landing, dumped 200,000 pounds of fuel over Washtenaw and Livingston counties. Reports suggest that the plane was flying too low for the fuel to disseminate, possibly resulting in ground contamination.

  Lisa Roose-Church, "Was Jet Fuel Dumped at Low Altitude," Livingston Daily Press & Argus, May 19, 2006, http://www.livingstondaily.com.

- On May 24, 2006, two Northwest Airline flights were grounded in Fargo, North Dakota, due to mechanical problems. Passengers aboard one flight reported being jostled after the pilot hit the brakes while taxiing down the runway. "We heard a squeal and something bang, and everyone flew forward into the seat in front of them," reported Virginia Eli, of Fargo.

  "Two Northwest Airlines Jets Delayed in Fargo," AP Wire and Wire Service Sources, Associated Press, May 24, 2006, http://twincities.com.

- On June 16, 2006, a Northwest Airlines Airbus A-319, bound for Minneapolis from Vancouver, was forced to make an "unscheduled" landing at Gallatin Field airport near Bozeman after the pilot smelled "something burning" in the cockpit.

  "NWA Airbus Makes Unscheduled Landing in Montana," KARE 11 TV, The Associated Press, June 6, 2006, http://www.kare11.com.

- On June 18, 2006, a Northwest Airlines flight from Taiwan made an emergency landing in western Japan after developing engine problems in one of its four engines.

  "Northwest Airlines Lands Safely in Western Japan After Engine Trouble," The Star Online, June 18, 2006, http://www.thestar.com.my.

- On June 27, 2006, twelve of the one hundred and seventy-six passengers on Northwest Airlines Flight 1192, from Las Vegas to Detroit, were treated for ear pain after the cabin failed to pressurize properly, resulting in an emergency landing. Two of the twelve were later treated at a local hospital.

  Lawrence Mower, "Flight Forced to Return Because of Pressure Problem," Las Vegas Review-Journal, June 27, 2006, http://reviewjournal.com/lvrj_home/2006/Jun-27-Tue-2006/news/8186553.html.

- On July 17, 2006, Northwest Airlines Flight 1515, from Albany to Detroit, was forced to make an emergency landing after the pilot identified a problem with one of the DC-9's two engines. Following the emergency landing the pilot experienced problems with the plane's braking system. Passengers exited the plane on the runway and were bused to the terminal.

  "Detroit-bound Plane makes Emergency Landing at Albany Int'l," The Business Review (Albany), July 17, 2006, http://www.bizjournals.com/albany/stories/2006/07/17/daily15.html.

- On July 24, 2006, a Northwest Cargo jet bound for Anchorage was forced to make an emergency landing at Kansai International Airport after one of its four engines failed. After landing, steam gushed from Engine No. 1. A fire engine was dispatched to the runway after the plane landed.

  "Engine Trouble Forces NW Cargo Jet to Make Emergency Landing," MSN-Mainichi Daly News, July 24, 2006, http://mdn.mainichi-msn.co.jp/national/news/p20060724p2a00m0na002000c.html.

- On July 27, 2006, Northwest Airlines Flight 884 from Minneapolis to Toronto, was forced to make an emergency landing in central Michigan after smoke filled the cabin.

"NWA Plane Make Emergency Landing," WCCO-TV, The Associated Press, July 27, 2006, http://wcco.com/local/local_story_208071225.html.

- On September 2, 2006, Northwest Airlines Flight 44 bound for London from Minneapolis was forced to make an emergency landing in Duluth after the cabin began to fill with smoke from an electrical problem in the jet's entertainment system. Twenty first-responders from Duluth and surrounding townships responded to the call and waited while the plane landed.

  "London-bound Northwest Airlines Flight Diverted to Duluth," Duluth News Tribune.com, September 2, 2006, http://www.duluthsuperior.com.

- On September 5, 2006, a Northwest flight made an emergency landing after smoke was reported in the cockpit. Local emergency crews responded and were on the runway at Indianapolis International Airport during the landing.

  "Northwest Jet Has Cockpit Emergency in Indianapolis," The Indy Channel.com, September 5, 2006, http://www.theindychannel.com/print/9789402/detail.html.

- On October 5, 2006, a Northwest Airlines flight, from Minneapolis to Seattle, carrying 250 passengers, was forced to make an emergency landing in Billings, Montana, after pilots were forced to shut down the plane's left engine, due to equipment failure.

