BEFORE THE FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Petition for Rulemaking
Occupational Safety & Health Standards for Airline Crewmembers

May 8, 1990

Docket no. __________

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I. NEED FOR RULE AND PROPOSED RULE CHANGE

A. Hazards to Crewmembers

The flight attendant occupation is uniquely dangerous since flight attendants are constantly exposed to the risk of an airplane crash. The large forces upon impact, the likelihood of a major fuel fire, and efforts to assist passengers before departing the aircraft maximize the possibility of fatalities and injuries during crashes. In addition, flight attendants are confronted with the possibility of disastrous in-flight emergencies such as decompressions, aircraft sabotage, in-flight fires and structural failure of aging aircraft. Less catastrophic, but also capable of causing disabling injuries, are encounters with severe turbulence, where unrestrained crewmembers may be forcefully thrown about the aircraft.

Although less dramatic, flight attendants face many other hazards in their environment. These include:

*In-Flight Radiation: A draft FAA advisory circular has estimated the risk of excess crew cancer from cosmic radiation at 3 per 1,000 crewmembers flying a typical route for twenty years. Due to a reevaluation of the health risks of ionizing radiation based on further examination of the Japanese survivors of the
atomic bomb, the estimated cancer risk for crewmembers may go as high as one percent.¹

Although the average occupational exposure of crewmembers to radiation probably exceeds that of most persons classified as radiation workers, and although pregnant crewmembers on a wide variety of routes exceed recommended occupational exposure levels of 50 mrem/month, the FAA has left this area totally unregulated.

*Carbon Dioxide:* In a recent study of environmental air quality performed under a Department of Transportation contract², carbon dioxide levels exceeding ASHRAE recommended limits for indoor environments were found on 87 percent of randomly selected flights. The study recommends that sorption be considered as a way of reducing carbon dioxide in the environment. FAA's standard for carbon dioxide is much higher than that for other confined environments.

*Biologic aerosols:* Major sources of biologic aerosols aboard aircraft include the cargo compartment (pets, laboratory specimens, etc.), wet surfaces in the aircraft, including the

¹This reevaluation took place in: Committee on the Biological Effects of Ionizing Radiations. "Health Effects of Exposure to Low Levels of Ionizing Radiation: BEIR V." 1990.

ventilation system, and, of course, passengers. A typical flight involves close proximity to hundreds of persons in a poorly ventilated environment which, especially in modern aircraft, can involve extensive recirculation of stale air. Flight attendants anecdotally report high rates of respiratory infections, and the National Academy of Sciences has recommended that "maximal airflow be used with full passenger complements to decrease the potential for microbial exposure and that recirculated air be filtered to reduce microbial aerosol concentrations." The FAA has no rules in this area.

*Environmental tobacco smoke: Flight attendants aboard smoking flights suffer from acute respiratory irritation, and are also at increased risk for lung cancer as a result of passenger smoking. Crew complaints about cabin air quality fell on deaf ears at the FAA throughout the 1980s, and it was only through congressional intervention that a study of cabin air quality was done. That study, released by the National Academy of Sciences in

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3Committee on Airliner Cabin Air Quality, Board on Environmental Studies and Toxicology, National Academy of Sciences, "The Airliner Cabin Environment, Air Quality and Safety", 7 (1986)(hereinafter "NAS study"). The NAS study cited one case where 72% of passengers developed flu after sitting in an unventilated plane on the ground for four hours with an infected passenger. The epidemic was only discovered because most passengers saw the same physician in a small town. The 1989 DOT study found relatively low levels of bacteria and fungi on the sampled aircraft, but the study did not address the spread of viruses.
1986, recommended a total ban on smoking on domestic flights.

The FAA refused to ban smoking as recommended by the National Academy of Sciences and an act of Congress ultimately resulted in a near-total domestic ban. Flight attendants are nevertheless still exposed to environmental tobacco smoke on international flights and some long-range domestic flights.⁴

*Ozone: Ozone levels in the atmosphere at flight altitudes can be high, and the FAA has a standard for ozone exposure. Unfortunately, the airlines are not required to monitor actual exposure levels, and an FAA study in 1978-79 found that 11% of flights were in non-compliance.⁵ On one United Airlines flight in 1986, over 110 passengers and crew suffered symptoms such as headaches, eye irritation, dizziness and nausea. The catalytic converters were operating at approximately 50% efficiency, and the National Transportation Safety Board found that ozone was the prime suspect.⁶

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⁴This petition, if adopted, would not affect smoking on international flights unless OSHA eventually bans workplace smoking.

⁵Rogers, J.W. "Results of FAA Cabin Ozone Monitoring Program in Commercial Aircraft in 1978 and 1979." FAA-EE-80-10 (1980). In contrast, the 1989 DOT study of 96 randomly sampled flights found no ozone problem.

*Blood-borne disease: FAA regulations require flight attendants to be trained in the provision of first aid during medical emergencies aboard aircraft, and passengers suffer medical emergencies that involve bleeding (nose-bleeds, cuts, childbirth) with some frequency aboard aircraft. The possibility of exposure to blood-borne diseases such as Hepatitis B is therefore not insignificant. Although OSHA has a proposed rule in this area, and some carriers provide barrier devices, FAA has not expressed an interest in protecting crewmembers.

*Cabin pressurization and ventilation: Cabin pressurization at 8,000 feet, the maximum generally allowed by regulation, has been described as providing sufficient blood oxygen for a healthy adult performing the increased work load of a flight attendant.\(^7\) However, the respiratory systems of many career flight attendants have been compromised by exposure to environmental tobacco smoke, contagious passenger viral infections, and other air quality problems and a "healthy" flight attendant cannot be assumed.

Moreover, flight attendants work not only at an artificial altitude of 8,000 feet, but in an environment of reduced fresh air ventilation. Fresh air has been intentionally reduced on modern aircraft to conserve fuel, with targeted fresh air rates dropping

below 10 cfmp\textsuperscript{8} and actual fresh air rates even lower. The FAA has no minimum fresh air standard for the cabin, although it does have one for the cockpit.

A separate pressurization problem is the effect of cabin pressure changes on the ears of flight attendants. Although flying with an upper respiratory infection is not recommended by medical experts\textsuperscript{9}, flight attendants are often encouraged by management to do so through disciplinary action for use of sick leave. The combination of an upper respiratory infection and pressure changes can lead to excruciatingly painful and often long-term ear problems.

\textit{Cart-related injuries:} Two hundred pound meal and beverage carts are one of the largest sources of injuries aboard aircraft. A petition for rulemaking, filed by the Association of Flight Attendants in 1987, explains why:

The carts must be maneuvered, often by only one flight attendant, in confined galley areas, on and off the lift (elevator) platforms which may have a floor discontinuity with the adjacent galley floor of up to one and a half inches, and through carpeted aisles at floor inclinations of three to five degrees during level flight. Additionally, on short flights on which service must be initiated almost immediately, the flight attendants must move the carts against the acceleration of the airplane and at floor inclinations of up

\textsuperscript{8}Cubic feet per minute per passenger.

to ten degrees. During descent, a similar floor inclination is encountered. The weight of the cart combined with the relatively small wheel diameter (generally two and a half to three inches) makes maneuvering particularly difficult on the carpeted floors.

The situation is worsened by a uniform lack of maintenance of the carts, particularly the brake system. Mechanical malfunction can cause the swingdrop brake legs to drag on the floor when the brakes fail to release. The flight attendants are required to overcome both the weight of the cart and the brakes. Similar mechanical disrepair can cause the brakes to grab unexpectedly while the cart is being moved which can both injure the flight attendant and cause spilling of hot liquids on slippery floors.

Extrapolating from injury data at one carrier, AFA's cart design petition estimated that back injuries are probably occurring throughout the industry at one per day. The typical injury is sprain or strain, with the back being the most likely injured part of the body. Many flight attendants are permanently disabled by cart injuries. In addition to acute injuries, carts also cause carpal tunnel syndrome, particularly those carts with hand brakes.

The AFA cart petition was assigned to the Northwest Mountain Region of the FAA for analysis. The region occasionally writes AFA letters stating that it is too busy to work on the petition.\(^{10}\)

\(^{10}\)The FAA's Washington headquarters did take one important step after the petition was filed. It issued a directive to its field inspectors asking them to ensure that each carrier had a cart maintenance program.

\(^{11}\)Although the FAA processes industry requests for exemptions from existing rules with great speed, it gives very low priority to petitions for new rules from crewmember and passenger groups seeking safety improvements. Although this slowness is no doubt partially designed to discourage such petitions (the primary purpose being to avoid placing economic burdens on the carriers),
*Assaultive passengers: Flight attendants are encouraged to sell alcoholic beverages aboard aircraft, and reduced oxygen at aircraft altitudes enhances the effect of alcohol. In addition, many passengers experience flying as a stressful condition. These two conditions, combined with any predisposition toward violent behavior, particularly toward women, often result in assaults upon flight attendants.

*Noise: Although few types of workplace equipment make as much noise as a jet engine, the FAA has no occupational hearing protection rules. Flight attendants regularly complain of excessive noise on aircraft, and these complaints are not limited to take-off and landing.

