

January 24, 2011

Docket Operations, M-30
U.S. Department of Transportation
1200 New Jersey Avenue, SE
West Building Ground Floor
Room W12-140
Washington, DC 20590-0001

Delivered electronically via www.regulations.gov

**RE: DOCKET NO. FAA-2010-1259, NOTICE OF PROPOSED INTERPRETATION,
INTERPRETATION OF REST REQUIREMENTS**

The National Air Transportation Association (NATA), the voice of aviation business, is the public policy group representing the interests of aviation businesses before Congress, federal agencies and state governments. NATA's 2,000 member companies own, operate, and service aircraft. These companies provide for the needs of the traveling public by offering services and products to aircraft operators and others such as fuel sales, aircraft maintenance, parts sales, storage, rental, airline servicing, flight training, Part 135 on-demand air charter, fractional aircraft program management and scheduled commuter operations in smaller aircraft. NATA members are a vital link in the aviation industry providing services to the general public, airlines, general aviation, and the military.

NATA appreciates the Federal Aviation Administration (FAA) publishing the Notice of Proposed Interpretation (the Notice) and its solicitation of comments prior to acting on the matter and respectfully submits the following comments for consideration.

NATA objects to the proposal to re-interpret § 135.267(d) and recommends the FAA allow existing interpretations of that regulation to stand until rulemaking to revise the flight, duty and rest regulations applicable to Part 135 unscheduled operations is initiated. NATA further recommends that such rulemaking reflect the work of the Part 135/125 Aviation Rulemaking Committee (Part 135 ARC) recommendations¹.

¹ The flight, duty and rest subgroup of the 135 ARC developed a comprehensive proposal to address unscheduled/on-demand operations under 14 CFR Part 135. See docket FAA-2002-13923, document ID FAA-2002-13923-0127.

No Safety Justification

The FAA has not provided any statistical or anecdotal evidence that safety is or has previously been compromised by the current interpretation of § 135.267(d). We are not aware of Part 135 operations where crew fatigue resulting from an extension of duty for late arriving passengers or cargo (or for a ground delay encountered after taxi and prior to “wheels up”) was directly linked to an accident. Indeed, the existing FAA interpretations make reference to the fact that the provisions of § 91.13 apply to any operations conducted under the current interpretations of § 135.267(d) and that the operation may not occur if there is a threat to safety.

The FAA’s only apparent justification for the proposal to re-interpret § 135.267(d) is that the “FAA has determined it is illogical that nearly-identical (emphasis added) regulatory language” is interpreted in two different ways. There is no absence of logic when one understands that the rules are not identical and that the differences are both significant and relevant to the discussion and ultimate interpretations of the rules.

Circumstances Beyond Control

The FAA seems to be confusing its own regulations in the attempt to revise the interpretations of § 135.267(d).

Section 121.471(g), which was addressed in the so-called Whitlow interpretation, deals with flight time and permits crewmembers to exceed flight time limits when, “due to circumstances beyond the control of the certificate holder (such as adverse weather conditions), [flights] are not at the time of departure expected to reach their destination within the scheduled time.” The FAA incorrectly associates this rule to § 135.267(d).

Section 121.471(g) is in fact much more akin to § 135.267(e). Both regulations stipulate the conditions under which *flight time* may be exceeded for “circumstances beyond the control” of the certificate holder or crewmember. NATA points out the consistent use of the phrase “circumstances beyond the control” in both regulations. Importantly, neither of these regulations addresses crew look-back rest or duty time requirements.

In the Whitlow letter², the FAA states that the exception of § 121.471(g) “only applies to the scheduling of flight time. It is inapplicable to, and does not excuse, a violation of the rest requirement.”

The very interpretation that the FAA wishes to use to restrict the look-back rest exception of § 135.267(d) clearly states that § 121.471(g) *only applies to flight time and has no bearing on rest requirements*. Therefore, NATA argues that the FAA cannot rely upon the Whitlow letter interpretation of the “circumstances beyond the control” exception for extending flight time to justify a change in the interpretation of § 135.267(d) rest requirements.

The FAA has interpreted that exception within § 121.471(g) is limited to enroute weather or air traffic control delays that were not reasonably known prior to departure. NATA does not necessarily disagree with the application of this interpretation to § 135.267(e) because that rule applies to valid reasons for exceeding *flight time* limitations and has language, “circumstances beyond the control,” that is identical to the Part 121 rule.

The FAA does not accept unplanned maintenance or late arriving passengers or cargo as suitable reasons for exceeding flight time restrictions. Indeed, it hard to imagine how a late arriving passenger could realistically result in increased flight time, which is why the FAA does not view it as a permissible reason to extend flight time. In contrast, it is quite obvious how late arriving passengers or cargo could result in more time on duty than originally planned.