  The Gazette Staff, "Flight Makes Emergency Landing," The Billings Gazette, October 5, 2006, http://www.billingsgazett.net/articles/2006/10/05/news/local/75-landing.prt.

- On October 12, 2006, Northwest Airlines Flight 206 from Green Bay to Detroit was forced to return to Green Bay after the pilot reported smoke in the cockpit. After an emergency landing, passengers were transported back to the terminal in buses. The aircraft was towed to the gate, unable to proceed under its own power because of a brake problem.

  Corinthia McCoy, "Cockpit Smoke Forces Plane to Land," Green Bay Press Gazette, October 12, 2006, http://www.greenbaypressgazett.com.

- On October 14, 2006, the pilot of a Northwest Airlines passenger aircraft reported mechanical difficulties with its control panel, resulting in an emergency landing in Tulsa.

  "Passenger Aircraft Makes Emergency Landing," WorldNow and KTEN, October 14, 2006, http://kten.com/global/story.asp?s=5542755.html.

- On October 28, 2006, Northwest Airlines Flight 1498 from Green Bay to Detroit made an emergency landing after one of the three generators on the DC-9 shorted out.

  "Jet Has Emergency, Has to Land at MBS," The Saginaw News, October 28, 2006, http://www.mlive.com/news.

- On November 10, 2006, Northwest Airlines Flight 756, bound for Detroit, experienced a major engine problem, causing the cabin to fill with smoke. In spite of an acrid smoke-filled cabin, oxygen masks failed to drop. Crew members told passengers to "breathe through their clothes" to avoid smoke inhalation. The flight returned to Minneapolis-St. Paul International Airport for an emergency landing.

  Joy Powell, "NWA Flight Turns Back After Smoke Fills Cabin," Star Tribune, Minneapolis-St. Paul, November 10, 2006, http://www.startibune.com/462/v-print/story/801002.html.

All of these incidents occurred during a mere seven-month timeline. The mishaps can be expected to become more frequent and more severe with the passage of time. Nevertheless, because of Northwest's recent return to profitability, other airlines, in the name of competitiveness, will feel compelled to follow that airline's dark example.

The petitioners' ancillary attempts at equitable arguments are often chilling. They suggest that it is somehow unfair to test subcontractor employees who are performing safety-sensitive maintenance on aircraft components when the employee has "no idea that he or she is doing so." (Petitioners' Brief at 10). Similarly, petitioners contend that individuals who perform the safety sensitive work of ensuring the integrity of aircraft windows should not be tested because they do not regularly perform the work. Id. And welders, whose specialty really lies in the repair of factory and farm implements, should not be tested because they are now experimenting with aircraft maintenance work previously performed by licensed aircraft mechanics. Id. Rather than provide a rationale for exempting these identified individuals from FAA requirements, the petitioners' examples more readily support a condemnation of the

industry's ill-considered strategy of cutting costs by resorting to inexperienced workers to perform safety sensitive maintenance functions.

The petitioners confirm that the safety sensitive work that used to be concentrated under the direct control of the carriers themselves is now scattered to the winds – landing in obscure shops where the employees have no appreciation for the fact that people's lives depend on their sobriety. This condition undoubtedly makes the FAA's task much more daunting. It is no excuse, however, for aggravating the situation by eliminating a fundamental safety precaution.

The FAA has been roundly criticized for failing to respond to the realities of outsourcing by adjusting its monitoring practices. Considering what is at stake, the petitioners' effort to further hinder the FAA's tardy efforts is unconscionable. The petitions for review should be denied.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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Dated: February 8, 2007

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Times New Roman font, 12 point type. Based on a word count under Microsoft Word 2000, this brief contains 4,488 words, excluding the Certificate as to Parties, Rulings, and Related Cases, the glossary, table of contents, table of authorities, addenda, and certificates of counsel.

Lee Seham /ss

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REGULATORY ADDENDUM

**14 C.F.R. Part 121, Appendix I (November 21, 1988),
as published in 53 Fed. Reg. 47024.**

Federal Aviation Administration

DEPARTMENT OF TRANSPORTATION

Anti-Drug Program for Personnel Engaged in Specified Aviation Activities

14 C.F.R. Part 121

53 Fed. Reg. 47024

November 21, 1988

ACTION: Final rule.