*Galleys, cargo compartments, and floors: Flight attendants are regularly injured at work, and the reasons were recently summarized well in a study of flight attendant injuries published in Aviation, Space, and Environmental Medicine. 12 Although the

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it is important for the progress of air safety that it not have this effect.

study covered a foreign carrier, the analogy to domestic problems is inescapable. The study looked at a flight attendant population of 1,631 from 1983 to 1987. There were 15,573 lost workdays. The primary types of injuries were:

- Contusions: 34.4%
- Articular damage: 19%.
- Lacerations: 14.7%.
- Spine disorders: 13.3%
- Fractures: 7.8%
- Barotraumatic otitis: 4.7%
- Muscular strain: 3.3%
- Miscellaneous: 2.8%

According to the analysis, the injuries were a result of a combination of unsafe practices and unsafe conditions. The most common unsafe conditions were:

- Turbulence; changes in the barometric pressure; use of glass containers such as glasses, bottles, and coffee pots; inability to secure service carts in the passage way when unattended; defective brakes on service carts; improper position of the food and liquid containers, some of them very high (at eye-level) and others very low (almost at floor level); lack of proper room in the working areas; bottles in working places; improperly stored service objects and hand luggage falling; faulty overhead compartment latches; inconvenience in handling carry-on luggage due to the overhead compartment height; irregularities on the floor surface due

13If this petition is ultimately to be decided on cost/benefit grounds, we are willing to submit domestic data to make this point.
to wrinkles, torn rugs, etc; defective and clogged food and liquid containers creating problems when being handled; protrusions, damage, and sharp edges on the galleys and galley equipment."

There are many other hazards to crewmembers. For example, crewmembers are sometimes faced with exposure to toxic fumes from hazardous cargo, extreme heat and cold, particularly on small commuter aircraft, stress, electrical shocks, fatigue, and fatalities in galley elevators from crushing.

Our goal here is not to list all the hazards that crewmembers face, but to point out that there are serious health and safety problems hidden behind the upbeat image of the flight attendant and flight attendant occupation marketed by the airlines. The fact is that a large number of flight attendants die in crashes, and a large number are severely disabled in the course of their normal work moving heavy objects in a cramped environment. The threat of turbulence, explosive decompressions, assaultive passengers, radiation, passenger viral illnesses, 200 pound meal and beverage carts with faulty brakes, and often pitiful air quality argue forcefully for strong agency oversight of occupational hazards. Yet the reality is that flight attendants are largely unprotected.

"Id. at 1110."
B. The Failure of FAA and OSHA to Regulate Crew Health

Twenty years ago, Congress made a bold commitment to the safety and health of all American workers through the passage of the Occupational Safety and Health Act.\textsuperscript{15} That Act imposed a duty on employers to provide a safe and healthy workplace, created certain substantive rights for employees, and created an agency, the Occupational Safety and Health Administration, to write and enforce workplace standards.

Unfortunately, airline crewmembers have not benefited from the passage of the Act. They have enjoyed virtually none of the protections of the Act, and airlines feel free to ignore almost all OSHA standards. This unfair situation results from a provision in the Act that was designed to avoid duplication of agency activity. That provision, which is analyzed in detail in Part II of this petition, provides for partial OSHA preemption whenever another federal agency regulates the working conditions of employees.\textsuperscript{16}

\begin{footnotesize}
\textsuperscript{15}Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et. seq.

\textsuperscript{16}Section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. 653(b)(1). This section is quoted and discussed infra at 24-54.
\end{footnotesize}
In 1975 the Federal Aviation Administration claimed total jurisdiction over crewmember health and safety, but has since failed to make any serious effort to address occupational safety and health issues outside of the area of crash survivability. OSHA, in response to FAA's claim of total jurisdiction, has refused to assist flight attendants. The sad result is that flight attendants must seek occupational safety and health protection from an agency, the FAA, which has done little to protect them.

This petition attempts to remedy this situation by asking the FAA to explicitly adopt the regulations of OSHA as FAA standards. The FAA has for fifteen years claimed jurisdiction over crewmember health, and this petition would ensure that the agency actually exercises that jurisdiction by affording crewmembers the same protections afforded other American workers.

This petition therefore asks the Federal Aviation Administration to add a new Subpart to Parts 121 and 135 of the FARs containing the provisions which are underlined in the next

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17 "Occupational Safety or Health Standards for Aircraft Crewmembers, Guidance Information," FAA, 40 Fed. Reg. 29114. This notice is quoted and discussed infra at 41.

18 An alternative solution to the problem would be for OSHA to enforce its standards where the FAA is not actively regulating. AFA would not oppose either spontaneous OSHA action or clarifying legislation that would achieve this goal. In the interim, we hope that OSHA will carefully monitor the FAA's response to this petition.
C. Sections Implementing Protections of the OSH Act

Most of the central provisions of the Occupational Safety and Health Act are devoted to procedures for standards writing and enforcement. Since the Federal Aviation Act already sets forth provisions for standards writing, enforcement, exemptions, penalties, and judicial review, it would be repetitive to incorporate the language of these sections of the OSH Act into the FAA's regulatory scheme.

In addition to the procedures set forth in the Act, the Act also sets out certain duties for employers and rights for employees. These duties and rights are for the most part spelled out in greater detail in OSHA's regulations, and FAA adoption of the OSHA regulations will therefore provide employees with those same rights. However, two important statutory provisions are not spelled out in the regulations, and we therefore ask the FAA to specifically adopt them in addition to the regulations:

1. General duty: Each air carrier shall provide to each of its employees employment and a place of employment which are free from recognized hazards that are causing or are likely

19 The proposed rule changes also appear without analysis in Part III of this petition.

20 Sections 6, 7, 9, 10, 11, 12, 13, 17.
to cause, death or serious physical harm to his employees.\textsuperscript{21}

(2) Prohibition against discrimination: No air carrier shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding related to health and safety or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right under the Federal Aviation Act or the regulations issued thereunder.\textsuperscript{22}

The first subsection will ensure that an air carrier realizes that it has a general obligation to provide a safe and healthy workplace, even where no specific standard applies. The second provision allows for enforcement of the regulations by prohibiting discrimination against those who file complaints or otherwise seek protection from hazardous conditions.

D. Sections Implementing OSHA Standards

In addition, we ask the agency to adopt the following OSHA standards, with the noted modifications:

\begin{itemize}
\item[(3)] \textbf{Recording and reporting occupational injuries and illnesses: 29 C.F.R. 1904.2, 1904.3, 1904.4, 1904.5(a)-}\textsuperscript{21}
\end{itemize}

\textsuperscript{21}Patterned after Section 5(a)(1) of the OSH Act. A comprehensive review of the requirements for a general duty violation can be found in ABA Section of Labor and Employment Law, \textit{Occupational Safety and Health Law} (S. Bokat and H. Thompson, 1988).

\textsuperscript{22}Patterned after section 11(c) of the OSH Act. Although OSHA has regulations addressing section 11(c) at 29 C.F.R. Part 1977, these regulations set out OSHA's interpretation of section 11(c), rather than creating a separate regulatory prohibition against discrimination.
This section simply requires the carriers to comply with OSHA recordkeeping requirements, using OSHA forms. Many carriers already comply as a result of a Bureau of Labor Statistics determination that these regulations apply to air carriers. For those carriers already in compliance, this section would create no additional burden, except that records would also have to be made available to the FAA upon request for inspection and copying, and the FAA would have to be advised immediately of fatalities and multiple hospitalization accidents. 29 C.F.R. 1904.9 is not adopted since, as noted earlier, the FAA has its own enforcement scheme for violation of Federal Air Regulations.

(4)(a) Access to employee exposure and medical records: 29 C.F.R. 1910.20 is adopted as an FAA rule, with the following substitutions. Wherever the phrase "employer" is used, the phrase "air carrier" shall be substituted. Whenever the phrase "Assistant Secretary" or "Assistant Secretary of Labor for Occupational Safety and Health" is used, the phrase "Federal Aviation Administration" shall be substituted. In paragraph 1910.20(a), the phrase "Federal Aviation Act" is substituted for "Occupational Safety and Health Act." And in paragraph 1910.20(a)(3), the phrase "the following subsection"

23Discussed infra at 49 n.3.
is substituted for "29 C.F.R. 1913.10" and "29 C.F.R. 1913.10(d)".

(4) (b) Rules of agency practice and procedure concerning FAA access to employee medical records: 29 C.F.R. 1913.10 is adopted as an FAA rule with the following substitutions. Wherever the phrase "OSHA" is used, the phrase "FAA" shall be substituted. Wherever the phrase "Assistant Secretary of Labor" or "Assistant Secretary" is used, the phrase "Administrator of the FAA" shall be substituted. And whenever the phrase "Office of the Solicitor of Labor" is used, the phrase "Office of the FAA Chief Counsel" shall be substituted.

This section would, among other things, give crewmembers and their designated representatives the right to examine and copy exposure and medical records, as well as any analyses using exposure or medical records. It would also require carriers to make records available to the FAA, and to maintain the records for specified periods of time. The purpose of this section is to improve the detection, treatment, and prevention of occupational disease. The regulation contains provisions to protect medical privacy, as well as trade secrets.

