

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Consolidated Case Nos.

01-1027

01-1303

01-1306

AIR TRANSPORT ASSOCIATION OF AMERICA, INC.,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent,

**AIR LINE PILOTS ASSOCIATION,
COALITION OF AIRLINE PILOTS ASSOCIATIONS
AND REGIONAL AIRLINE ASSOCIATION,**

Intervenors.

**On Petition For Review Of Order
Of The Federal Aviation Administration**

**INTERVENOR AIR LINE PILOTS ASSOCIATION'S OPPOSITION
TO AIR TRANSPORT ASSOCIATION'S AND REGIONAL AIRLINE
ASSOCIATION'S MOTIONS TO STAY**

Intervenor Air Line Pilots Association, International ("ALPA") opposes the Air Transport Association's ("ATA") and the Regional Airline Association's ("RAA") hereinafter ("Petitioners") motions for a stay of two actions of the Federal Aviation Administration ("FAA") concerning its safety regulation governing flight time limitations and rest for flight crewmembers. The first action complained of is a

November 20, 2000 Interpretation issued by the FAA's Office of Chief Counsel (ATA Motion to Stay, Exhibit A) and the second action is the FAA's Notice of Enforcement published on May 17, 2001. 66 Fed. Reg. 27,548. The FAA denied Petitioners' request for a stay on July 10, 2001 (RAA Motion to Stay, Exhibit 3).

Preliminary Statement

In this litigation, Petitioners contend that the FAA's rules concerning flight time limitations for pilots impose only prospective scheduling restrictions on air carriers. In their view, which is incorrect, the agency's November 20, 2000 Interpretation of its regulations clarifying that the rules impose an actual duty limit is a departure from past interpretations and constitutes rulemaking without the notice and comment required by the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

In 1985 the FAA promulgated amendments to its domestic scheduled flight time limitation regulations for flight crewmembers. 50 Fed. Reg. 29,307-322 (1985). The stated purpose of the amendments was to "protect against acute (short-term) fatigue by requiring specific rest periods in the 24 hours proceeding the completion of scheduled flight time and protect against chronic or long term fatigue by setting cumulative flight time limits." The FAA recognized that the amendments did not specifically establish duty periods but stated that the required rest periods "effectively limit the length of duty periods." By requiring a specified rest period in every 24-hour period, the time a pilot could be on duty during that period was established.

In the rule, 14 C.F.R. § 121.471(b), the FAA established a scheduling limitation for the required rest in a 24-hour period which ranged from 9 to 11 hours depending on the

amount of scheduled flight time. The FAA recognized that there would be occasions when actual flight time would exceed the scheduled time. Therefore, to provide air carriers flexibility, the agency provided for a reduction in the rest as specified in 14 C.F.R. 121.471(c). Two conditions were imposed, (1) the reduced rest could not be reduced under any circumstances and (2) a compensatory rest, which could not be reduced, must be given not later than 24 hours after the start of the reduced rest. 50 Fed. Reg. 29312, 29313 (July 18, 1985).

Thus, in 1985 the FAA made it clear in the preamble that the scheduled rest could be reduced due to operational delays but the reduced rest period could not be reduced further and must be provided. The mandated minimum 8-hour rest effectively imposed a 16-hour duty limit in a 24-hour period. The FAA recognized that the air carriers needed some flexibility to accommodate operational delays and therefore allowed for a reduced rest in the circumstances where the actual operation would exceed the scheduled times. They even allowed an air carrier to schedule a reduced rest in order to give the carriers even more flexibility. However, the FAA warned the carriers that if they choose to schedule a reduced rest, they would have to schedule realistically to avoid disruptions to their schedule since under no circumstances could rest be less than 8 hours.

The FAA said:

“The purpose of the rest reduction is to allow scheduling flexibility for the benefit of air carriers, pilots, and the flying public. Although this rule allows for scheduling a reduced rest, it does not allow for any reduction of the minimum reduced rest or of the minimum compensatory rest under any circumstances. Therefore, in order to benefit fully from this flexibility, an air carrier should schedule realistically to avoid any

possible flight schedule disruptions. The FAA expects that most air carriers will schedule at least 9- to 11-hour required rest periods. But, in those instances when air carriers need to schedule a shorter rest or when rest must be reduced because actual flight time has exceeded scheduled flight time, the rule allows for some scheduling flexibility.”

50 Fed. Reg. 29,313 (July 18, 1985).

For example, a carrier could schedule a pilot for less than 8 hours of flight with a 9-hour rest period.