Scheduled Completion Of Any Flight Segment

vs

Planned Completion Time Of The Assignment

The regulations requiring look-back rest in § 121.471(b) & (c) and 135.267(d) are not identical and should not be subject to identical interpretation.

² Response to Question 5 of “Situation 2” in November 20, 2000 Letter to Captian R. Rubin from J. Whitlow, Deputy Chief Counsel.

The Part 121 rules stipulate that a pilot cannot accept a flight time assignment unless, during the 24 hours “preceding the scheduled completion of any flight segment,” the required rest period exists.

In contrast, § 135.267(d) states that a pilot may not accept an assignment unless the required 10-hour rest period is located in the “24-hour period that precedes the planned completion time of the assignment.”

Through the Notice, the FAA is attempting to equate the terms “scheduled completion of any flight segment” and “planned completion time of the assignment.” NATA strongly objects. Had the original drafters of the regulations intended to have a regulatory requirement for Part 135 that was identical to Part 121, they would have very likely simply copied the Part 121 rule word-for-word. This was not done. These phrases are not interchangeable, and the choice for distinct regulatory language should not and cannot be overlooked or minimized.

The FAA has previously issued definitive interpretations of § 135.267(d). The prior interpretations presented factual scenarios that are, in all relevant ways, identical to the scenario presented in the Notice’s “Background” section. There has been no lack of clarity or misunderstanding of how the FAA views the phrase “planned completion time of the assignment.” The FAA has consistently interpreted that late arriving passengers/cargo and unexpected maintenance were legitimate reasons for extending the planned assignment time.

“The key to the applicability of § 135.267(d) is in the final phrase “*planned completion time of the assignment*” (emphasis added). If the original planning is upset for reasons beyond the control of the crew and operator, the flight may nevertheless be conducted, though crew duty time may extend beyond the planned completion. This assumes, of course, that the original planning was realistic.

As to what circumstances are beyond the control of the operator and crew, the FAA has taken the position that delays caused by late passenger arrivals,

maintenance difficulties, and adverse weather constitute circumstances beyond the certificate holder's control."

Interpretation 1992-4 to Fred R. Hutson.

In NATA's view, it is clear that the regulatory language of "flight segment" in § 121.471(b) and (c) requires on-going evaluation of the look-back rest requirements on a "per flight segment" basis. It is also clear, as it has been to the FAA until publication of the Notice, that the look-back rest requirements of § 135.267(d) establish a different minimum regulatory standard. The FAA has on multiple occasions definitively stated that Part 135 unscheduled operators are to evaluate their compliance with the look-back rest requirements on an "assignment" (rather than segment) basis and that their meaning of the word "assignment" is properly construed to include multiple flight segments.

Applying Part 121 Standards To Part 135

NATA objects to the attempt to apply situations, regulations and interpretations for scheduled Part 121 domestic operations to unscheduled Part 135. The FAA is drawing parallels that do not exist throughout the Notice. In fact, it would be more logical for the FAA to attempt to align Part 121 supplemental rule interpretations to Part 135 as both relate to unscheduled activity. Likewise due to the international aspects of Part 135 the FAA could even attempt a logical argument that some of the Part 121 flag rules are more akin to Part 135. Each of these makes more sense than the correlation the agency is attempting to draw between Part 121 domestic rules and Part 135 unscheduled rules. Of note is that each of those rules for the different Part 121 operations is less strict and provides more flexibility than the current Part 135 unscheduled rules.

The Part 135 rest requirements are already in many ways more stringent than any Part 121 requirement. Section 135.267(d) requires, without exception, the provision of a ten-hour rest period prior to beginning duty, regardless of the length of planned flight(s) or anticipated duty time. This is unlike Part 121 rules where the FAA permits

a planned reduction in rest down to eight hours under domestic rules and rest periods are assigned following duty under both flag and supplemental rules.

By attempting to apply Whitlow to Part 135, the FAA is imposing one of the limitations of Part 121 without providing the accompanying flexibilities available under those same Part 121 rules. Part 135 unscheduled rules have no provision for reducing rest. At all times, even under the current exception for unplanned extended duty assignments, the crew must have received a full ten-hour rest period prior to beginning duty.

Section 121.471 (and its companion for scheduled Part 135 operations in § 135.265) has provisions to provide reduced rest that makes working under a “per segment system” for evaluating look-back rest far more workable. No such system exists for Part 135 unscheduled operations, nor is FAA proposing to create one.

It is critical to understand that even when an unanticipated delay, consistent with current interpretations that allow the duty to continue, occurs during an assignment under § 135.267(d) (and therefore a portion of the 10-hour rest period is now outside the 24-hour look-back), it doesn’t negate the fact that the ten hours of rest did in fact occur.