PART 121 -- CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

8. The authority citation for Part 121 continues to read as follows:

Authority: *49 U.S.C. 1354*(a), 1355, 1356, 1357, 1401, 1421-1430, 1472, 1485, and 1502; *49 U.S.C. 106*(g) (Revised, Pub. L. 97-449, January 12, 1983).

9. By adding a new § 121.429 to read as follows:

§ 121.429 Prohibited drugs.

(a) Each certificate holder shall provide each employee performing a function listed in Appendix I to this part and his or her supervisor with the training specified in that appendix.

(b) No certificate holder may use any contractor to perform a function listed in Appendix I to this part unless that contractor provides each of its employees performing that function for the certificate holder and his or her supervisor with the training specified in that appendix.

10. By adding a new § 121.455 to read as follows:

§ 121.455 Use of prohibited drugs.

(a) This section applies to persons who perform a function listed in Appendix I to this part for the certificate holder. For the purpose of this section, a person who performs such a function pursuant to a contract with the certificate holder is considered to be performing that function for the certificate holder.

(b) No certificate holder may knowingly use any person to perform, nor may any person perform for a certificate holder, either directly or by contract, any function listed in Appendix I to this part while that person has a prohibited drug, as defined in that appendix, in his or her system.

(c) Except as provided in paragraph (d) of this section, no certificate holder may knowingly use any person to perform, nor may any person perform for a certificate holder, either directly or by contract, any function listed in Appendix I to this part if that person failed a test or refused to submit to a test required by that appendix given by a certificate holder or an operator as defined in § 135.1(c) of this chapter.

(d) Paragraph (c) of this section does not apply to a person who has received a recommendation to be hired or to return to duty from a medical review officer in accordance with Appendix I to Part 121 of this chapter or who has received a special issuance medical certificate after evaluation by the Federal Air Surgeon for drug dependency in accordance with Part 67 of this chapter.

11. By adding a new § 121.457 to read as follows:

§ 121.457 Testing for prohibited drugs.

(a) Each certificate holder shall test each of its employees who performs a function listed in Appendix I to this part in accordance with that appendix.

(b) No certificate holder may use any contractor to perform a function listed in Appendix I to this part unless that contractor tests each employee performing such a function for the certificate holder in accordance with that appendix.

12. By adding a new Appendix I to Part 121 to read as follows:

Appendix I -- Drug Testing Program

This appendix contains the standards and components that must be included in an anti-drug program required by this chapter.

I. *DOT Procedures.* Each employer shall ensure that drug testing programs conducted pursuant to this regulation comply with the requirements of this appendix and the "Procedures for Transportation Workplace Drug Testing Programs" published by the Department of Transportation (DOT) (49 CFR Part 40). An employer may not use or contract with any drug testing laboratory that is not certified by the Department of Health and Human Services (DHHS) pursuant to the DHHS "Mandatory Guidelines for Federal Workplace Drug Testing Programs" *(53 FR 11970;* April 11, 1988).

II. *Definitions.* For the purpose of this appendix, the following definitions apply:

"Accident" means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage (*49 CFR 830.2*).

"Annualized rate" for the purposes of unannounced testing of employees based on random selection means the percentage of specimen collection and testing of employees performing a function listed in section III of this appendix during a calendar year. The employer shall determine the annualized percentage rate by referring to the total number of employees performing a sensitive safety- or security-related function for the employer at the beginning of a calendar year or by an alternative method specified in the employer's drug testing plan approved by the FAA.

"Employee" is a person who performs, either directly or by contract, a function listed in section III of this appendix for a Part 121 certificate holder, a Part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter (except operations of foreign civil aircraft navigated within the United States pursuant to Part 375 or emergency mail service operations pursuant to section 405(h) of the Federal Aviation Act of 1958), or an air traffic control facility not operated by, or under contract with, the FAA or the U.S. military. Provided however that an employee who works for an employer who holds a Part 135 certificate and who also holds a Part 121 certificate is considered to be an employee of the Part 121 certificate holder for the purposes of this appendix.

"Employer" is a Part 121 certificate holder, a Part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter (except operations of foreign civil aircraft navigated within the United States pursuant to Part 375 or emergency mail service operations pursuant to Section 405(h) of the Federal Aviation Act of 1958), or an air traffic control facility not operated by, or under contract with, the FAA or the U.S. military. Provided, however, that an employer may use a person to perform a function listed in section III of this appendix, who is not included under that employer's drug program, if that person is subject to the requirements of another employer's FAA-approved anti-drug program.