Day 1
2400 - 0900 Rest
0901 - 1159 Duty

Day 2
2400 - 0900 Rest
0901 - 1159 Duty

If on Day 1, due to operational delays, the schedule were to be exceeded by $\frac{1}{2}$ hour, the carrier would have two options. They could continue the pilot into the next 24-hour period thereby retroactively reducing the 9-hour rest or replace the flight crew on the last flight segment so they could be released to rest at or before 2400 hours. However, if the carrier elected to retroactively reduce the rest meaning that the rest would have started at 00:30, then when the pilot is released on Day 2 at 00:30, a 10-hour compensatory rest is required.

Should the air carrier elect to schedule the pilot for a reduced rest on Day 1, then the carrier must be realistic and ensure that the schedule can be met because the pilot has no flexibility at the end of the day. The pilot must be released at 2400 for a 10-hour compensatory rest.

In FAA Interpretation 1998-7 (Exhibit 1 hereto) the FAA addressed the issue of whether a pilot may continue his duty if he knows at the time of departure that he will not arrive at his destination in time to be able to look back 24 hours and find at least a minimum 8-hour rest.

The FAA said:

“For your convenience, the facts set forth in your September 23 letter are restated below:

‘Flight deck crewmembers were scheduled for less than 8 hours of flight time and reduced rest of 8 hours during a 24 consecutive hour period. The following 24 consecutive hour period, they were scheduled for less than 8 hours of flight time and a compensatory rest of 10 hours that was scheduled to begin prior to 24 hours after the commencement of the reduced rest period. However, on their last flight segment of the period, they were given a ground hold for weather. When they were finally cleared for departure, the arrival time of the last segment would put them beyond the 24 hours after the commencement of reduced rest period. The crew would have returned to the gate and been relieved. However, they were directed to proceed, as the Company believed that FAR 121.471(g) allowed them to complete the schedule.’

You then correctly point out that §121.471(g) applies only to scheduling of flight time and that §121.471(c)(1) provides that a compensatory rest must begin no later than 24 hours after the commencement of a reduced rest. Nevertheless, you ask whether §121.471(g) would permit a compensatory rest period to begin later than 24 hours after the commencement of the 8 hour reduced period, assuming that a delay is caused by circumstances beyond an air carrier’s control.

The answer is no. It has been a long-standing FAA position that an air carrier may not assign, and a crewmember may not accept, an assignment that would encroach upon his or her rest period, including a minimum reduced or compensatory rest period. Indeed, in the preamble language to the July 18, 1985 final rule, the Agency stated that:

‘Although this rule [§121.471(c)] allows for scheduling a reduced rest, it does not allow for any reduction of the minimum reduced rest or of the minimum compensatory rest under any

circumstances. Therefore, in order to benefit fully from this flexibility, an air carrier should schedule realistically to avoid any possible flight schedule disruptions.'

See 50 Fed. Reg. 29,306, 29,313 (July 18, 1985) (emphasis added).

Thus, in this situation, both the air carrier and the crewmembers were potentially in violation of §121.471(b)(1). This is because both the air carrier and crew knew, prior to departure, that the scheduled arrival time of the last flight segment would force the crew to begin its compensatory rest period later than 24 hours after the commencement of the reduced rest period, and thus the requirements of the §121.471(c)(1) exception were not met. As characterized above, §121.471(c) is an exception to §121.471(b). Therefore, if a person does not meet the §121.471(b) criteria or the §121.471(c) exception elements, then that person can be charged with a violation of §121.471(b)."

The FAA went on to say the only circumstance that would allow an encroachment on the required rest period would be where the delay occurred in flight during the last flight segment.

The FAA, since the publication of the amendments, has consistently required that pilots must receive at least 8 hours of rest in a 24-hour period. The November 20, 2000 Interpretation is consistent with the FAA's explanation of the regulation when it was promulgated and as previously interpreted by the FAA. As we will show, the motions to stay are untimely and Petitioners have not met the requirements for a stay. We will show that: (1) they will likely fail on the merits; (2) they have not shown irreparable injury; (3) a stay will cause substantial harm to other parties; and (4) a stay would not be in the public interest. Virginia Petroleum Job Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958).

