

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

In re:)
)
Antidrug and Alcohol Misuse) Docket No. FAA-2002-11301
Prevention Programs for Personnel) (Notice No. 02-04)
Engaged in Specified Aviation)
Activities)

Comments of the Air Transport Association of America, Inc.

The Air Transport Association of America, Inc. (“ATA”) submits these comments in response to the Notice of Proposed Rulemaking published in the Federal Register on February 28, 2002 (67 Fed. Reg. 9366) (the “NPRM” or “Notice”). The Notice proposes to clarify certain regulatory language, increase consistency between the antidrug and alcohol misuse prevention regulations, and make certain other changes to these regulations.

ATA appreciates the opportunity to comment on the changes proposed in the NPRM. ATA is the principal trade and service organization for the U.S. airline industry. ATA’s members¹ will be directly affected by the proposed rule. ATA’s members account for more than 95% of the passenger and cargo traffic carried annually by U.S. scheduled airlines. ATA’s members also account for approximately 50% of all U.S. passengers carried in international air transportation.

In addition, ATA’s members employ over 250,000 individuals subject to drug and alcohol testing under the antidrug and alcohol misuse regulations. In calendar year 2001,

¹ Members are: Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International Airlines, Federal Express, Hawaiian Airlines, JetBlue Airways, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are: Aerovias de Mexico, Air Canada, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

ATA's members conducted over 90,000 drug screens and nearly 28,000 alcohol screens on their covered employees. Accordingly, ATA has a strong interest in ensuring that these regulations are operationally efficient and do not impose any unnecessary costs. In 2001, the U.S. airline industry lost \$7.8 billion, including compensation paid under the Air Transportation Safety and System Stabilization Act. In the first half of 2002, the industry lost more than \$3.5 billion, and for the full year ATA estimates a \$5 billion loss, perhaps more.

Our review shows that certain changes proposed in the NPRM would lead to operational inefficiencies and unnecessary costs, and we oppose those specific proposals. Our concerns and recommended solutions are discussed below. Additionally, however, we do not believe that the justification for the NPRM articulated in the "Analysis of Benefits" section of the NPRM – potentially reducing the number of employer errors and agency enforcement actions – is sufficient under the Administrative Procedure Act, Executive Order 12866 and applicable DOT regulatory policies and procedures to support this rulemaking. This issue is discussed below in footnote 3.

A. Appendix I – Drug Testing Procedures

1. Pre-employment Testing. ATA's primary concern is with the proposed revisions regarding pre-employment testing under § V.A. of Appendix I. FAA proposes to revert to the pre-1994 requirement that an employer have the results of a pre-employment test before it can "hire" an individual. In support of this proposal, FAA states that some employers have failed to give pre-employment tests, and FAA attributes these failures to confusion

about the 1994 language that requires the pre-employment test to be given before an individual first performs a safety-sensitive function.

Based on the experience of our members, we respectfully disagree with the FAA's conclusion that a language change is needed. Our experience with this provision, which as noted above is considerable, is that failures to perform pre-employment testing have not been the result of confusion about when these tests must be performed, but instead because of a variety of other reasons: simple human error/forgetfulness, inadequate administrative systems, or occasionally the need to get someone in place in a position. The change proposed by FAA will not prevent these kinds of errors from occurring in the future.

On the other hand, the basic reason for the 1994 language – flexibility that realistically reflects the overall hiring process – has not changed and is as valid today as it was in 1994. Although the preamble to the FAA's August 19, 1994 final rule simply states that pre-employment tests must be given (and results obtained) prior to the first time an individual performs a safety-sensitive function, the DOT "Common Preamble" accompanying the publication of the alcohol abuse prevention regulations on February 15, 1994, fully explains the reasoning for this change. In the Common Preamble, DOT notes that the change was made to make the pre-employment test more meaningful and to give employers needed flexibility:

To make such a [pre-employment] test more meaningful, we are requiring a covered employee to undergo alcohol testing any time prior to the first time the employee performs safety-sensitive functions for an employer. This could occur the first time that the employee performs a safety-sensitive function after being hired or after a transfer within the employer's organization. Some commenters suggested that such tests only be required upon a conditional offer of employment. The rules give the employer the flexibility to test at any time during the hiring process, including before or after the employee receives a conditional offer of employment, or before (preferably just before) the employee

starts performing safety-sensitive functions . . . The latter choice will enable the employer to avoid the cost of testing several applicants for each job, tie pre-employment tests to the performance of safety-sensitive functions and accommodate the statutory language requiring a pre-employment test for an “employee”, rather than an applicant. (Emphasis added). 59 Fed. Reg.7321 (Feb. 15, 1994).

