Air Carrier Contract Maintenance Requirements

Comments on the Notice of Proposed Rulemaking published at
77 Fed. Reg. 67584 (November 13, 2012).

Submitted to the Federal Aviation Administration online at http://www.regulations.gov.

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Submitted by the
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February 5, 2013

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

Dear Sir or Madam:

Please accept these comments in response to Air Carrier Contract Maintenance Requirements, Notice of Proposed Rulemaking, which was published for public comment at 77 Fed. Reg. 67584 (November 13, 2012). The comment period for this NPRM closes February 11, 2013.

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Who is ASA?

Founded in 1993, ASA represents the aviation parts distribution industry, and has become known as an organization that fights for safety in the aviation marketplace.

ASA and ASA's members are committed to safety and seek to give input to the United States Government regarding government policies so that the aviation industry and the government can work collaboratively to create the best possible guidance for the industry and the flying public.

ASA is an active participant in efforts to increase and support safety. ASA has a number of programs designed to support aviation safety, like the ASA-100 accreditation program which is coordinated with FAA AC 00-56A. ASA works with the FAA and other non-US regulatory

authorities to develop and maintain programs designed to support aviation safety as it relates to distribution, maintenance and installation of aircraft parts.

ASA has over 500 members. About 25% of ASA's members hold repair station certificates and nearly all of ASA's members sell aircraft parts to repair stations. ASA's membership has a tremendous interest in the important safety responsibilities that exist between certificate holder and maintenance provider. ASA's members are typically small businesses. Most of them employ between 2 and 20 employees.

ASA's members who perform maintenance are all likely to be indirectly affected by this rule, because many of them perform maintenance for air carriers.

ASA's members who do not perform maintenance for air carriers should not be affected by this rule, because they do not perform maintenance; however because of past inconsistencies in interpretation of similarly situated FAA rules, ASA would appreciate an explicit statement to this effect (and if this supposition is incorrect, then the cost-benefit analysis should be amended to include the effect on 2500 aircraft parts distributors).

Comments

Risk of Flow Down

Issue

The new provisions requiring development of policies, procedures, methods, and instructions that apply to contract maintenance providers, could have a negative effect on air carrier purchasing practices if they were to be applied to distribution facilities. This is a real concern, as past FAA regulations that are applied to maintenance providers have been applied to aircraft parts distributors as well, and past history has shown that explicit FAA disclaimer language can prevent unintended consequences.

Analysis

After drug and alcohol regulations were altered to flow down to sub-tier contractors, many maintenance organizations asked their parts distributors for evidence of their drug and alcohol testing programs, and many air carriers asked their parts distributors for the same. Based on public comments, the FAA had inserted language in the preamble to the final rule explaining that purchase and procurement of parts, absent contract maintenance tasks, was not subject to the revised testing rule. This fortuitous insertion prevented unintended flow-down by providing parts distributors with an easy response to demonstrate that they were not intended to be subject to those requirements.

The proposed contract maintenance rule would require that covered work be performed in accordance with the certificate holder's maintenance program and manual. The preamble contemplates that this would likely be accomplished by ensuring that the certificate holder would provide the repair station with the applicable portions of its own maintenance manual.[1] The air carrier would then be responsible for ensuring that these provision were followed.

In most cases, the parts used in performing the covered work will have been procured from third-party distributors. If distributors are deemed to be performing maintenance or alterations by virtue of supplying parts, and therefore must be considered in the creation of the required policies, procedures, methods, and instructions, or provided the applicable portions of the maintenance manual, it is possible that the effect of regulations that were never intended to apply to distributors would be "flowed-down" to them by a mandate from each air carrier that the distributors comply with its manual (in which the regulatory requirements are ensconced).

It is possible that such application of the air carrier's manuals to distributors would impose a compliance burden that the distributors could not meet, because they are unable to perform maintenance activity. This could be particularly confusing in cases where a single entity owns both a repair station and a parts distribution business, because in such cases the parts distribution business may distribute parts that are outside the scope of the repair station's maintenance privileges (and therefore it cannot legally perform maintenance on those parts, even though it can legally sell them).