ARGUMENT

I. PETITIONER'S CASE WILL LIKELY FAIL ON THE MERITS.

Petitioners correctly state that agency interpretive rules, general statements of policy, or rules of agency organization, procedure or practice do not call into play the APA's notice and comment requirements. 5 U.S.C. § 553(b)(3)(A). The challenged agency actions here, the November 20, 2000 Interpretation and the May 17, 2001 enforcement policy notice, plainly fall under the interpretive rule, policy and practice exemptions to the APA. Further, because the November 20, 2000 Interpretation does not reverse or significantly revise either the 1985 regulation, or subsequent FAA legal interpretations, Petitioners' case will likely fail on the merits. See Association of American Railroads v. Dept. of Transportation, 198 F.3d 944, 950 (D.C. Cir 1999) (rejecting claim based on Alaska Professional Hunter Ass'n, Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999); finding no revision of existing interpretation). See also Truckers United for Safety v. FHA, 139 F.3d 934, 939 (D.C. Cir. 1998) (agency's description of rule as interpretive entitled to weight).

Here, the difficulty, if any, appears to be not that the FAA has changed its position but rather that the agency has never rigorously enforced the rule.

In the preamble to the 1985 final rule, the FAA unambiguously stated:

"[R]educed and compensatory rest period are absolute and may not be further reduced under any circumstances....

In order to assure that a flight crewmember receives both the reduced and compensatory rests within a reasonable period, the final rule requires, in all appropriate sections, that the compensatory rest begin no later than 24 hours after the commencement of the reduced rest period."

See 50 Fed. Reg. 29,306 at 29,312 (July 18, 1985) (emphasis added).

Indeed, ATA itself recognized less than one month after the FAA published its final rule in 1985 that the language of the rule cannot support the view now pressed by Petitioners. In an August 16, 1985 petition for reconsideration, ATA requested that the FAA insert the words “be scheduled to” in paragraphs (c)(1), (c)(2), and (c)(3) of Section 121.471, so that each section would refer to a (compensatory) rest period “that must be scheduled to begin no later than 24 hours after commencement of the reduced rest period.” See Exhibit 2 hereto. No such change was made.

Petitioners argue that the November 20, 2001 interpretation inappropriately establishes duty limits, but the FAA has long recognized, and put parties on notice, that the rest period does indeed serve to limit duty periods. In the preamble to the 1985 final rule, the agency expressly noted that, although the new rule did not specify a duty limit for flight crewmembers, “adequate and timely rest periods effectively limit the length of duty periods.” See 50 Fed. Reg. 29,306 at 29,308 (July 18, 1985). While the FAA declined in the final rule explicitly to “institute a limit on duty beyond the inherent limits necessitated by the required rest,” that very language reflected the FAA’s recognition that the required rest requirements inherently limit a flight crewmember’s duty time. Id. (emphasis added).

Were the FAA simply to require rest periods to be scheduled, as ATA and RAA suggest, the agency would be out of harmony with the statutory mandate to issue rules governing maximum hours or periods of service and would instead regulate only scheduling. But Congress did not direct the FAA to issue rules governing the

maximum scheduled hours or periods of service; it was concerned with actual service. The Federal Aviation Act of 1958 – as codified at 49 U.S.C. § 44701(a) – requires the Administrator of the FAA to issue “regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers.”

After a lengthy recitation of irrelevant hypothetical situations (which were not presented to the agency) and case law in this Circuit, Petitioner ATA, at page 12 of its motion, finally reaches the merits. Relying primarily on three FAA Interpretations, 1989-16, 1992-24 and 1994-2, ATA contends that the FAA did not employ “look back” calculations prior to the November 20, 2001 Interpretation to recalculate past periods on the basis of actual expected flight time. To support this reading of the FAA’s interpretations, Petitioners rely upon conclusory affidavits supplied by its member airline employees. *Id.* at 13.¹

The cited FAA Interpretations simply fail to support Petitioners’ position that the mandatory minimum rest required by 14 CFR 121.471(c) may be reduced in actual operations. Petitioners fail to discuss other FAA interpretations plainly setting forth the explanation that this required rest may never be reduced. *See e.g.*, FAA Interpretation 1998-7, discussed above, where the FAA emphatically rejected extension of a pilot’s duty day beyond 16 hours based on 14 CFR 121.471(g). Even the three Interpretations cited by Petitioners, ATA’s motion at 5-6, carefully read, fail to support Petitioners’

¹ ALPA notes that the affidavits filed by ATA and RAA include limited factual information based on the personal knowledge of the affiants. Rather, the affidavits are replete with speculation and prohibited legal argument. *Cf.* Fed. Rule App. P. 27(a)(2)(B)(ii) (argument by affidavit prohibited).

case.² Once the 1985 regulation is understood, the fog clears and it becomes apparent that Petitioners' arguments are not supported by any of the FAA Interpretations cited in their motions.