As evidenced by the fact that the current rulemaking proposal to revise Part 121 requirements was not issued until 2010, the FAA has apparently been satisfied with the safety provided by some pilots receiving a planned rest period of as little as eight hours, resulting in having a planned duty period of sixteen hours. Under § 135.267(d), a rest period must always be at least ten hours and, therefore, no duty period may ever be *planned* for more than 14 hours.

For this reason, NATA argues that the rest and duty cycles are far better for the Part 135 pilot even under the current interpretations that allow for unexpected circumstances to extend duty.

Rulemaking Required

In the Notice, the FAA wrongly states that the prior interpretations allowed extension of duty beyond the “permissible 14-hour period” (75 FR 80747). In fact, every FAA interpretation of § 135.267(d) definitively states that there is no explicit limitation on duty time, 14 hours or otherwise. This is an important fact, because if the FAA follows through with the proposed interpretation the agency will be establishing a maximum 14-hour duty period.

The FAA cannot require indirectly, via an interpretation, that which the regulations do not directly require and that all prior interpretations definitively state: *that there is no limit on duty established in § 135.267(d)*.

The proposed interpretation establishes a hard limit on duty, providing only a narrow exception for delays incurred while airborne on the last flight leg of an assignment. The FAA is creating a new regulatory requirement that, in our view, mandates rulemaking.

This is uniquely different from the circumstance that led the court to uphold the Whitlow letter. In that case, the FAA had not previously issued a definitive interpretation of the circumstances under which the full rest period could not be found in the prior 24-hour look-back period. That case also dealt extensively with the flight time limitations of Part 135. The flight time limitations of Part 135 unscheduled operations are not at issue in the Notice and the new interpretation it proposes.

Finally, as acknowledged in the Notice by reference to the prior interpretations of § 135.267(d), the FAA has previously and definitively explained in detail the circumstances under which the required 10-hour rest period in § 135.267(d) may not fall completely within the 24-hour look-back.

Unintended Consequences

Because the FAA’s proposed interpretation imposes the “per flight segment” evaluation of look-back rest without providing the opportunity for exceptions (such as

reduced rest) that are available to Part 121 carriers, there will be several unintended consequences.

Scheduled Part 121 Domestic carriers typically have flight crews based at or within a reasonable distance to every location they serve. Part 135 on-demand carriers do not have crews at their destination airports.

When a Scheduled Part 121 Domestic carrier must cancel a specific flight due to the Whitlow interpretation, the carrier can call a reserve crew to duty to take the flight, albeit with a likely departure delay. That initial crew can then enter a rest period and resume duty assignments following that rest. More than likely, the carrier has arrangements with a local hotel that can accommodate the crew for their rest period.

In the case of an on-demand operator, if the flight is cancelled because of a delay encountered prior to “wheels up” (which is the standard the FAA seeks to apply), the potential outcomes would create additional safety hazards and costs.

The carrier may dispatch an additional crew and aircraft to that location so the passengers or cargo can be transported to the planned destination. In such a case, the crew that hit their duty time limit would be well within the regulations then to fly their empty aircraft back to the home base as a Part 91 repositioning flight. This presents concerns that the FAA has failed to identify, address and justify:

- By requiring another aircraft and crew, the number of operations has increased. With every additional take off and landing required, the exposure to risk has increased.
- The initial flight crew could be unnecessarily exposed to additional risk because the flight is conducted under Part 91 requirements, whereas if the flight had been permitted to operate as planned it would be held to the higher operational requirements of Part 135.

- The costs of operating the secondary aircraft are not at all considered — nor are the opportunity costs for both operator and customer. The operator now has two aircraft out and could miss another charter opportunity. The customer is unable to be where he/she wanted and when, and/or the cargo will not reach its destination on time. If the operator chooses not to reposition the original aircraft and crew under Part 91, expenses for obtaining a suitable rest facility for the crew and for obtaining hangar or ramp parking for that aircraft during the rest period are incurred.

In the event of a charter flight involving a patient transport, the effect of the proposed interpretation could be life threatening. In addition to the concerns with a “typical” charter flight explained above, the potential for loss of life exists in an air medical situation. Often, when an aircraft has been chartered for a patient transport, it is because the patient is in such a fragile state that over-the-road transportation is simply not recommended. It has happened that the departure of the aircraft is delayed due to a medical emergency experienced prior to the aircraft’s departure. By restricting the ability of the flight crew to wait for the patient to be sufficiently stabilized prior to departure (and thus extending duty), the FAA is jeopardizing the safety and the life of those patients.

Establishing that the crew must determine their compliance with the 14-hour duty limit prior to “wheels up” places an unnecessary mandate on crews that could lead to hurried completion of pre-takeoff checks and a reduction in safety. A crew that knows that when they start the engines that they are “close” to the limit may feel unintended pressure to just “get through the lists and get out” or perhaps increase their taxi speed so that they are wheels up before the clock expires. NATA posits that it would make far more sense and be in the interest of safety for any such restriction to apply prior to the beginning of flight time (per §1.1 definition) rather than wheels up.