"Failing a drug test" means that the test result shows positive evidence of the presence of a prohibited drug or drug metabolite in an employee's system.

"Passing a drug test" means that the test result does not show positive evidence of the presence of a prohibited drug or drug metabolite in an employee's system.

"Positive evidence" means the presence of a drug or drug metabolite in a urine sample at or above the test levels listed in the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40).

"Prohibited drug" means marijuana, cocaine, opiates, phencyclidine (PCP), amphetamines, or a substance specified in Schedule I or Schedule II of the Controlled Substances Act, *21 U.S.C. 811,* 812 (1981 & 1987 Cum.P.P.), unless the drug is being used as authorized by a legal prescription or other exemption under Federal, state, or local law.

"Refusal to submit" means refusal by an individual to provide a urine sample after he or she has received notice of the requirement to be tested in accordance with this appendix.

III. *Employees Who Must Be Tested.* Each person who performs a function listed in this section must be tested pursuant to an FAA-approved anti-drug program conducted in accordance with this appendix:

a. Flight crewmember duties.

b. Flight attendant duties.

c. Flight instruction or ground instruction duties.

d. Flight testing duties.

e. Aircraft dispatcher or ground dispatcher duties.

f. Aircraft maintenance or preventive maintenance duties.

g. Aviation security or screening duties.

h. Air traffic control duties.

IV. *Substances For Which Testing Must Be Conducted.* Each employer shall test each employee who performs a function listed in section III of this appendix for evidence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines during each test required by section V of this appendix. As part of reasonable cause drug testing program established pursuant to this part, employers may test for drugs in addition to those specified in this part only with approval granted by the FAA under 49 CFR Part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshhold.

V. *Types of Drug Testing Required.* Each employer shall conduct the following types of testing in accordance with the procedures set forth in this appendix and the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40):

A. *Preemployment testing.* No employer may hire any person to perform a function listed in section III of this appendix unless the applicant passes a drug test for that employer. The employer shall advise an applicant at the time of application that preemployment testing will be conducted to determine the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs in the applicant's system.

B. *Periodic testing.* Each employee who performs a function listed in section III of this appendix for an employer and who is required to undergo a medical examination under Part 67 of this chapter, shall submit to a periodic drug test. The employee shall be tested for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs as part of the first medical evaluation of the employee during the first calendar year of implementation of the employer's anti-drug program. An employer may discontinue periodic testing of its employees after the first calendar year of implementation of the employer's anti-drug program when the employer has implemented an unannounced testing program based on random selection of employees.

C. *Random testing.* Each employer shall randomly select employees who perform a function listed in section III of this appendix for the employer for unannounced drug testing. The employer shall randomly select employees for unannounced testing for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs in an employee's system using a random number table or a computer-based, number generator that is matched with an employee's social security number, payroll identification number, or any other alternative method approved by the FAA.

(1) During the first 12 months following implementation of unannounced testing based on random selection pursuant to this appendix, an employer shall meet the following conditions:

(a) The unannounced testing based on random selection of employees shall be spread reasonably throughout the 12-month period.

(b) The last collection of specimens for random testing during the year shall be conducted at an annualized rate equal to not less than 50 percent of employees performing a function listed in section III of this appendix.

(c) The total number of unannounced tests based on random selection during the 12-months shall be equal to not less than 25 percent of the employees performing a function listed in section III of this appendix.

(2) Following the first 12 months, an employer shall achieve and maintain an annualized rate equal to not less than 50 percent of employees performing a function listed in section III of this appendix.

D. *Postaccident testing.* Each employer shall test each employee who performs a function listed in section III of this appendix for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs in the employee's system if that employee's performance either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. The employee shall be tested as soon as possible but not later than 32 hours after the accident. The decision not to administer a test under this section must be based on a determination, using the best information available at the time of the accident, that the employee's performance could not have contributed to the accident. The employee shall submit to postaccident testing under this section.

E. *Testing based on reasonable cause.* Each employer shall test each employee who performs a function listed in section III of this appendix and who is reasonably suspected of using a prohibited drug. Each employer shall test an employee's specimen for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs. An employer may test an employee's specimen for the presence of other prohibited drugs or drug metabolites only in accordance with this appendix and the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40). At least two of the employee's supervisors, one of whom is trained in detection of the possible symptoms of drug use, shall substantiate and concur in the decision to test an employee who is reasonably suspected of drug use. In the case of an employer holding a Part 135 certificate who employs 50 or fewer employees who perform a function listed in section III of this appendix or an operator as defined in § 135.1(c) of this chapter, one supervisor, who is trained in detection of possible symptoms of drug use, shall substantiate the decision to test an employee who is reasonably suspected of drug use. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use.