II. PETITIONERS WILL NOT SUFFER IRREPARABLE HARM.

ALPA represents 63,000 pilots at 38 U.S. airlines, the majority of airline pilots in the United States. These pilots currently comply with the November 20, 2000 Interpretation and the regulation that limits them to 16 hours of duty. See Exhibit 3 hereto. The Petitioners' speculation concerning the need to hire additional flight crewmembers, the potential loss of "tens of millions of dollars" due to flight cancellations, and cost to reprogram their scheduling computers is incorrect, unsupportable hyperbole. Even ATA's affiants admit that their conclusions as to compliance are based upon analysis of a pool of scheduling (not historic) data. The RAA affiants do not even attempt to make such projections. In other words, the ATA and RAA affidavits only state that it was predicted that a statistically minute percentage of pilots would have been on duty beyond 16 hours. Petitioners completely fail to provide this Court with the details of a single verified instance of any domestic flight

² Interpretation 1989-16 allows a final segment to be completed outside 24 hours when weather causes a "diversion." Since diversion is a term of art requiring that the aircraft be in flight on the last segment, the interpretation is consistent with the November 20, 2001 Interpretation in refusing to penalize carriers or pilots for unforeseen circumstances which arise after takeoff on the last segment. Interpretations 1992-24 ("It is important to note however, that the delay cannot infringe on the next required rest period") and 1994-2 ("the rules do not allow for reduction of the minimum reduced rest [8 hours] under any circumstances") likewise fail to support Petitioner's claims.

crew remaining on flight duty for longer than 16 hours.³ Presently, ALPA pilots are not exceeding 16 hours of duty and there has been no pilot hiring rush nor any large number of flight cancellations resulting from the duty limit. In fact those air carriers who submitted affidavits asserting irreparable harm if the 16-hour limit were imposed have collective bargaining agreements with their pilots that limit their actual time on duty to 16 hours with the majority of carriers limited to less than 16 hours of actual duty. See Exhibit 4 hereto. Since the air carriers are contractually limited to 16 hours or less of actual duty for their pilots, the enforcement of the 16-hour rule cannot have any adverse impact on them.⁴ Moreover, their scheduling systems track both FAA and contractual limits. Because they now must track actual duty times for contract purposes, they should not have to reprogram their computers extensively to track FAA limits.

Petitioners have failed to demonstrate any irreparable injury if a stay is not granted and for this reason the Court should deny the request for a stay of enforcement.

³ ALPA is aware of rare, limited instances over the last year of non-compliant behavior on the part of a few airlines. Where such conduct was discovered, the Association has moved vigorously to ensure the carrier complies with the 16-hour maximum duty requirement of 14 C.F.R. 121.471. These known instances are on the order of half a dozen to no more than 10. Presently, the ALPA national office is unaware of a single U.S. based air carrier for which ALPA is the collective bargaining agent and at which domestic pilots are forced to remain on duty past the 16-hour federal regulatory limit.

⁴ In support of its motion to stay, ATA submits here, but did not submit to the FAA, the Affidavit of David A. Swierenga, an employee of ATA who assumes that any new costs associated with compliance with 14 C.F.R. 121.471 will not be recoverable by the airlines. While denying that compliance with 14 C.F.R. 121.471 will impose any significant new costs on the airlines, ALPA attaches hereto in response as Exhibit 5, the Declaration of Ana McAhrn-Shultz, who concludes, contrary to ATA's assertion, that costs associated with mandatory regulatory compliance are in fact recoverable.

III. GRANTING A STAY WOULD NOT BE IN THE PUBLIC INTEREST AND WOULD BE HARMFUL TO OTHER PARTIES.

Petitioners want this Court to stay an FAA safety rule that would limit flight crewmembers to 16 hours of actual duty, twice the normal workday in America.⁵ In other words, the Petitioners are asking the Court to permit air carriers to have pilots on duty for unlimited periods of time. If a stay is granted those pilots who do not have contractual protections would have no duty limit. The pilots that would be affected transport the traveling public in regular scheduled service. Common sense and experience tells us that a person who has been awake for 17 hours, an hour to get to work and 16 hours on duty is not alert. Indeed, scientific evidence shows that after being awake 17 hours a pilot's cognitive function is equivalent to someone with a .05 alcohol level. See Exhibit 6 hereto. The FAA precludes a pilot from flying that has a .04 alcohol level, 14 C.F.R. 91.17(a)(4). If a stay is granted some pilots could be operating well over 16 hours to the detriment of the traveling public.