The final rule should make clear that its provisions do not flow down to aircraft parts distributors, absent additional contract maintenance tasks. Such flow down would not enhance safety because the distributors are not themselves performing maintenance, and their products are already subject to FAA approval (upon production).

Additionally, such flow down could harm business relationships, and unintentionally harm small businesses by encouraging certificate holders to limit their distribution channels to contract maintenance partners eligible to perform maintenance.

Recommendation

Insert language in the final rule stating that the covered work requirement do not apply to purchases of goods, absent a maintenance or alteration task. To achieve this goal, we recommend that the following paragraph be added to the preamble of the Final Rule:

Mere purchase of aircraft parts, absent a contract to perform maintenance, does not fit within the scope of this rule change. Therefore, when an air carrier purchases aircraft parts (including parts that have been previously repaired), the source of purchase (the distributor) is not considered to be a contract maintenance provider, and such a distributor would not be subject to the requirements of this contract maintenance rule. This should be distinguished from those

[1] 77 Fed. Reg. at 67,586.

situations where an air carrier has sent its own parts to a maintenance facility for maintenance purposes.

Acceptability of Policies, Procedures, Methods

Issue

The proposed rule would require part 121 and 135 certificate holders who contract with outside maintenance providers to:

> "[D]evelop policies, procedures, methods, and instructions for the accomplishment of all such maintenance, preventive maintenance, and alterations, and these policies, procedures, methods, and instructions must insure that, if they are followed, the maintenance, preventive maintenance, and alterations are performed in accordance with the certificate holder's maintenance program and maintenance manual."[2]

Under the proposed rule, these policies must be in a form "acceptable to the FAA."[3] Such vague language allows for inconsistent interpretation and application of the regulation by individual FAA inspectors and should be changed to provide more objective standards for compliance.

Analysis

Section 319 of the FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, required the FAA to issue regulations to ensure that maintenance performed by outside contractors satisfy certain terms and conditions:

> "(c) TERMS AND CONDITIONS.—Covered work performed by a person who is employed by a person described in subsection (b)(3) shall be subject to the following terms and conditions: (1) The applicable part 121 air carrier shall be directly in charge of the covered work being performed. (2) The covered work shall be carried out in accordance with the part 121 air carrier's maintenance manual. (3) The person shall carry out the covered work under the supervision and control of the part 121 air carrier directly in charge of the covered work being performed on its aircraft."

The Air Carrier Contract Maintenance NPRM was issued in an effort to satisfy this requirement. The proposed rule, however, appears to go beyond the intent of the law. Rather than simply requiring air carriers to be directly in charge of the covered work the proposed rule would require each carrier to develop "policies, procedures, methods, and instructions" for the oversight of contract maintenance work. The approval of these provisions is then left to the unfettered discretion of the FAA inspector assigned to the carrier.

[2] 77 Fed. Reg. at 67,592, 67,593.
[3] Id. at 67,592, 67,593.

A regulation that provides no objective standards, but instead leaves interpretation to the unfettered discretion of reviewing government employee is Constitutionally void for vagueness. The Courts of Appeals have made it clear that when an agency imposes an obligation on the public, the agency must comply with the legislative rulemaking requirements of the Administrative Procedures Act. For example,

> "when a statute does not impose a duty on the persons subject to it but instead authorizes (or requires--it makes no difference) an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency."[4]

In the Mission Group Kansas v. Riley, the U.S. Department of Education promulgated a rule that did not include the objective standards for interpreting that rule. The objective standards were later issued as policy guidance. The Court of Appeals remanded the matter for further factual findings, but made it clear that the failure to put the standards out for prior notice-and-comment with the rule was a problem.[5]

The NPRM proposes that the required provisions must be "acceptable to the FAA."[6] However, the proposed rule provides no guidance to explain what will be acceptable or unacceptable to the FAA, other than to state that the procedures must ensure compliance with the with the certificate holder's maintenance program and maintenance manual; but this language is already explicitly stated in the rules, so it seems redundant to state that the procedures must be acceptable to the FAA, unless there is some other criterion to be used. Because Courts assume that regulatory language must have some meaning, and that it is not merely precatory in nature, a reviewing Court would be forced to conclude that the requirement to be acceptable to the FAA is a different standard from the requirement to ensure work is performed in accordance with the certificate holder's maintenance program and maintenance manual. But this interpretation leads us right back to the fact that there is no guidance about what is "acceptable" other than the requirement to ensure program/manual compliance.