(5) Right to inspection: Any employee or representative of an employee who believes that a safety and health regulation has been violated may request an inspection of his or her workplace by giving notice of the alleged violation to the Principal Operations Inspector for his or her carrier. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or representative of employees. A copy shall be provided the carrier by the Principal Operations Inspector no later than at the time of inspection except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or in any record published, released, or made available by the Federal Aviation Administration. If, upon receipt of such notification, the Principal Operations Inspector determines that the complaint meets the above requirements, and that there are reasonable
grounds to believe that the alleged violation exists, he shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. Inspections under this section shall not be limited to matters referred to in the complaint.

This section is patterned after 29 C.F.R. 1903.11 and would give crewmembers the ability to obtain an FAA inspection after filing a formal complaint. The OSHA regulations on inspection provide a broad range of employer and employee rights when an inspection occurs. See 29 C.F.R. Part 1903. These are not adopted here since the FAA has an existing scheme for conducting inspections of air carriers, and this petition does not seek to alter the FAA's statutory enforcement scheme. In this section we are merely seeking one fundamental right for crewmembers -- the right to an inspection when an apparent hazard exists.

(6) Other general industry standards: Unless specifically contradicted by a Federal Air Regulation, 29 C.F.R. 1910. Subparts D through S are adopted as Federal Aviation Administration rules, with the following substitution. Wherever the phrase "employer" is used, the phrase "air carrier" is substituted. For purposes of this section, an FAA standard does not contradict an OSHA standard if it covers the same hazard, but provides less protection than the OSHA standard.

This provision would require the airlines to comply with OSHA's "General Industry" standards. These standards are targeted to industry in general and not to specific workplaces. Since OSHA's general industry safety standards have a strong industrial flavor to them, a large number of the standards would have no
obvious relevance to crewmembers. However, several would have some impact. Although not meant to be a dispositive list, the relevant standards are discussed below:

Subpart D—Walking-Working Surfaces—OSHA's rules concerning cleanliness, guarding of floor openings, and protections against falling on stairs and platforms (stairs are often driven up to, or contained within aircraft) have a potential application to airline operations where these problems arise.

24Subpart E (means of egress) would probably have no impact since by its own terms it excludes "vehicles, vessels, or other mobile structures." 29 C.F.R. 1910.36. This should not be a serious problem since the FAA has detailed regulations concerning egress from aircraft. Subpart F would probably have no impact since it covers "powered platform installations permanently dedicated to interior or exterior building maintenance of a specific structure or group of structures" [29 C.F.R. 1910.66(a)], vehicle mounted work platforms, and manlifts attached to an endless belt. Subpart M (compressed gas) would have little relevance since by its own terms it does not apply to compressed air machinery and equipment used on transportation vehicles. 29 C.F.R. 1910.169(a)(1). Subpart O (machinery and machine guarding) would have little applicability to the in-flight environment, since there are no machines of the type specified in 1910.213 et seq. As with Subpart O, the type of equipment envisioned by Subpart P (power tools) is unlikely to appear on the aircraft. Subpart Q (welding, cutting, and brazing) would not apply since the operations covered by this subpart are not found on aircraft when in operation. Subpart R applies to "Special Industries" such as textiles and sawmills, and is thus inapplicable. Subpart S (electrical) would have little relevance since, by its own terms (and not because of section 4(b)(1)) it does not apply to "ships, watercraft, railway rolling stock, aircraft, or automotive vehicles other than mobile homes and recreational vehicles." 29 C.F.R. 1910.301. If new sections are added, e.g. the promised "safety-related work practices", these might have an applicability to crewmember protection, particularly as there are a number of electrical hazards on board the aircraft associated with carts and galleys. Subpart T would not apply to crewmembers since it applies to commercial diving. 29 C.F.R. 1910.401 et seq.
Subpart G--Occupational Health and Environmental Control--The ventilation requirements of 1910.94 apply to specific situations, such as abrasive blasting, that would not apply to airline operations. However, the noise limits and hearing conservation rules would have applicability to crewmembers, as crewmembers are exposed to high levels of noise both while crossing ramp areas, during boarding, and in flight. 29 C.F.R. 1910.95. The radiation standard, 1910.96, is written in terms of exposure to radiation sources possessed, used, or transferred by an employer. Although we considered suggesting language that would bring exposure to cosmic radiation within the scope of this regulation, this would require a major restructuring of the regulation. A better approach would probably be a separate petition for rulemaking concerning radiation exposure. 25

Subpart H--Hazardous Materials--As currently written, this section, covering issues such as bulk oxygen systems, spray finishing using flammable liquids, and explosive and blasting agents, would have little or no applicability to the in-flight

25 The Association of Flight Attendants supported a petition for rulemaking that asked the FAA to set limits on crewmember exposure to cosmic radiation. Although this petition was denied, a recent draft FAA advisory circular indicates that cosmic radiation exposure levels, in rems, are much higher than estimated at the time the petition was denied. Combined with the suggestion in the 1990 National Academy of Sciences BEIR V report, "Health Effects of Exposure to Low Levels of Ionizing Radiation", that low-level radiation exposure is more hazardous than previously thought, FAA regulation in this area seems inevitable.
environment. One section with possible applicability is the general requirement for inspection of compressed gas cylinders, although the FAA's detailed design and inspection requirements would probably override these requirements.

Subpart I--Personal Protective Equipment--Although airline crewmembers are not candidates for what is commonly thought of as the usual personal protective equipment, e.g. helmets and gloves, there may be emergency circumstances where gloves would be appropriate.

Subpart J--General Environmental Controls--Carriers might have to devote more attention to cleanliness and marking of hazards under this subpart, as well as to the provision of potable water on some aircraft. The new "lock-out/tag-out" rule would only arguably apply to on-board equipment, such as galley food lifts, since the rule covers only "the servicing and maintenance of machines and equipment", and flight attendants normally would not perform maintenance. See 29 C.F.R. 1910.147.

Subpart K--Medical and First Aid--Since carriers have first aid equipment and crews are trained in first aid, the first aid section would probably not create additional burdens for the carriers. See 29 C.F.R. 1910.151.

Subpart L--Fire Protection--The FAA has detailed requirements
for the type and location of fire extinguishing devices aboard aircraft. To the extent they would contradict and exceed OSHA's requirements, the FAA rules would prevail. Since crews are trained to put out fires, and flight attendants have recently been given protective breathing devices to be used in fighting lavatory fires, it could be argued that crewmembers should wear less flammable clothing.\textsuperscript{26}

Subpart N—Materials Handling—Although this section is primarily aimed at materials handling equipment, it contains general requirements concerning materials storage and housekeeping which may have applicability to combined passenger/cargo operations, particularly where cargo is stored on the main deck. It could be argued, on the other hand, that cargo which is being transported is not being stored.\textsuperscript{27}

Subpart Z—Toxic and Hazardous Substances—Since there are numerous potential sources of air contaminants in the aircraft

\textsuperscript{26}Several years ago the FAA proposed reducing the flammability of crew uniforms. Although the fabrics available then met with little enthusiasm throughout the industry, the scientific progress in this area merits a reexamination of this issue.

\textsuperscript{27}Just as OSHA has the final say on the application of the general industry standards to any particular workplace, the FAA (and not petitioners) would have to decide the applicability of the standards to the crew environment. All parties commenting on this petition are urged to submit views concerning the possible application of the general industry standards to airline operations. Assuming an OSHA standard is applicable, comments are sought as to whether the air carriers are operating outside the standard.
cabin, from carbon monoxide to cleaning fluids, this section would apply to airline crewmembers. The airlines would have to meet the new permissible exposure limits published in 1989 (Tables Z-1, Z-2 and Z-3 of 29 C.F.R. 1910.1000) as well as the standards developed under section 6(b) of the Act, 29 C.F.R. 1910.1001 et seq.

Subpart Z would also require the airlines to comply with OSHA's hazardous communication standard, 29 C.F.R. 1910.1200. This rule requires employers to provide employees with information and training on dangerous chemicals in their workplace. To the extent that such chemicals are present on an aircraft, e.g. spraying of aircraft cabins with insecticides, crewmembers would have to be so informed and trained.

(7) Definitions and other general provisions: 29 C.F.R. 1910.1(d)-(h) are adopted as FAA standards except that an "employee" shall mean a crewmember employed by an air carrier. 29 C.F.R. 1910.5 (c)-(f), 1910.6 and 1910.7 (applicability, incorporation by reference, and testing laboratories) are adopted as FAA standards.

This section simply adopts the applicable OSHA definitions and other provisions which are frequently cross-referenced in the OSHA general industry standards.

(8) Incorporation of future OSHA regulations: Whenever OSHA publishes a proposed regulation, the FAA shall immediately seek public comment on whether the proposed regulation should apply to airline crewmembers. If the agency determines that the OSHA rule will provide a protection not already afforded
to airline crewmembers, it shall adopt the final OSHA rule upon issuance.