Petitioners' claim that a pilot can always be relieved from duty if he reports he is fatigued is hollow and unrealistic as fatigue is subtle, and often a pilot does not realize he is fatigued until it is too late. Moreover, it is documented that pilots have been fired for refusing to fly after claiming fatigue. See Hynes Declaration, Exhibit 3B hereto. In short, a stay will permit air carriers to push pilots to fly when they are tired which is detrimental to the pilots and the traveling public.

⁵ ATA's hypothetical, ATA motion at 3, ironically hypothesizes a regime in which pilots routinely work 14 to 16 hours – and ATA wants to extend even those hours.

IV. PETITIONER'S MOTION TO STAY IS UNTIMELY.

The motions for stay should be denied as untimely. Petitioners' motions to stay are procedural motions, which were required to be filed as soon as possible, but no later than 30 days after docketing. The due date of February 23, 2001, for ATA's motion to stay application of the FAA's November 20, 2000 Interpretation, was specified in the initial order sent out by the Clerk's office at the time of docketing. RAA was granted leave to intervene late but never requested leave to file late procedural motions. Nor is it clear that they would have had standing to move to stay the November 20, 2001 Interpretation had they filed such a motion in Case No. 01-1027. Petitioner ATA has offered no credible reason why it did not timely move to stay the November 20, 2000 agency action. This alone seriously undercuts ATA's argument that the November 20 Interpretation will result in hundreds of millions of dollars of irreparable harm.

Petitioners separately challenge the FAA's Notice of Enforcement policy dated May 17, 2001. Because an agency's decisions on enforcement policy, including whether or not to take enforcement action for regulatory non-compliance, are not substantive and therefore not reviewable, 5 U.S.C. 553(b)(3)(A); see Heckler v. Chaney, 470 U.S. 821, 831 (1985) (the Court has recognized for many years that an agency's decision not to prosecute or enforce is generally committed to an agency's absolute discretion), there was in fact no requirement for the FAA to publish notice of its enforcement policy, or to provide opportunity for notice and comment. See also ANR Pipeline Co. v. F.E.R.C., 205 F.3d 403, 407 (D.C. Cir. 2000) (policy statement does not become substantive rule merely because agency chooses to publish it in the Federal Register); Syncor Int'l Corp.

v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997) (statements of enforcement policy do not affect legal norm and are not reviewable); Pacific Gas and Electric Co. v. Federal Power Comm'n, 506 F.2d 33, 38-39 (D.C. Cir. 1974) (statement of policy which is not finally determinative of the rights to which it is addressed is not a substantive rule and not reviewable under APA). The May 17, 2001 FAA notice of enforcement policy was a non-substantive, non-reviewable agency action. This judicial recognition of the existence of agency discretion is due in no small part to the unsuitability for judicial review of agency decisions which lead to little or no enforcement in certain areas based upon the ordering of priorities. 470 U.S. at 831.

The FAA administrator is given substantial discretion by Congress to prescribe and enforce the air safety regulations. To enforce the various substantive provisions of the Federal Aviation Act, the Administrator shall prescribe maximum hours or periods of service of airmen and other employees of air carriers (49 U.S.C. § 44701(a)(4)); has investigative and enforcement discretion (id. §§ 46101(a)(2), (3)); may bring a civil suit for violations of the act (id. § 46106); and shall conduct inspections and exercise discretion with respect to amending, modifying, suspending or revoking an air carrier's operating certificate (id. § 44709(b)(1)(A)). See 470 U.S. at 831-32.

The danger that agencies may not carry out their delegated powers with sufficient vigor does not lead one to the conclusion that the courts are the appropriate body to police this aspect of their performance. These sections do not mandate prosecution of every violator of the FARs but commit those decisions to the sound discretion of the Administrator. The Act's inspection and enforcement provisions thus

commit complete discretion to the Administrator on how the provisions are to be exercised. Heckler v. Chaney, 470 U.S. at 835.

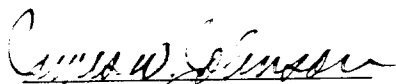
ATA and RAA here, essentially complain that the FAA changed its interpretation of 14 C.F.R. 121.471 because it now intends to enforce the FAR in that arena. As has been explained, the November 20, 2001 Interpretation could itself have been the subject of a timely filed motion for stay, but Petitioner ATA elected not to file such a motion.

Because the agency's May 17, 2001 notice of enforcement policy in this arena is unreviewable, Petitioners are unable to bootstrap its present motion for a stay to meet the Court's February 23, 2001 deadline for procedural motions.

CONCLUSION

For the foregoing reasons, Petitioner's motion to stay should be denied.

Respectfully submitted,



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July 27, 2001

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2001, copies of the foregoing **Opposition** were served via next business day delivery service, upon the following:


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