F. *Testing after return to duty.* Each employer shall implement a reasonable program of unannounced testing of each individual who has been hired and each employee who has returned to duty to perform a function listed in section III of this appendix after failing a drug test conducted in accordance with this appendix or after refusing to submit to a drug test required by this appendix. The individual or employee shall be subject to unannounced testing for not more than 60 months after the individual has been hired or the employee has returned to duty to perform a function listed in section III of this appendix.

VI. *Administrative Matters.* -- A. *Collection, testing, and rehabilitation records.* Each employer shall maintain all records related to the collection process, including all logbooks and certification statements, for two years. Each employer shall maintain records of employee confirmed positive drug test results and employee rehabilitation for five years. The employer shall maintain records of negative test results for 12 months. The employer shall permit the Administrator or the Administrator's representative to examine these records.

B. *Laboratory inspections.* The employer shall contract only with a laboratory that permits pre-award inspections by the employer before the laboratory is awarded a testing contract and unannounced inspections, including examination of any and all records at any time by the employer, the Administrator, or the Administrator's representative.

C. *Employee request to retest a specimen.* Not later than 60 days after receipt of a confirmed positive test result, an employee may submit a written request to the MRO for retesting of the specimen producing the positive test result. Each employee may make one written request that a sample of the specimen be provided to the original or another DHHS-certified laboratory for testing. The laboratories shall follow chain-of-custody procedures. The employee shall pay the costs of the additional test and all handling and shipping costs associated with the transfer of the specimen to the laboratory.

D. *Release of Drug Testing Information.* An employer may release information regarding an employee's drug testing results or rehabilitation to a third party only with the specific, written consent of the employee authorizing release of the information to an identified person. Information regarding an employee's drug testing results or rehabilitation may be released to the National Transportation Safety Board as part of an accident investigation, to the FAA upon request, or as required by section VII.C.5 of this appendix.

VII. *Review of Drug Testing Results.* The employer shall designate or appoint a medical review officer (MRO). If the employer does not have a qualified individual on staff to serve as MRO, the employer may contract for the provision of MRO services as part of its drug testing program.

A. *MRO qualifications.* The MRO must be a licensed physician with knowledge of drug abuse disorders.

B. *MRO duties.* The MRO shall perform the following functions for the employer:

1. Review the results of the employer's drug testing program before the results are reported to the employer and summarized for the FAA.

2. Within a reasonable time, notify an employee of a confirmed positive test result.

3. Review and interpret each confirmed positive test result in order to determine if there is an alternative medical explanation for the confirmed positive test result. The MRO shall perform the following functions as part of the review of a confirmed positive test result:

a. Provide an opportunity for the employee to discuss a positive test result with the MRO.

b. Review the employee's medical history and any relevant biomedical factors.

c. Review all medical records made available by the employee to determine if a confirmed positive test resulted from legally prescribed medication.

d. Verify that the laboratory report and assessment are correct. The MRO shall be authorized to request that the original specimen be reanalyzed to determine the accuracy of the reported test result.

4. Process employee requests to retest a specimen in accordance with section VI.C of this appendix.

5. Determine whether and when, consistent with an employer's anti-drug program, a return-to-duty recommendation for a current employee or a decision to hire an individual to perform a function listed in section III of this appendix after failing a test conducted in accordance with this appendix or after refusing to submit to a test required by this appendix, including review of any rehabilitation program in which the individual or employee participated, may be made.

6. Ensure that an individual or employee has been tested in accordance with the procedures of this appendix and the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40) before the individual is hired or the employee returns to duty.

7. Determine a schedule of unannounced testing for an individual who has been hired or an employee who has returned to duty to perform a function listed in section III of this appendix after the individual or employee has failed a drug test conducted in accordance with this appendix or has refused to submit to a drug test required by this appendix.

C. *MRO determinations.* 1. If the MRO determines, after appropriate review, that there is a legitimate medical explanation for the confirmed positive test result that is consistent with legal drug use, the MRO shall conclude that the test result is negative and shall report the test as a negative test result.