Although petitioners would prefer to see automatic FAA adoption of OSHA rules and standards upon issuance as a matter of equitable treatment of crewmembers, this might not allow an appropriate comment period as required by the Administrative Procedures Act. This provision therefore allows the public and the airline industry an opportunity to send comments to the FAA about proposed OSHA rules immediately upon OSHA publication and before adoption by the Federal Aviation Administration. Although the industry, under this proposal, would not have an opportunity to comment upon the final OSHA rule, it should be noted that OSHA industries can only comment on proposed, and not final OSHA rules.

It would be unfair to the crewmembers to commence rulemaking after the final OSHA standard is issued. Given the pace of FAA rulemaking, this would mean that crewmember protection would consistently lag two to three years behind that afforded employees in other industries.

(9) Incorporation of currently proposed OSHA regulations: The FAA hereby seeks comment on whether all current proposed OSHA rules (e.g., protection from bloodborne diseases) should be applied to crewmembers.

If and when the FAA issues a proposed rule based on this
petition, there will at that time be certain proposed OSHA rules that have been recently published but not yet finalized. In accordance with the subsection just discussed, this subsection would ask the public for comment on whether those rules, when finalized by OSHA, should be applied to crewmembers.

Having described the regulatory changes we seek, we now turn to an examination of the respective occupational health jurisdiction and actions of OSHA and the FAA. The analysis of this relationship will explain in detail how OSHA and the FAA have failed to protect crewmember safety and health, and why we are asking the FAA to provide such protections.

II. THE RELATIONSHIP BETWEEN OSHA AND THE FAA

Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 653(b)(1), addresses the jurisdiction of OSHA when another federal agency is also involved in regulating the working conditions of a group of employees. In an effort to avoid duplicative agency effort, Congress provided that:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.
The respective jurisdiction of OSHA and the FAA over airline crewmember health and safety can best be analyzed by examining the court and Occupational Safety and Health Review Commission cases interpreting section 4(b)(1), and past OSHA and FAA statements concerning the extent of their jurisdiction over the airlines. Although the cases on 4(b)(1) focus on the relationship between OSHA and a variety of federal agencies, the seminal cases involving OSHA and the Federal Railroad Administration are of particular interest since the FRA, like the FAA, is a transportation agency within the Department of Transportation. There are also a handful of cases specifically addressing the relationship between OSHA and the FAA.

The cases interpreting section 4(b)(1) have centered around the issue of whether another federal agency can completely preempt OSHA from jurisdiction, or whether preemption is limited to specific working conditions or hazards regulated by the other agency. The latter interpretation of 4(b)(1) ensures that employees are protected from all major hazards, and is thus preferable from a public policy standpoint.

A. Federal Railroad Administration Coverage of Railroads

The preemption issue has been extensively litigated in the railroad area, where both the Federal Railroad Administration and OSHA have some jurisdiction. In *Southern Railway Co. v*
Occupational Safety and Health Review Commission, 539 F.2d 335 (4th Cir. 1976), cert. denied, 429 U.S. 999 (1976), Southern argued that OSHA had no jurisdiction to issue citations concerning safety hazards in maintenance and repair facilities since the Federal Railroad Administration traditionally regulated the railroads. The court disagreed, noting that OSHA is only preempted where another agency has actually exercised authority over the employee's "working conditions", defined as "the environmental area in which an employee customarily goes about his daily tasks."\footnote{28} The FRA's regulations, the court found, were confined to over-the-road operations such as locomotives, and the agency did not regulate railroad office or shop and repair facilities. Therefore, OSHA had appropriately issued citations.

A different interpretation of the term "working conditions" in section 4(b)(1) appears in Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977). The court again rejected the railroads argument for an industry-wide preemption of OSHA, stating that OSHA was only preempted when the FRA regulated the working conditions of employees, defined as a "surrounding" or a "hazard." The court explained:

Thus, comprehensive FRA treatment of the general problem of railroad fire protection will displace all OSHA regulation on fire protection, even if the FRA activity does not encompass

\footnote{28} Southern Ry. v OSHRC, 539 F.2d at 339.
every detail of the OSHA fire protection standards, but FRA regulation of portable fire extinguishers will not displace OSHA standards of fire alarm signaling systems.  

The court also ruled that an FRA advanced notice of proposed rulemaking announcing possible future action in the area of railroad shops and offices was not an "exercise" of authority sufficient to exempt the railroads from OSHA coverage in these areas.  

Similarly, another court found that the railroads were not exempted from OSHA coverage when the FRA moved from an advanced notice to a notice of proposed rulemaking, since this still did not constitute an exercise of authority.

In other railroad cases it has been found that: injuries during maintenance of a train axle/wheel device were covered by OSHA, since FRA regulations required the maintenance, but did not specify how it would be done; OSHA had jurisdiction over the death of a worker who was pulled into the unguarded blades of a machine that ran on the tracks and dug up the track bed, since the FRA had

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29 Southern Pacific Transportation Co. v. Usery, 539 F.2d at 391.

30 Id. at 392.


no rules covering exposure of the worker to the undercutter\textsuperscript{33}; OSHA rules requiring protective hearing devices did apply to a diesel engine repair shop since FRA locomotive noise regulations were not aimed at this specific situation\textsuperscript{34}; an FRA policy statement preempted OSHA since FRA "had determined that the hazard of open pits and platforms in railroad repair facilities should go unregulated" because "standard guardrails at these platforms and pits would create greater hazards than they would alleviate"\textsuperscript{35}; and railroads must comply with OSHA's recordkeeping, reporting, and access requirements.\textsuperscript{36}

It is clear from the railroad cases that OSHA in many cases has authority to regulate railroad employees from hazards that are not addressed by the FRA.\textsuperscript{37} It follows that OSHA could attempt to

\textsuperscript{33}\textit{PBR, Inc. v. Secretary of Labor}, 643 F.2d 890, 896 (1st Cir. 1981).

\textsuperscript{34}\textit{Consolidated Rail Corporation}, 10 OSHC 1869 (Rev. Comm'n 1982) (noting that OSHA could not require engineering controls to reduce noise).

\textsuperscript{35}\textit{Consolidated Rail Corporation}, 10 OSHC 1577 (Rev. Comm'n 1982).


\textsuperscript{37}Another area analogous to aviation is Coast Guard regulation of vessels. A split has developed in the courts over the extent of OSHA preemption. The Review Commission in 1982 granted an industry-wide exemption from OSHA to virtually all vessels at sea, including uninspected vessels. \textit{Dillingham Tug & Barge Corporation}, 10 OSHC 1859 (Rev. Comm'n 1982). The Commission noted that the
Coast Guard had issued extensive regulations over vessels aimed at protecting the health and safety of seamen. To ask employers to compare every OSHA standard with the Coast Guard regulations in a search for unregulated working conditions assumes that the Coast Guard regulations are insufficient, the court said. "It is thus inconsistent with the established rule that section 4(b)(1) does not permit an inquiry into the stringency of another agency's exercise of authority." 10 OSHC at 1862.

In a decision sharply critical of *Dillingham Tug & Barge Corporation*, the Second Circuit held that OSHA's noise regulations applied to uninspected vessels because "isolated Coast Guard regulations . . . do not constitute an exercise of statutory authority by the Coast Guard . . . sufficient to oust OSHA of jurisdiction . . . ." *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 779 (2d Cir. 1984), cert. denied, 47 U.S. 1003 (1985).

While the regulations cited by the Commission in *Dillingham* are safety regulations which pertain to the "seaworthiness" of vessels and the safety of those aboard, they only incidentally regulate the working conditions of employees. Examples of safety regulations only incidental to the regulation of working conditions are: regulation on the use of petroleum gas; ventilation requirements; backfire flame control; and fire extinguishers. Other regulations merely govern qualifications for a particular employment, for example, the Manning requirements found in 46 C.F.R. section 157, and not the working conditions of that employment.

It would do violence to the clear intent of Congress to hold that these instances of Coast Guard regulation of working conditions aboard uninspected vessels would serve to deny an entire class of employees the protection of major safety legislation such as the OSH Act.

Similarly, the Eleventh Circuit held that OSHA had jurisdiction over a crane fatality on an uninspected vessel in the absence of any Coast Guard regulations covering crane operation. *In re Inspection of Norfolk Dredging Company*, 783 F.2d 1526 (11th Cir. 1986), cert. denied, 479 U.S. 883. The court refused to follow a Fifth Circuit case, *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1976) which held that seamen aboard uninspected vessels were not covered by OSHA's protection against retaliatory discharge.

In *Taylor Diving and Salvage Co. v. U.S. Department of Labor*, 674 F. Supp. 30 (D.D.C. 1987), the district court held that OSHA's Records Access Standard, requiring employers to maintain any employee medical records and records of employee exposure to toxic materials for 30 years, applied to commercial divers even though
regulate aspects of crew health and safety ignored by the FAA. Whether OSHA could succeed would depend on whether the courts cared more about protecting employees, or avoiding the potential for agency duplication. The following is a review of the historical

the Coast Guard regulated diving and required maintenance of accident records. The Court held that the Records Access Rule did not regulate "working conditions", and, even if it did, the purpose of the Records Access rule was completely different from the Coast Guard's record keeping rule.