This type of nebulous language has historically led to complaints about inconsistency in regulatory interpretation and allegations that FAA inspectors were adding new *de facto* requirements to the regulatory structure that were never intended at the time of the promulgation of the rule.[7]

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[4] Mission Group Kansas v. Riley, 146 F.3d 775, 784 (1998).

[55] Mission Group Kansas, 146 F.3d at 782 (stressing the importance of "whether potentially affected parties were given an opportunity to comment on the "interpretation" now advanced., and explaining that "[a]n agency whose powers are not limited either by meaningful statutory standards or . . . legislative rules poses a serious potential threat to liberty and to democracy").

[6] See, e.g., 77 Fed. Reg. at 67,592.

[7] It is worth noting that the FAA Modernization and Reform Act also required the FAA to convene a regulatory consistency panel to "determine the root causes of inconsistent interpretation of regulations by the Administration's Flight Standards Service and Aircraft Certification Service." Pub. L. No. 112-95, § 313. The answer to that Congressional concern is demonstrated by this proposed regulation: language so vague and lacking in guidance as to be open to substantially varied interpretation by local inspectors.

Aviation safety is not enhanced by affording opportunity for varying and inconsistent interpretation by FAA inspectors or manipulation of regulatory requirements by industry.

Recommendation

The text of this proposed rule that requires that the air carrier's policies must be in a form "acceptable to the FAA" should be removed from the rule.

This vague language should be replaced with specific standards that explain what will be acceptable to the FAA, so that the objective standards of the regulations can be used for compliance. Luckily, the objective standards are already in the proposed regulation so a simple reference to those proposed standards is sufficient. This is already accomplished by the proposed directive to have procedures that "ensure that, when followed by the maintenance provider, the maintenance, preventive maintenance, and alterations are performed in accordance with the certificate holder's maintenance program and maintenance manual." Because there are already specific standards in sections 121.368 and 135.426 which further explain what this means, the rule should be sufficient using the existing reference language without the requirement that the procedures be acceptable to the FAA.

We propose that proposed subsections 121.368(g) and 135.426(g) be redrafted to eliminate the reference to "acceptable to the FAA" as follows (strikethroughs are deletions from the NPRM text):

> (g) The policies, procedures, methods, and instructions required by paragraph (e) and (f) of this section must be ~~acceptable to the FAA and~~ included in the certificate holder's maintenance manual as provided in § 121.369(b)(10).

We also propose that proposed subsections 121.369(b)(10) and 135.427(b)(10) be redrafted to eliminate the reference to "acceptable to the FAA" as follows (strikethroughs are deletions from the NPRM text):

> (10) Policies, procedures, methods, and instructions for the accomplishment of all maintenance, preventive maintenance, and alterations carried out by a maintenance provider. These policies, procedures, methods, and instructions must ~~be acceptable to the FAA and~~ ensure that, when followed by the maintenance provider, the maintenance, preventive maintenance, and alterations are performed in accordance with the certificate holder's maintenance program and maintenance manual.

Another alternative for proposed subsections 121.369(b)(10) and 135.427(b)(10) would be to draw specific reference to the requirements of section 121.368 (in 121.369(b)(10)) and section 135.426 (in 135.427(b)(10)). By doing this, it would clarify that these are the objective standards that must be met in order to be acceptable to the FAA.

Making Maintenance Instructions Available to Maintenance Contractors

Issue

The preamble to the proposed rule stresses the importance of sharing the air carrier's maintenance manual with the maintenance contractor; but the proposed regulations fail to follow-through on this promise by establishing enforceable standards reflecting this concern.