2. If the MRO determines, after appropriate review, that there is no legitimate medical explanation for the confirmed positive test result that is consistent with legal drug use, the MRO shall refer the employee to an employer's rehabilitation program is available or to a personnel or administrative officer for further proceedings in accordance with the employer's anti-drug program.

3. Based on a review of laboratory inspection reports, quality assurance and quality control data, and other drug test results, the MRO may conclude that a particular drug test result is scientifically insufficient for futher action. Under these circumstances, the MRO shall conclude that the test is negative for the presence of drugs or drug metabolites in an employee's system.

4. In order to make a recommendation to hire an individual to perform a function listed in section III of this appendix or to return an employee to duty to perform a function listed in section III of this appendix after the individual or employee has failed a drug test conducted in accordance with this appendix or refused to submit to a drug test required by this appendix, the MRO shall --

a. Ensure that the individual or employee is drug free based on a drug test that shows no positive evidence of the presence of a drug or a drug metabolite in the person's system;

b. Ensure that the individual or employee has been evaluated by a rehabilitation program counselor for drug use or abuse; and

c. Ensure that the individual or employee demonstrates compliance with any conditions or requirements of a rehabilitation program in which the person participated.

5. Notwithstanding any other section in this appendix, the MRO shall make the following determinations in the case of an employee or applicant who holds, or is required to hold, a medical certificate issued pursuant to Part 67 of this chapter in order to perform a function listed in section III of this appendix for an employer:

a. The MRO shall make a determination of probable drug dependence or nondependence as specified in Part 67 of this chapter. If the MRO makes a determination of nondependence, the MRO has authority to recommend that the employee return to duty in a position that requires the employee to hold a certificate issued under Part 67 of this chapter. The MRO shall forward the determination of nondependence, the return-to-duty decision, and any supporting documentation to the Federal Air Surgeon for review.

b. If the MRO makes a determination of probable drug dependence at any time, the MRO shall report the name of the individual and identifying information, the determination of probable drug dependence, and any supporting documentation to the Federal Air Surgeon. The MRO does not have the authority to recommend that the employee return to duty in a position that requires the employee to hold a certificate issued under Part 67 of this chapter. The Federal Air Surgeon shall determine if the individual may retain or may be issued a medical certificate consistent with the requirements of Part 67 of this chapter.

c. The MRO shall report to the Federal Air Surgeon the name of any employee who is required to hold a medical certificate issued pursuant to Part 67 of this chapter and who fails a drug test. The MRO shall report to the Federal Air Surgeon the name of any person who applies for a position that requires the person to hold a medical certificate issued pursuant to Part 67 of this chapter and who fails a preemployment drug test.

d. The MRO shall forward the information specified in paragraphs (a), (b), and (c) of this section to the Federal Air Surgeon, Federal Aviation Administration, Drug Abatement Branch (AAM-220), 800 Independence Avenue, SW., Washington, DC 20591.

VIII. *Employee Assistance Program (EAP).* The employer shall provide an EAP for employees. The employer may establish the EAP as a part of its internal personnel services or the employer may contract with an entity that will provide EAP services to an employee. Each EAP must include education and training on drug use for employees and training for supervisors making determinations for testing of employees based on reasonable cause.

A. *EAP education program.* Each EAP education program must include at least the following elements: display and distribution of informational material; display and

distribution of a community service hot-line telephone number for employee assistance; and display and distribution of the employer's policy regarding drug use in the workplace.

B. *EAP training program.* Each employer shall implement a reasonable program of initial training for employees. The employee training program must include at least the following elements: The effects and consequences of drug use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug use and abuse; and documentation of training given to employees and employer's supervisory personnel. The employer's supervisory personnel who will determine when an employee is subject to testing based on reasonable cause shall receive specific training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use in addition to the training specified above. The employer shall ensure that supervisors who will make reasonable cause determinations receive at least 60 minutes of initial training. The employer shall implement a reasonable recurrent training program for supervisory personnel making reasonable cause determinations during subsequent years. The employer shall identify the employee and supervisor EAP training in the employer's drug testing plan submitted to the FAA for approval.

IX. *Employer's Drug Testing Plan.* -- A. *Schedule for submission of plans and implementation.* (1) Each employer shall submit a drug testing plan to the Federal Aviation Administration, Office of Aviation Medicine, Drug Abatement Branch (AAM-220), 800 Independence Avenue, SW., Washington, DC 20591.