OSHA jurisdiction over many other workplaces has been reviewed by the courts. For example, OSHA was held not to be preempted by an employer's promise in a Department of Defense contract to comply with the department's safety manual on explosives manufacture. Ensign-Bickford Company v. OSHRC, 717 F.2d 1419 (D.C.Cir. 1983), cert. denied, 446 U.S. 937 (1984). OSHA was preempted from regulating accidental gas ignition during repair of a pipeline in a trench since this environmental working area was already covered by DOT Office of Pipeline Safety regulations. Columbia Gas of Pennsylvania, Inc. v. Marshall, 636 F.2d 913 (3d Cir. 1980). OSHA was also preempted from regulating farm worker exposure to pesticides by Environmental Protection Agency regulations written pursuant to a statute authorizing EPA to regulate farm worker exposure. Organized Migrants in Community Action, Inc. v. Brennan, 529 F.2d 1161, 1166 (D.C.Cir. 1975). On the other hand, EPA regulation of farm worker exposure to pesticides was held not to preempt OSHA from regulating hospital worker exposure to ethylene oxide, a gas used both in hospitals as a sterilizing agent, and on farms as a pesticide. Public Citizen Health Research v. Aucter, 554 F. Supp. 242 (D.D.C. 1982), rev'd on other grounds, 702 F.2d 1150 (D.C.Cir. 1983). In American Petroleum Institute v. OSHA, 581 F.2d 493, 510 (5th Cir. 1978), aff'd on other grounds sub. nom. Industrial Union Dep't, v. American Petroleum Institute, 448 U.S. 607, the court held that Consumer Product Safety Commission benzene labeling requirements did not preempt potential OSHA action since the CPSC rules were designed to protect consumers, and not workers. According to the court in Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985), OSHA, and not the Mine Safety Health Administration, had jurisdiction over a utility worker electrocuted while attempting to check a meter at an electrical substation built and owned by a mining company. And in Marshall v. Nichols, 486 F.Supp. 615 (E.D. Tex. 1980), the district court held that OSHA was preempted from regulating off-shore platforms in light of extensive Coast Guard and United States Geological Survey regulations covering the platforms.
relationship of the FAA to OSHA.

B. FAA Regulation of the Aviation Industry

1. Aviation Cases

The relationship of OSHA to the FAA was first addressed by the Review Commission in *American Airlines, Inc.*, 3 OSHC 1624 (Rev. Comm'n 1975). At issue was whether FAA regulations covering the shipping of radioactive materials preempted OSHA regulations requiring workplace radiation monitoring, radiation evaluation studies, hazard posting, and recordkeeping. American admitted that it was not in compliance with the OSHA rules in its New York cargo facility, but argued that only FAA had jurisdiction. The Review Commission ruled that FAA regulations requiring proper packaging and labeling of radioactive equipment preempted OSHA. In response to OSHA's argument that the FAA regulations provided no worker protection when the radioactive materials were improperly packaged, the Commission stated that:

Labor's real concern is that the FAA standards may not be sufficiently stringent, or may not be complied with. Section 4(b)(1), however, does not permit Labor to enforce its standards simply because another Federal agency's standards may not be as effective, or may be violated.\(^{39}\)

\(^{39}\) *American Airlines*, 3 OSHC at 1625.
In a dissent, Commissioner Cleary argued that the FAA regulations did not protect workers in cargo storage areas, but rather "deal solely with working conditions aboard aircraft carrying radioactive materials."  

In 1976, Northwest Airlines turned an OSHA inspector away from its hangers in New York, arguing that the FAA had exclusive control over the hanger facility. A magistrate issued a warrant but later withdrew it citing section 4(b)(1) of the Occupational Safety and Health Act. The Second Circuit, after reviewing the holdings of the federal appeals courts in the railroad cases, ruled that the magistrate had acted prematurely and that Northwest would have to exhaust its administrative remedies. Marshall v. Northwest Orient Airlines, 574 F.2d 119, 122 (2d Cir. 1978). The court noted that the railroad cases had offered only "vague standards" and that "the determination of preemption requires an inquiry into complex issues of law and fact" which would be more appropriately done after an OSHA inspection and administrative review refined the issues.  

Northwest was back before the Review Commission in 1980 in a case involving ground maintenance at John F. Kennedy International Airport. Northwest Airlines, Inc., 8 OSHC 1982 (Rev. Comm'n 1980). In order to service Boeing 747 landing lights, the leading edge

40 Id. at 1628.

flaps are extended so that the mechanic has access to the flap cavity. If the flaps are suddenly retracted, the mechanic would be killed or crushed. OSHA had cited Northwest for a violation of section 5(a)(1) of the OSH Act, which provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." OSHA reasoned that Northwest should be following a lock-out/tag-out procedure in its maintenance manual, and that Northwest should have installed panels which were available from Boeing giving direct access to the lights.

OSHA argued before the Commission that the Federal Aviation Act is directed to "safety of flight" and not to the occupational safety and health of ground workers, and that the Commission's criteria for OSHA preemption set forth in Fineberg Packing Co., 1 OSHC 1598 (Rev. Comm'n 1974), had not been met. In Fineberg the Commission held that an agency only preempted OSHA if its statutes and standards had as a policy or purpose the inclusion of employees in the class of persons to be protected. An incidental effect on safety and health was not enough. Both Northwest and the FAA disagreed, arguing that the Federal Aviation Act did provide a statutory basis for regulating the occupational safety and health of ground workers.

42Section 601 of the Federal Aviation Act, discussed infra.
The Commission agreed with Northwest and the FAA, noting that it was giving "considerable weight to the fact that the FAA interprets its enabling legislation to give it such authority."\textsuperscript{43} Since the Commission's decision turned on an interpretation of section 601 of the Federal Aviation Act, 49 U.S.C. App. 1421(a), it is summarized here:

Section 601(a) of the Federal Aviation Act requires the FAA to "promote the safety of flight in civil aircraft in air commerce" by issuing: (1) minimum standards governing the design, construction, and performance of aircraft; (2) minimum standards governing appliances; (3) reasonable rules governing the inspection of aircraft and inspection facilities; (4) reasonable rules governing the reserve supply of aircraft and fuel; (5) reasonable rules governing the maximum hours of airmen and other airline employees; and (6) "such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce."

The Commission ruled that this provision does give the FAA authority to regulate the safety of ground personnel:

\textsuperscript{43}Northwest Airlines, 8 OSHC at 1988 (citing NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944)).
Undoubtedly, prevention of airplane crashes was Congress' primary consideration in enacting the legislation in question. But to recognize that prevention of airplane crashes was Congress' primary concern does not mean that it was Congress' sole concern. The statute reflects other concerns of Congress. While section 1421(a) speaks of "safety of flight in air commerce," subsection 6 of section 1421(a) authorizes the FAA to establish standards and regulations "as the Administrator may find necessary to provide adequately for national security and safety in air commerce." If, as the Secretary argues, the scope of section 1421(a)(6) is limited to "safety of flight in air commerce," this reads out of the statute entirely the reference to national security. Rather than adopt such an interpretation, the FAA concluded that Congress did not intend section 1421(a)(6) to be limited to safety of flight. . . . Moreover, it was not unreasonable for the FAA to conclude that the phrase "safety in air commerce" in section 1421(a)(6) encompasses more than safety of flight and includes the ground safety of airline personnel who are an integral part of air commerce."

Having held that the FAA had the authority to regulate ground workers, the Commission went on to find that the FAA's requirement that airlines develop maintenance manuals which include provisions to protect the safety of maintenance personnel, and which can be disapproved by the FAA, constituted an exercise of that authority sufficient to displace OSHA. The Commission rejected OSHA's argument that the manual requirements, developed by individual carriers outside of Administrative Procedure Act notice and comment rules, was not a valid exercise of authority.6

6"Northwest Airlines, 8 OSHC at 1988-89.


6Id.
A different conclusion was reached by the California state courts in *United Airlines v. Occupational Safety and Health Appeals Board*, 32 Cal.3rd 762, 187 Cal. Rptr. 387, 654 P.2d 157 (Calif. Sup. Ct. 1982). The court found that an FAA approved maintenance manual did not preclude the California Division of Occupational Safety and Health from citing United Airlines for failure to provide a guardrail on an elevated platform used by a maintenance worker. The case differed from Northwest Airlines in that it involved a state law allowing preemption of the state OSHA plan only when another agency is specifically mandated or vested by law to protect worker health and safety. While the FAA might have authority to issue health and safety regulations, the court reasoned, its primary statutory purpose is in-flight safety. The court also found that the FAA had failed to ensure comprehensive health and safety protection in the airline manuals, and was therefore not exercising jurisdiction in that area.

In granting the state agency authority over maintenance workers, the court dismissed United's argument that the ruling would lead to chronic uncertainty over whether FAA or state OSHA regulations applied to a particular hazard.

Although United contends that the FAA desires to regulate all aspects of ground maintenance safety, the materials before us suggest that the FAA is by no means fighting

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47 *United Air Lines*, 32 Cal.3d at 762.