Finally, because Part 135 operators operate under one set of rules regardless of whether they operate internationally, the FAA could easily, and quite realistically, create fatigued pilots by adopting the proposed interpretation. Consider an international flight ultimately bound for the United States that is planned to require 14

hours of duty (due to time waiting for the passengers to complete business), but only 9 hours of flight time.

If, because of a change in winds aloft, the planned final flight is now expected to take 9 hours and 2 minutes, creating a duty period of 14 hours and 2 minutes, the crew must abandon the flight. However, it completely complies with the regulations for the carrier to assign the crew immediately to a 10-hour rest period, require them to report for duty following that rest and then complete the flight. In this example, the crew, which was planning to be awake for approximately the next 10 hours (and had rested previously), must now try to sleep when they are not at all tired. They will be expected to be awake and alert for duty when they were reasonably expecting to be off duty and able to recover from their flight.

NATA, and all scientific information on fatigue available, supports the conclusion that the crew would have been far better off having had a duty period of 14 hours and 2 minutes rather than flipping their entire duty/rest cycle around. However, because the current Part 135 regulations do not provide the flexibility and exceptions that Part 121 Flag and Supplemental rules do, flipping the pilots' duty/rest cycle is the only option.

NATA believes the FAA must consider and address these valid concerns and that this is best accomplished by engaging in a complete revision to the Part 135 rules for crewmember flight, duty and rest.

135 ARC Recommendations

Several years ago, the industry provided the FAA with a complete solution to the many issues surrounding crew flight, duty and rest requirements for Part 135 unscheduled operations. The FAA should act on those comprehensive recommendations rather than selectively import Part 121 requirements and manipulate the current regulations via legal interpretations.

The Part 135 Flight, Duty and Rest (FDR) Subgroup was a part of the Part 135 ARC and included both industry and FAA representatives. The FDR subgroup met several times over a one-year period and developed a comprehensive proposal to address

unscheduled/on-demand operations under Part 135. The FDR subgroup proposal addresses all of the major areas of concern raised by the National Transportation Safety Board, the FAA and the industry, as applied to the unique Part 135 operating environment. NATA urges the agency to utilize the Part 135 ARC's work as a complete solution rather than to attempt to implement one-size-fits-all rules by applying interpretations applicable to Part 121 or selectively adopting only portions of the Part 135 ARC recommendations.

Indeed, the Part 135 ARC recommended establishment of a duty limit, that duty time could be extended under only a few circumstances and that there would be a hard limit on duty, much like the restrictions established in Whitlow. However, the many restrictions proposed by the Part 135 ARC were balanced by a host of other regulatory changes that must also be implemented to achieve the intended safety results without imposing unjustified costs that exceed those benefits.

The recommendations for pilot flight, duty and rest regulations submitted by the Part 135 ARC would dramatically improve upon current regulations while still permitting the operational flexibility inherent to the continued ability to conduct on-demand operations. The following offer a brief overview of the merits of that proposal.

- Science-based fatigue principles were applied to all areas. The window of circadian low is accounted for by requiring operators to establish pilots on a regularly planned, predictable sleep/wake cycle. Changing a particular pilot's cycle requires provision of ample transition time.
- Rest is defined and protected. When a rest period is assigned, it would be at least 10 hours. There is no provision for reducing rest under any circumstances. The system recognizes circadian rhythms by establishing a predictable rest opportunity. A pilot is assigned a for an adequate adjustment period. The pilot may not be contacted or assigned to duty during that protected time.
- Enhancements to time off. Pilots are provided more days off than current rules require, and days off would be provided on a monthly, rather than quarterly

basis, so as to address the issue of cumulative fatigue better.

- Duty periods include limits. A duty period including a flight assignment is limited to 14 hours (for a 2-pilot crew). Duty may be extended up to one hour if specific circumstances occur after engine startup and before takeoff (e.g., a temporary ground hold). Continuing a flight once airborne if a delay is encountered is left to the pilot's authority. Importantly, any duty extension requires compensatory rest to mitigate the potential effects of cumulative fatigue.

In addition, the 125/135 ARC proposal also includes provisions related to:

- Long Range (Multi-time zone) flights
- Tail-end ferry and positioning flights
- Fatigue Management Programs

Summary

NATA appreciates the opportunity to have our views considered as the FAA determines its action on the Notice of Proposed Interpretation. We strongly recommend that the FAA allow the current interpretations of 135.267(d) to stand while efforts to conduct comprehensive rulemaking to revise the Part 135 crewmember flight, duty and rest regulations are initiated. We request that the FAA publish its review of comments submitted and the final action it takes in the *Federal Register* to ensure that the public is reasonably made aware of the outcome of this action.

Sincerely,



James K. Coyne
President