Analysis

Current regulations require a repair station performing work for an air carrier to follow the provisions of that air carrier's maintenance program.[8] Some contracts and licensing agreements, however, have actually inhibited air carriers from sharing that data.[9]

If a repair station must follow the air carrier's manual in order to comply with the regulations, then it seems clear that corresponding air carrier regulations should require the air carrier to provide the repair station that performs the covered work with the applicable sections of the manual that makes up its maintenance program. Indeed, the FAA has acknowledged this fact in the preamble to the proposed rule.[10] This would support the air carrier's existing regulatory responsibility for the airworthiness of the work performed on the aircraft, and it would also be consistent with the FAA's oft-stated concept that the maintenance provider is really an extension of the air carrier's maintenance program.[11]

Unfortunately, the proposed rule fails to provide explicit language that would oblige the certificate holder to provide the repair station performing the covered work with the applicable sections of the manual that make up its maintenance program. This seems to be a major oversight on the part of the drafters of the rule. The proposed language requires only that the air carrier have "policies, procedures, methods, and instructions" that will ensure that the maintenance is performed in accordance with the certificate holder's maintenance program and maintenance manual. By using this sort of indirect language, the FAA is inviting industry to circumvent the FAA's clear intent, and they are inviting ad hoc re-interpretations of their intent.

A better practice would be to explicitly state the requirement to certificate holder to provide the repair station performing the covered work with the applicable sections of the manual that make up its maintenance program, instead of relying on a mere inference of this requirement to guide the industry.

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[8] See 14 C.F.R. § 145.205(a).

[9] The FAA has attempted to address part of this problem by issuing a policy statement discussing the practice of Design Approval Holders using restrictive language and access to limit the availability, distribution, and use of Instructions for Continued Airworthiness. The policy explains that it is inappropriate for a DAH to limit the use of ICA between the owner/operator and its maintenance providers. *See* Policy Statement, PS-AIR-21.50-01: Type Design Approval Holder Inappropriate Restrictions on the Use and Availability of Instructions for Continued Airworthiness.

[10] See 77 Fed. Reg. at 67,586.

[11] See id.

Recommendation

Amend sections 121.368(c) and 135.406(c) as follows (underlined text is to be added to the proposed language of the NPRM):

> (c) All covered work must be carried out in accordance with the certificate holder's maintenance manual. The certificate holder must provide to its maintenance contractor each applicable section of its maintenance manual as well as any document that are cross-referenced by the applicable sections of the maintenance manual or are otherwise necessary for the maintenance contractor to perform the maintenance, preventive maintenance, or alteration assigned by the certificate holder.

The text of this proposed language is drawn, in part, from existing section 145.205. This proposed language would coordinate with the 121.367(a) requirement to have an inspection program ensuring that maintenance, preventive maintenance, and alterations are performed in accordance with the certificate holder's manual; and the 145.205 requirement to follow the air carrier's manual. It would close an open loophole by ensuring that the manual provisions that are required to be followed are also required to be shared (so that they *can* be followed).

Centralized Database of Maintenance Providers

Issue

The proposed rule would require each certificate holder who contracts any of its maintenance, preventive maintenance, or alteration work to an outside source to provide is local FAA Certificate Holding District Office a list that includes the name and address of each maintenance provider it uses and a description of the work performed.[12] The proposal seeks to enable the FAA to better collect information regarding which maintenance providers are performing what types of maintenance and compile that information into a meaningful database,[13] as well as allow the FAA to better target its inspection resources, *id.* However, because the proposal requires reporting of data to District Offices, and again offers no guidance as to what "acceptable to the FAA" means, the potential for continued confusion and inefficiency remains.

Analysis

The preamble to the NPRM explains that "although carriers are required to list their maintenance providers and a description of the work done in their maintenance manuals, these lists are not always kept up to date, are not always complete, and are not always in format that is readily useful for FAA oversight and analysis purposes."[14]

The preamble goes on to explain that the data is used by the FAA in planning surveillance of air carrier maintenance programs and the extent to which maintenance providers are performing

[12] 77 Fed. Reg. at 67,584-85.
[13] Id. at 67,587
[14] Id. at 67,585.

their work in accordance with maintenance manuals.[15] It is therefore necessary that the information be "complete and readily available centrally" so that the FAA can better target its inspection resources.[16] Unfortunately, the proposed rule does not clearly address and solve these two issues that preclude FAA analysis and oversight.