48 *Id.* at 776.
for the broad jurisdiction which United would thrust upon it. In an amicus brief filed in the Northwest case, the FAA stated "... it is not necessary to decide whether FAA has exclusive authority by statute to regulate all aspects of the occupational safety of airline maintenance personnel ... FAA does not assert such broad authority." And in a letter written in February 1982 to an amicus in this case, the deputy chief counsel of the FAA expanded on the agency's position, noting that the FAA has only "limited safety and health jurisdiction ... in the (United) maintenance facility" and explaining that "(t)he FAA's authority in this regard is limited by its statutory grant and may not be expanded by the FAA or an airline. Thus, the FAA cannot require an airline to include a provision in its manual concerning the potability of drinking water in its maintenance facility; nor, if an airline included such a provision in its manual, could the FAA require that it be followed." Consequently, in the many areas of employee safety and health that do not implicate inflight safety, no conflict between the two agencies is apparent.49

The disputes at United and Northwest came to the attention of Congress, and hearings were held on the conflict between the FAA and OSHA. A draft memorandum of understanding was written by the FAA and OSHA. The hearings and memo are discussed in the following section.

In U.S. Air, Inc., v. OSHRC, 689 F.2d 1191 (4th Cir. 1982), the Fourth Circuit held that OSHA could not require passenger lounge doors at airports to be unobstructed or open for fire reasons, when FAA regulations required them to be locked or obstructed for security reasons. The court held that the FAA was regulating the working conditions of the airline employees, relying

49 Id. at 774.
on its Southern Railway definition of a working condition as an "environmental area in which an employee goes about his daily tasks." OSHA was therefore preempted from enforcing its regulations.


The dispute over whether OSHA should protect maintenance workers led to hearings in 1980 before the House Subcommittee on Government Activities and Transportation⁵⁰, and a 1981 report by the House Committee on Government Operations.⁵¹ That report contains as an appendix a draft memorandum of understanding between the FAA and OSHA covering airline maintenance and ground support personnel.⁵² The draft memorandum of understanding acknowledged that the FAA has authority over safety of aircraft in flight, while


OSHA has jurisdiction over the safety and health of the employees. It then set forth, among other things, elaborate joint OSHA/FAA procedures to protect maintenance employees. Under these procedures, if a safety and health issue arose, the FAA would rapidly determine whether the applicable OSHA rules conflicted with the safety of flight, or with airline maintenance manual requirements. If there were no conflicts, then OSHA would have jurisdiction. Moreover, if the OSHA rules did not conflict with the safety of flight, but did conflict with manual requirements, then the FAA would withdraw its approval of the manual requirement so that OSHA could regulate the area. Procedures were also included for joint FAA and OSHA inspections aimed at clarifying jurisdiction, for sharing of information about safety and health problems, and for resolution of conflicting regulations.

According to the House report, drafting of the memorandum began in earnest after the 1980 hearings at the urging of subcommittee members, but was complicated by the Northwest case, discussed above, which reduced OSHA jurisdiction. As a result of the Northwest case, "OSHA sought to enter into an agreement under which they could avoid the harsh result in Northwest, and the FAA hoped that, by entering into a memorandum, OSHA could be persuaded not to pursue its appeal in that case, thereby removing the possibility that FAA's procedure for approving maintenance manuals
would be disapproved in court."\(^{53}\) However, according to the report, OSHA decided that the Northwest appeal was too important to give up. After being urged by unions to pursue the appeal and not the memorandum of agreement\(^{54}\), OSHA refused to enter into the agreement. Expressing its dismay, the report noted that: "The subcommittee was disappointed that the opportunity and the effects to resolve this problem were lost. It is unfortunate that essentially ancillary concerns over legal precedent prevailed, with the result that contradictions in or duplications of responsibility, litigation, and reduced protection for those in the workplace have been prolonged."\(^{55}\) Ironically, the courts dismissed the appeal of the Review Commission decision.\(^{56}\) \(^{57}\)

\(^{53}\) House Report at 8.

\(^{54}\) The unions believed that the memorandum would give complete occupational safety and health authority to the FAA.

\(^{55}\) Id. at 9.


\(^{57}\) It might be argued that a memorandum of understanding between the FAA and OSHA concerning crewmembers might be useful at this time. Although it might be useful for the agencies to agree on sharing worker complaint information and agency expertise, a memorandum would not seem to create any additional burden on airlines to comply with existing OSHA regulations unless the two agencies were to clearly define their respective authority and the obligations of the carriers. For example, the agencies might agree that the carriers should comply with OSHA's standards, and that OSHA should pursue disease and repetitive injury issues as an enforcement matter, with FAA retaining primary jurisdiction over immediate injuries and crashworthiness issues. Thus, OSHA would have jurisdiction over issues such as carpal tunnel syndrome from poor meal and beverage cart design, hearing loss, reproductive problems, and cancer, while FAA would maintain its traditional jurisdiction over issues related to in-flight emergencies, such as
3. FAA Policy Statements and Testimony on Crew Health and Safety

In 1975 the FAA published a document in the Federal Register setting forth its views concerning aircraft crewmember safety and health standards. Although the document cannot be said, as a legal matter, to define the FAA's jurisdiction, the statement would probably be given some weight by the courts if OSHA attempted to regulate some aspect of crewmember health and safety. Because of the significance of this document, it is quoted here at length.


Pursuant to its complete and exclusive responsibility for the regulation of the safety of civil aircraft operation under the Federal Aviation Act . . . the FAA prescribes and enforces standards and regulations affecting occupational safety or health with respect of U.S. registered civil aircraft in operation.

Title VI of the Act . . . contains the principal substantive provisions that authorize and require the FAA to promote the safety of civil aircraft operations by prescribing and revising standards and regulations governing, in the interest of safety, the design and materials . . . , workmanship, construction, and performance of aircraft, maximum hours of periods of service of airmen and other employees of air carriers, and the transportation of dangerous articles.

With respect to civil aircraft in operation, the above mentioned safety regulatory responsibilities directly and completely encompass the safety and health aspects of the work environment of aircraft crewmembers. Aircraft design and operational factors are indivisible from occupational safety proper seat restraints and proper restraint of carts during turbulence, and crashes. Such an arrangement would play to each agency's strength in terms of technical expertise.
or health factors insofar as they affect the workplace of those crewmembers. Aircraft design and operational problems affecting the flight safety of crewmembers necessarily affect their occupational safety or health. Regulatory solutions of these problems necessarily involve practices, means, methods, operations, or processes needed to control the workplace environment of aircraft crewmembers.

Acting under its responsibility for the occupational safety or health of aircraft crewmembers, the FAA has issued numerous regulations directly affecting the workplace of pilots, flight engineers, cabin attendants, and other persons whose workplace is on aircraft in operation. These regulations, among (other) things, aircraft performance and structural integrity, safety equipment for emergency ditching and evacuation, fire protection, protective breathing rescue aids, and emergency exits used by crewmembers. Other regulations affecting the crewmember workplace have been issued with respect to cockpit lighting, crewmember seat belts, toxicity and other characteristics of materials in the crewmember workplace, and other environmental factors affecting that workplace, including noise reduction, smoke evacuation, ventilation, heating, and pressurization. Maximum hours of duty and duty aloft for air carrier crewmembers are also regulated, as is the protection of crewmembers from radioactive and other hazardous materials.

In addition, the FAA has issued, or will be issuing notices of proposed rulemaking that include many proposals for further achieving safety and healthful working conditions for aircraft crewmembers. These proposals, for example, involve aircraft configuration and related design provisions such as pilot eye height criteria to be used in cockpit design; galley designs to ensure proper retention of items of mass; placarding of serving carts and galley equipment for maximum load; location of flight attendant seats near exits; increased accessibility of emergency equipment to flight attendants; design of flight attendant seats; crewmember seat belt and shoulder harness criteria; slip resistant floors in crewmember workplaces; crewmember safety provisions concerning lower deck galleys, alarms, signs, elevators, interphones, and escape routes; and other provisions such as improved requirements for portable oxygen equipment. In a related action, the FAA has also proposed flammability standards for flight attendant uniforms.

Every factor affecting the safety and health working conditions of aircraft crewmembers involves matters inseparably related to the FAA's occupational safety and health responsibilities under the Act. With respect to civil aircraft in operation, the overall FAA regulatory program, outlined in part above, fully occupies and exhausts the field
of aircraft crewmember occupational safety and health.

The essence of this statement is that the FAA, by virtue of its wide-ranging statutory authority, and by virtue of its regulations aimed at addressing in-flight and post-crash emergencies, has exhaustive authority to protect crewmember health. Ironically, the FAA has made few statements about crew health, or about this Federal Register notice, since 1975. Moreover, no exhaustive, or even systematic effort has been made to protect crew health or safety beyond those areas where the safety of the crew is important to ensure the safety of the passengers. When it was about to enter into the inter-agency agreement with OSHA concerning maintenance workers, the FAA did mention the 1975 notice. Testifying in 1980, an FAA witness stated:

I might say that I think that the FAA's position in this area has probably changed considerably over the past, oh, four, five years. For lack of a better word, I might say our position has matured. I think initially the position we took in 1975, you may recall the publication in the Federal Register where the FAA took a fairly strong preemptive position indicating that it did, in fact, totally occupy this area. I think it is pretty apparent that, as Dr. Bingham [of OSHA] indicated, that our position is no longer that.