The FAA’s desire to make it easier for employers to avoid pre-employment testing failures by changing this rule is laudable,² but does not outweigh the need for flexibility to conduct pre-employment testing in a way that is operationally efficient and cost-effective. The flexibility the rule affords is critical to ATA members because the hiring and training process for safety-sensitive employees can be complex and take a long time. And there can be a considerable amount of hiring for covered functions. Between 1999 and 2000, flight attendant employment increased by 8138³ in the industry, and in 2000, 19,030 pilots were hired.⁴

ATA members need the flexibility to conduct the pre-employment test at a time that makes sense in the course of the overall hiring process. For example, the pilot hiring/training process can take anywhere from four to six months, and even longer on occasion. During this time, prospective pilots regularly drop out. Given both the length of the process and that some individuals ultimately will not make it through the process, it

² FAA does not contend that the proposed change will measurably improve safety, nor does it quantify the information it relies on to contend that the 1994 change caused more pre-employment test failures. Instead, FAA simply states its belief that the proposed change will reduce pre-employment testing failures. Regardless of the number of failures, which we believe is very small based on our experience, what is absolutely true is that no accident or incident has been attributed to a missed pre-employment test. This is not surprising. In 2001, ATA members had 175 verified positive pre-employment tests, a detection rate of 0.6%. In order to implement its authority reasonably, FAA must consider this information in the overall safety perspective, including the fact that these employees are subject to random drug and alcohol testing. When put into this broader perspective, FAA cannot reasonably say that the proposed change has any, much less a measurable, safety benefit, and to implement this change would be arbitrary and capricious.

³ ATA Annual Report 2000.

⁴ According to AIR Inc., a pilot recruitment firm, the breakdown in 2000 was: majors 4782, nationals 6601, jet operators 2805, non-jets 2782, fractionals 1363, and others 697.

makes no sense to require them to be pre-employment tested before being “hired.” The same issues and concerns apply to flight attendant and mechanic hiring, although the hiring/training process may be shorter.

For these reasons, ATA urges FAA to retain the current text of § V.A.1. of Appendix I, so that it continues to read as follows:

Prior to the first time an individual performs a safety-sensitive function for an employer, the employer shall require the individual to undergo testing for prohibited drug use.

Also, proposed § V.A.2. should be revised to read as follows:

No employer shall allow an individual transferring from a non-safety-sensitive position to a safety-sensitive position unless the employer receives a negative drug test result for the individual prior to the first time he or she performs a function listed in Section III.

Additionally, FAA must revise paragraph 3. As noted above, the hiring/training process for pilots can take three to six months or longer, and the hiring/training process for flight attendants can also take several months. The 60-day period proposed in paragraph 3 would require ATA members to conduct at least two pre-employment tests on these individuals, without any public safety benefit and at considerable additional cost. We recommend that the 60-day period be deleted. FAA policy on pre-employment tests should be that once an applicant is tested and a negative result is returned, he or she need not be pre-employment tested again. Alternatively, the 60-day time period should be changed to 180 days so that it is realistic. In either case, FAA policy should not be driven by “what if” scenarios that might occur only in very rare instances. Rather, FAA policy should be based on the realistic hiring and training practices of the segment of the industry that employs most of the employees affecting public safety – the ATA member airlines.

2. Employees Who Must be Tested. In the preamble, FAA explains that it is clarifying the existing requirement that employees of contractors who perform covered safety-sensitive functions are subject to the testing required under Appendix I, and that this requirement “means performance under any tier of a contract.” *See* 67 Fed. Reg. at 9369-70. The preamble states that implementation guidance issued in 1989 and 1990, which clarified that testing requirements extended to subcontractors only if they took airworthiness responsibility for the work they performed, will no longer be followed.

ATA opposes changing this interpretation, regardless of whether it is viewed as formal or informal guidance, regardless of whether it constricts the potential reach of the regulation, and regardless of the nature of the document in which it was published. The point here is that in 1990 the FAA believed this interpretation to be justified from safety, operational and legal perspectives. Nothing has changed to warrant a change to the FAA’s interpretation of its own regulation.