The proposed rule would require that:

> Each certificate holder who contracts for maintenance, preventive maintenance, or alterations to be carried out by a maintenance provider must provide to its FAA Certificate Holding District Office, in a format acceptable to the FAA, a list that includes the name and physical (street) address, or addresses, where the work is carried out for each maintenance provider that performs work for the certificate holder, and a description of the type of maintenance, preventive maintenance, or alteration that is to be performed at each location.[17]

This language presents two apparent issues that conflict with the purpose of the regulation as stated in the preamble.

First, although name and physical address of the maintenance provider is unambiguous, the requirement of a description of the type of work carried out opens the door to confusion in the given description. The FAA explained that although the requirement that air carriers record in their maintenance manual a list of persons who have performed maintenance, including a description of that work, has been in place since 1965, the adequacy of compliance has been piecemeal and inconsistent.[18] The lack of consistent data in a usable format has made analysis and targeting of problem areas difficult.

The rule as proposed would require the information be provided, in a "format acceptable to the FAA," to a District Office. However, no guidance is provided as to what constitutes an acceptable format. This again leaves open to individual inspectors what form of data entry is appropriate. What is acceptable to one CHDO may not be deemed acceptable to another CHDO. Without clearly articulated guidance, the problems of incomplete work descriptions, short hand and annotations, and inconsistent interpretations of "acceptable" data entries, will remain among the various District Offices.

Second, the FAA observes that the data is included in air carrier maintenance manuals, not in a centralized database. Although the lists of maintenance providers and maintenance performed is available to the FAA upon request, the absence of the data in a single database makes analysis of the data difficult.

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[15] Id.
[16] Id.
[17] E.g. proposed 14 C.F.R. § 121.368(h).
[18] 77 Fed. Reg. at 67,587.

The requirement that data be provided to the CHDO does not eliminate the problem of a decentralized series of lists that make difficult the FAA goal of analysis and oversight. Rather than enter data directly into an FAA database or submit data to a single office, an air carrier "*must* provide to its FAA Certificate Holding District Office" the lists of maintenance providers and maintenance performed.[19]

Rather than centralize the data as the preamble suggests is the goal, the rule requires the maintenance data be shifted to a middle man. Presumably at that point the data would be entered into a centralized FAA database, but not without creating the opportunities for error that accompany the use of intermediaries.

The middle man effect, combined with the absence of meaningful guidance mentioned above, does little to ensure that the data that ultimately reaches the FAA's database will be in a format sufficient to improve analysis, oversight, and resource allocation.

If, as the FAA envisions, each carrier was able to input the data directly in to the FAA data base,[20] the issue of decentralized data sets would be resolved.

Recommendation

The language should be redrafted to specifically explain what data format the FAA database would require in order to both remove arbitrary determinations of acceptability as well as ensure a usable format of data upon entry. The requirement to report to the CHDO rather than input data directly to the database should be eliminated to avoid the possible entry and interpretation errors that may arise as a result of non-uniform interpretations of "acceptable to the FAA."

Also, the Paperwork Reduction Act analysis of this requirement should be supplemented to include (1) the updates necessary as new maintenance contractors are identified, (2) the updates necessary as old maintenance contractors begin undertaking new (not previously identified maintenance activities, and (3) the internal oversight and management necessary to ensure compliance. This last element is necessary because in a highly regulated system like aviation, there are simply too many different compliance responsibilities for participants in the industry to remember them all. If this was the only reporting requirement, then it could be implemented independently, but because of the myriad reporting requirements, such requirements must be integrated into a management system that ensures compliance on an ongoing basis. The management oversight to ensure that these documents are filed in accordance with the regulations may be more time-consuming than the mere completion of the reporting requirements.

[19] E.g., proposed 14 C.F.R. § 121.368(h) (emphasis added).
[20] 77 Fed. Reg. at 67,578

Conclusion

ASA looks forward to working with the FAA to better improve aviation safety and maintenance rules. Your consideration of these comments is greatly appreciated.

Respectfully Submitted,

Aviation Suppliers Association