I think it is quite clear that we felt that there are many areas, particularly with respect to activities on the ground, that we think they [OSHA] have the expertise or the jurisdiction to accomplish these things, and it is to carry that out that we have entered into these discussions and negotiations with OSHA.58

58Hearings on FAA/OSHA jurisdiction, supra n. 50 at 180. (Statement of Jonathan Howe, Deputy Director, Northwest Region, Federal Aviation Administration).
The FAA witness, however, made it quite clear that the FAA still considered its jurisdiction in flight to be exclusive.\textsuperscript{59}

4. OSHA's Position on Crewmember Health and Safety

If the FAA's policy statement was intended to remove OSHA completely from the area of crewmember health and safety, the policy statement had its desired effect. In a letter to the Association of Flight Attendants dated February 12, 1979, OSHA head Eula Bingham wrote:

The Occupational Safety and Health Act of 1970 does not, by virtue of section 4(b)(1), apply to hazardous working conditions that are addressed by another agency's standards or regulations. FAA has extensive regulations which apply to aircraft in flight, while OSHA has no standards specifically dealing with the safe operation of airplanes. Therefore, by operation of law under section 4(b)(1), OSHA's jurisdiction would have little or no application in the case of exposure of flight attendants to in-flight hazards.\textsuperscript{60}

\textsuperscript{59}Id. at 184 where the following exchange takes place:

Congressman Walker: But the point is that on the one hand, FAA is making it very clear that you have full jurisdiction in health and safety requirements in aircraft flight. That is not an area which you are going to concede to OSHA no matter what?

Mr. Howe: That is true. That is correct.

\textsuperscript{60}A copy of this letter is available from petitioner. It is important to note that Dr. Bingham uses the phrase "little or no jurisdiction" since OSHA requires, and the airlines appear to comply with, OSHA's record keeping requirement. See n. 70, infra.
In August, 1980, Dr. Bingham testified at the Congressional hearings on OSHA and the FAA and explained the difference between OSHA's treatment of maintenance workers and flight attendants:

(I)f a machinist employed by an airline ... complains to OSHA of unsafe or unhealthy working conditions, OSHA has the capability to send qualified compliance officers to examine the conditions under which the alleged hazard exits.

In fact, we have often done just that. Since 1971, OSHA has conducted more than 1,000 inspections of airline facilities; 453 of them in response to employee complaints. During these inspections, 288 violations were found and classified as serious.

In-flight crews face similar concerns regarding occupational health and safety. Over the years, OSHA has received a number of complaints from flight attendants. Many of these complaints involve issues such as excessive noise, ventilation problems due to unsafe ozone levels, as well as sprains, strained muscles and other hazards caused by faulty or unwieldy equipment. OSHA has made it a practice to refer these complaints directly to the FAA for action.\(^6\)

Under questioning, however, Dr. Bingham seemed to retreat from this "hands-off" position:

Although my opinion is not shared by all, I believe that section 4(b)(1) ... does not preclude us from applying our standards and making inspections actually inside an airplane. I see no difference between flight attendants who work in an airplane and a group of workers out in a factory in Peoria.\(^6\)

If there are no standards and no enforcement by FAA of these standards, and there is overexposure, say, to ozone, I would interpret the Occupational Safety and Health Act to say that

\(^6\)Hearings on FAA/OSHA jurisdiction at 21-22 (Statement of Dr. Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health).

\(^6\)Id. at 7.
it is conceivable that OSHA would have jurisdiction. If there exists a law that protects these workers, then we are preempted.\(^3\)

In an attempt to indicate that something was being done to address flight attendant health concerns, Dr. Bingham noted that the National Institute for Occupational Safety and Health planned to study flight attendant health and safety. Testifying after Dr. Bingham, Dr. James E. Melius of NIOSH stated that:

\[\text{(W)e have reached an agreement with the FAA and OSHA to initially look into three major areas of complaints of the flight attendants.}\]

The first area is respiratory illnesses. Flight attendants have many complaints concerning coughs, shortness of breath, chest tightness, and palpitations. A variety of exposures they may have that may lead to this. (sic) We are about to begin a research study into that problem.

The second area is reproductive problems. There are complaints of menstrual difficulties, frequent miscarriages, birth defects, and problems with infertility. We will also begin an investigation and an evaluation of that problem.

Third is what we call ergonomic problems. These are areas including problems with frequent injuries, musculoskeletal problems, back pain, and swollen ankles, that may be related to lifting requirements and other duties that the flight attendants perform on planes. We will also be beginning an investigation into that area.\(^4\)

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\(^3\)Id. at 11.

\(^4\)Id. at 24 (Statement of Dr. James E. Melius, Chief, Hazard Evaluations and Technical Assistance Branch, Center for Disease Control, Public Health Service).
Interestingly, all three agencies (OSHA, FAA, & NIOSH) appear to have completely lost interest in these subjects immediately after the hearing.

C. Analysis

It is readily apparent from the FAA policy statement, and the OSHA letter to the Association of Flight Attendants, that the airlines are enjoying a de facto exemption from OSHA jurisdiction. OSHA is not taking steps to protect airline crewmembers, and the FAA believes that it has sole jurisdiction. In such a situation, airline crewmembers, such as the petitioners, have only one logical place to go for health and safety protection -- the Federal Aviation Administration. It is for this reason that the petitioners are asking the Federal Aviation Administration to adopt the protections set forth in the OSHA regulations, and apply them to crewmembers.

This request is made with some misgivings, since it is unlikely that the FAA has either the sole jurisdiction in this area that it has claimed or the expertise and commitment to exercise that jurisdiction.\(^65\) If the FAA does not have sole jurisdiction,\(^{65}\)

\(^{65}\)For example, flight attendants are frequently experiencing in-flight illnesses aboard Alaska Airlines flights on MD-80 aircraft. The likely culprit is a cabin air quality problem. AFA has complained to the FAA inspector, who has taken little action beyond asking the company to forward flight attendant illness reports to the agency. The FAA is apparently not technically equipped to monitor cabin pollutants. Of course, if the agency
then OSHA should address those hazards that the FAA has failed to address. As noted in Part I of this petition, it is hoped that OSHA will take an interest in the disposition of this petition by the FAA in determining whether OSHA should take some steps to protect aviation crewmembers. 66 After all, the cases discussed above provide many arguments for OSHA regulation where the FAA has failed to act. The principal argument is that the OSHA is not preempted unless the FAA has exercised jurisdiction by addressing a working condition defined as a hazard. As the court in *Southern Pacific Transportation Co. v. Usery* stated: "comprehensive FRA treatment of railroad fire protection will displace all OSHA regulation on fire protection . . . but FRA regulation of portable fire extinguishers will not displace OSHA standards of fire alarm systems." 67 Thus, to the extent that the FAA has not comprehensively addressed a hazard, OSHA may retain some jurisdiction.

The Review Commission's decision in *Consolidated Rail Corporation* lends support to the idea that OSHA may retain some

really had a will to take such action, there would be a way for the agency to do it (e.g. use of industrial hygienists as consultants).

66 Moreover, this petition should not be construed as an opposition to legislation that would place under OSHA those industries now exempted in whole or part by section 4(b)(1).

jurisdiction over airline employees. In that case the FRA had issued regulations aimed at protecting the public, and not workers, from locomotive noise. Notwithstanding this, the Review Commission held that OSHA could require hearing protection for maintenance workers. Thus, to the extent an FAA regulation is aimed exclusively at protecting the public, OSHA may still have some authority to protect workers. Similarly, the Commission has held that railroads must comply with OSHA's recordkeeping requirements.

Since the FAA lacks any occupational injury and illness recordkeeping requirements, it could be argued that the airlines must also comply with the OSHA's recordkeeping requirements. This, in fact, is the position of the Bureau of Labor Standards, the agency responsible for administering the recordkeeping system established by the act. Another approach is to simply argue that

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68 Consolidated Rail Corporation, 10 OSHC 1869 (Rev. Comm'n 1982).

69 Consolidated Rail Corporation, 10 OSHC 177 (Rev. Comm'n 1982).

70 A BLS document providing guidance to industry contains the following information in a question and answer section:

Q. What about airline employees working aboard airplanes? When are these activities covered?

A. These activities are covered under the act while the airplane is on U.S. soil and in the official air space of the United States and its territory.


71 Donovan v. Red Star Marine Services, Inc., 729 F. 2d 774 (2d Cir. 1984), cert. denied, 47 U.S. 1003.
an OSHA rule that might apply to airline crewmembers does not cover a "working condition", and therefore cannot be preempted. This was the approach taken by the court in *Taylor Diving and Salvage Co. v. U.S. Department of Labor*, applying OSHA's "Final Standard Regulating Access to Employee Exposure and Medical Records", 29 C.F.R. 1910.20, to commercial divers.\(^{72}\)

The aviation cases involving maintenance workers also lend support to the idea that OSHA is only preempted when the FAA has specifically regulated an area. It was only because FAA regulations required carriers to develop manuals protecting maintenance workers that OSHA was preempted from regulating maintenance work in *Northwest Airlines, Inc.*, 8 OSHC 1982 (Rev. Comm'n 1980). Similarly, it was only because the FAA had regulations governing packaging of hazardous materials that OSHA's radiation standards were preempted in *American Airlines, Inc.*, 3 OSHC 1624 (Rev. Comm'n 1975).\(^{73}\)

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\(^{73}\) An argument can be made for an industry-wide exemption and would begin with the Fourth Circuit definition of "working conditions" in *Southern Railway* as "the environmental area in which an employee customarily goes about his daily tasks." *Southern Ry. v. OSHRC*, 539 F.2d at 339. *Southern* distinguished between over-the-road operations and repair shops, and the aircraft itself might be considered a distinct "environmental area."