The existing interpretation excludes subcontractors whose work is subject to further review and acceptance as complete and airworthy. This interpretation fairly and effectively balances the safety goals of drug (and alcohol) testing and the operational, practical and economic impacts of implementing these testing programs in commercial aviation. Simply because the regulation technically *can* reach every single person who falls within the covered function definitions does not mean that every such person *should* be included. Under the Administrative Procedure Act, other statutes and executive orders, the FAA is obligated to implement its regulations in a way that is sensible, fulfills underlying statutory goals, and ensures that the societal burden of its regulations does not exceed the benefit. The existing interpretation achieves these goals.

3. Periodic Testing. ATA supports elimination of the requirement for periodic testing.

4. Reasonable Cause Testing. FAA proposes to add a new sentence to § V.E. to allow, but not require, employers to make reasonable cause determinations regarding contractor employees, and to refer the contract employee for testing under the contractor's drug and alcohol programs. ATA opposes this proposal because it would place our members in the middle of a sensitive employer-employee situation with regard to someone else's employee. This provision, if adopted, would create administrative burdens and legal risks that are unacceptable. In particular, it would open up employers to litigation by contract employees alleging negligence, wrongful interference with contract, and discrimination, regardless of whether the employee tests positive. Moreover, even if an airline-employer makes a proper and timely referral, there is no guarantee that the contractor will conduct the testing in a timely manner. This is a particular concern if alcohol abuse is suspected.

FAA expresses a generalized concern about confusion among employers and contract employees not being tested, but does not quantify this concern and does not provide information about specific instances. Under these circumstances, there is no compelling safety or regulatory reason to place airline-employers in this position.

5. Implementing Antidrug Programs. ATA supports the proposal to eliminate the requirement for companies to have FAA-approved plans in favor of tracking pertinent information through the Operations Specifications SubSystem ("OPSS"). However, we are very concerned that this solely administrative change will create enforcement confusion within the FAA. This is because FAA Principal Operations Inspectors ("POIs") are

responsible for the content of air carrier Operations Specifications, and exercise compliance and enforcement authority over air carrier operations. Without clear, strong and repetitive guidance from the Drug Abatement Division, POIs may require carriers to submit additional or different information than required by this Part, and may reject otherwise compliant submissions. We have already heard anecdotal evidence of this happening to air carriers.

For these reasons, FAA should state clearly in the final rule that POIs are not authorized to require different or additional information, and that the Drug Abatement Division has exclusive authority over air carrier operations specifications submitted in compliance with this Part. We also recommend that FAA identify a contact person within the Drug Abatement Division for air carriers to contact in the event of a problem regarding its operations specification under this Part.

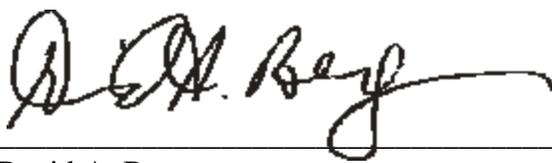
In addition to the above, we recommend that FAA identify what documentation employers should obtain from contractors to prove that they have compliant antidrug and alcohol abuse prevention programs in place. Since contractors will no longer have plan approvals issued by the FAA to demonstrate compliance, FAA needs to specify an alternative. We recommend the contractor's operations specification under this Part, but other documentation may make sense as well. To avoid confusion and a potential enforcement trap, FAA should specify in this regulation the documentation that contractors must provide to employers.

6. Permanent Disqualification. One issue the NPRM does not address, but should, has to do with implementing the permanent disqualification from service (in a covered function) requirement under Appendix I § VI.F, and Appendix J § V.B. Appendices I and J do not establish an adequate system to ensure that prospective employers can identify

employees who are permanently disqualified. In particular, because the regulations require records of confirmed positives to be retained for only five years, a limit we support as reasonable, an applicant who fails to disclose prior positive tests that are more than five years old (or at all) could avoid the permanent disqualification.⁵ But there is a simple solution.

Employers already submit considerable data to FAA in their annual MIS reports. It would be very easy to include the names of individuals who fail drug and alcohol tests, and for the FAA to maintain a list of those persons. This would allow the FAA to identify disqualified individuals and to make that information available, with appropriate safeguards, to prospective employers. There would be little cost or administrative burden on the FAA and employers, and the purpose of the permanent disqualification rule would be advanced to the benefit of the flying public. ATA is not aware of any legal impediment to the FAA collecting this information and making it available to covered employers. We urge FAA to implement such a system in the next fiscal year.

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⁵ In recent audits, FAA inspectors have instructed ATA members to ask previous employers for applicant records going back only two years. FAA should clarify if potential employers should request from previous employers failed test information going back 2 or 5 years. If only 2 years, then this further increases the likelihood that an applicant could frustrate the permanent bar.