(2) Each employer who holds a Part 121 certificate and each employer who holds a Part 135 certificate and employs more than 50 employees who perform a function listed in section III of this appendix shall submit an anti-drug program to the FAA (specifying the procedures for all testing required by this appendix) not later than 120 days after December 21, 1988. Each employer shall implement preemployment testing of applicants for a position to perform a function listed in section III of this appendix not later than 10 days after approval of the plan by the FAA. Each employer shall implement the remainder of the employer's anti-drug program no later than 180 days after approval of the plan by the FAA.

(3) Each employer who holds a Part 135 certificate and employs from 11 to 50 employees who perform a function listed in section III of this appendix shall submit an interim anti-drug program to the FAA (specifying the procedures for preemployment testing, periodic testing, postaccident testing, testing based on reasonable cause, and testing after return to duty) not later than 180 days after December 21, 1988. Each employer shall implement the interim anti-drug program not later than 180 days after approval of the plan by the FAA. Each employer shall submit an amendment to its approved anti-drug program to the FAA (specifying the procedures for unannounced testing based on random selection) not later than 120 days after approval of the interim anti-drug program by the FAA. Each employer shall implement the random testing provision of its amended anti-drug program not later than 180 days after approval of the amendment.

(4) Each employer who holds a Part 135 certificate and employs 10 or fewer employees who perform a function listed in section III of this appendix, each operator as defined in § 135.1(c) of this chapter, and each air traffic control facility not operated by,

or under contract with the FAA or the U.S. military, shall submit an anti-drug program to the FAA (specifying the procedures for all testing required by this appendix) not later than 360 days after December 21, 1988. Each employer shall implement the employer's anti-drug program not later than 180 days after approval of the plan by the FAA.

(5) Each employer or operator, who becomes subject to the rule as a result of the FAA's issuance of a Part 121 or Part 135 certificate or as a result of beginning operations listed in § 135.1(b) for compensation or hire (except operations of foreign civil aircraft navigated within the United States pursuant to Part 375 or emergency mail service operations pursuant to section 405(h) of the Federal Aviation Act of 1958) shall submit an anti-drug plan to the FAA for approval, within the timeframes of paragraphs (2), (3), or (4) of this section, according to the type and size of the category of operations. For purposes of applicability of the timeframes, the date that an employer becomes subject to the requirements of this appendix is substituted for [the effective date of the rule].

B. An employer's anti-drug plan must specify the methods by which the employer will comply with the testing requirements of this appendix. The plan must provide the name and address of the laboratory which has been selected by the employer for analysis of the specimens collected during the employer's anti-drug testing program.

C. An employer's anti-drug plan must specify the procedures and personnel the employer will use to ensure that a determination is made as to the veracity of test results and possible legitimate explanations for an employee failing a test.

D. The employer shall consider its anti-drug program to be approved by the Administrator, unless notified to the contrary by the FAA, within 60 days after submission of the plan to the FAA.

X. *Reporting Results of Drug Testing Program.* A. Each employer shall submit a semiannual report to the FAA summarizing the results of its drug testing program and covering the period from January 1-June 30. Each employer shall submit a annual report to the FAA summarizing the results of its drug testing program and covering the period from January 1-December 31. Each employer shall submit these reports no later than 45 days after the last day of the report period.

B. Each report shall contain:

1. The total number of tests performed and the total number of tests performed for each category of test.

2. The total number of positive test results by category of test; the total number of positive test results by each function listed in section III of this appendix; and the total number of positive test results by the type of drug shown in a positive test result.

3. The disposition of an individual who failed a drug test conducted in accordance with this appendix or who refused to submit to a drug test required by this appendix by each category of test.

XI. *Preemption.* A. The issuance of these regulations by the FAA preempts any State or local law, rule, regulation, order, or standard covering the subject matter of this rule, including but not limited to, drug testing of aviation personnel performing sensitive safety- or security-related functions.

B. The issuance of these regulations does not preempt provisions of State criminal law that impose sanctions for reckless conduct of an individual that leads to actual loss of life, injury, or damage to property whether such provisions apply specifically to aviation employees or generally to the public.

XII. *Conflict with foreign laws or international law.* A. This appendix shall not apply to any person for whom compliance with this appendix would violate the domestic laws or policies of another country.

B. This appendix is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of this appendix raises questions of compatability with that country's domestic laws or policies. On or before December 1, 1989, the Administrator shall issue any necessary amendment resolving the applicability of this appendix to such person on or after January 1, 1990.