As such, it might be compared to a ship at sea. If so, the Review Commission and Fifth Circuit cases giving the Coast Guard complete authority over seamen on inspected, and perhaps even uninspected vessels, would argue for an industry-wide exemption.
Although the FAA policy statement claiming complete jurisdiction over crewmember health and safety articulately makes a claim for an industry-wide exemption, it could be argued that it has a fundamental logical flaw. For while it is true that all aircraft design and operational issues have an effect on crewmember health and safety, it does not follow that all crewmember health and safety issues are considered during the design and operation of aircraft. For example, crewmembers may be subjected to excess cosmic radiation during flight, yet this has never been a subject of agency regulation and would not have been considered in aircraft design. The FAA policy statement merely advances a theoretical proposition, namely, that the agency has the authority to regulate all crewmember health issues. To the extent that it has not exercised that authority, OSHA has the authority and obligation to step in.

One final argument against total FAA preemption might be made. It could be argued that the FAA lacks jurisdiction to regulate issues purely related to crewmember health, and that OSHA would have jurisdiction under the Review Commission decision in Fineberg. For example, when the Association of Flight Attendants

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See Clary v. Ocean Drilling and Exploration Co., 609 F.2d 1120 (5th Cir. 1980); Dillingham Tug & Barge Corporation, 10 OSHC 1859 (Rev. Comm'n. 1982); Donovan v. Texaco, 720 F.2d 825 (5th Cir. 1983).

filed a petition for rulemaking with the FAA asking for cart design standards to prevent back and wrist injuries to flight attendants, the Air Transport Association (the trade association for the large carriers) replied that the petition was not appropriate for rulemaking since it was not "in the public interest." "Any public benefit that could possibly derive from adopting the AFA proposal would be a second order effect at best, and this effect would be of a passenger service nature, not a matter of flight safety." The position that crew health and safety is outside the jurisdiction of the FAA is, of course, difficult to reconcile with the airlines' position that the FAA, and not OSHA, has health and safety jurisdiction over maintenance workers. The position is also untenable if "safety of flight" is considered to encompass "safety of crewmembers in flight." If these two concepts are equated, the FAA has far-ranging authority to regulate crew health. Unfortunately, the FAA has not exercised that far-ranging authority and OSHA has not stepped in to fill the vacuum.

D. Conclusion

As in all cases involving OSHA and other agencies, a balance has to be found between wasteful agency duplication and wasting human lives by leaving hazards unregulated. On the one hand, it would be unprecedented for OSHA inspectors to board an aircraft to

75 Letter to the FAA from the Air Transport Association, FAA Docket No. 25200 (Sept. 2, 1987).
measure toxic gases in the air, examine a meal and beverage cart design to see how it might cause carpal tunnel syndrome, take noise measurements, or determine whether broken equipment is properly locked out or tagged. On the other hand, it is unfair and unsafe to leave airline crewmembers unprotected by OSHA's safety and health regulations. For although the FAA carefully regulates the safety of aircraft, its interest in protecting crewmembers has historically been another matter. First and foremost, the FAA wants to keep pilots safe so that they can fly the plane, and flight attendants safe so that they can evacuate the plane in an emergency. There has never been any serious interest on the part of the FAA in protecting the health and safety of crewmembers per se, and no one among the agency's 50,000 employees has been assigned to focus on this issue.

This petition offers one solution to the gaps in crewmember health and safety coverage caused by the FAA's de facto industry-wide preemption of OSHA. Although this industry-wide preemption is probably incorrect as a matter of law, it is the rule currently followed by OSHA and the FAA, with the possible exception of OSHA's recordkeeping requirement. If the FAA is going to claim total jurisdiction over crewmembers, it should exercise that jurisdiction by providing protections equal to those provided by OSHA. It is for that reason that this petition asks the FAA to adopt the OSHA regulations and apply them to crewmembers. If the FAA refuses to take action, petitioners will ask OSHA to protect our nation's
III. Text of Proposed Rule Change

AFA proposes that Parts 121 and Part 135 of the FARs be amended by adding a new Subpart at the end of each Part entitled: "Occupational Safety and Health of Crewmembers." The new Subpart would read as follows:

(1) General duty: Each air carrier shall provide to each of its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause, death or serious physical harm to his employees.

(2) Prohibition against discrimination: No air carrier shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding related to health and safety or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right under the Federal Aviation Act or the regulations issued thereunder.

(3) Recording and reporting occupational injuries and illnesses: 29 C.F.R. 1904.2, 1904.3, 1904.4, 1904.5(a)-(d)(1), 1904.6, 1904.7, 1904.11, 1904.12 and 1904.13, 1904.14, 1904.15, 1904.16, 1904.20, and 1904.21 are adopted as FAA rules, with the following substitutions. Wherever the phrase "employer" or "employer of employees" is used, the phrase "air carrier" shall be substituted. The term "Federal Aviation Administration" shall be substituted in section 1904.7 for "the Secretary of Labor ... and by representatives of the Secretary of Health Education, and Welfare ... of the act." The phrase "Federal Aviation Administration" shall be substituted in section 1904.8 for "nearest office of the Area Director of the Occupational Safety and Health Administration, U.S. Department of Labor" and "area director."

(4) (a) Access to employee exposure and medical records: 29 C.F.R. 1910.20 is adopted as an FAA rule, with the following substitutions. Wherever the phrase "employer" is used, the phrase "air carrier" shall be substituted. Whenever the phrase "Assistant Secretary" or "Assistant Secretary of Labor for Occupational Safety and Health" is used, the phrase "Federal Aviation Administration" shall be substituted. In paragraph 1910.20(a), the phrase "Federal Aviation Act" is substituted for "Occupational Safety and Health Act." And in
paragraph 1910.20(e)(3), the phrase "the following subsection" is substituted for "29 C.F.R. 1913.10" and "29 C.F.R. 1913.10(d)."

(4) (b) Rules of agency practice and procedure concerning FAA access to employee medical records: 29 C.F.R. 1913.10 is adopted as an FAA rule with the following substitutions. Wherever the phrase "OSHA" is used, the phrase "FAA" shall be substituted. Wherever the phrase "Assistant Secretary of Labor" or "Assistant Secretary" is used, the phrase "Administrator of the FAA" shall be substituted. And whenever the phrase "Office of the Solicitor of Labor" is used, the phrase "Office of the FAA Chief Counsel" shall be substituted.

(5) Right to inspection: Any employee or representative of an employee who believes that a safety and health regulation has been violated may request an inspection of his or her workplace by giving notice of the alleged violation to the Principal Operations Inspector for his carrier. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or representative of employees. A copy shall be provided the carrier by the Principal Operations Inspector no later than at the time of inspection except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or in any record published, released, or made available by the Federal Aviation Administration. If, upon receipt of such notification, the Principal Operations Inspector determines that the complaint meets the above requirements, and that there are reasonable grounds to believe that the alleged violation exists, he shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. Inspections under this section shall not be limited to matters referred to in the complaint.

(6) Other general industry standards: Unless specifically contradicted by a Federal Air Regulation, 29 C.F.R. 1910, Subparts D through S are adopted as Federal Aviation Administration rules, with the following substitution. Wherever the phrase "employer" is used, the phrase "air carrier" is substituted. For purposes of this section, an FAA standard does not contradict an OSHA standard if it covers the same hazard, but provides less protection than the OSHA standard.

(7) Definitions and other general provisions: 29 C.F.R. 1910.1(d)-(n) are adopted as FAA standards except that an "employee" shall mean a crewmember employed by an air carrier. 29 C.F.R. 1910.5 (c)-(f), 1910.6 and 1910.7 (applicability, incorporation by reference, and testing laboratories) are
adopted as FAA standards.

(8) Incorporation of Future OSHA Regulations: Whenever OSHA publishes a proposed regulation, the FAA shall immediately seek public comment on whether the proposed regulation should apply to airline crewmembers. If the agency determines that the OSHA rule will provide a protection not already afforded to airline crewmembers, it shall adopt the final OSHA rule upon issuance.

(9) Incorporation of Currently Proposed OSHA Regulations: The FAA hereby seeks comment on whether all current proposed OSHA rules (e.g. protection from bloodborne diseases) should be applied to crewmembers.

IV. Federal Register Summary

The Federal Aviation Regulations require petitioners to include a brief summary of their petitions for publication in the Federal Register. The following summary is therefore provided:

The Association of Flight Attendants, the largest flight attendant union in the United States, petitions the FAA to adopt and apply to airline crewmembers the statutory protections of the Occupational Safety and Health Act, and the existing and proposed standards of the Occupational Safety and Health Administration.

Respectfully submitted,

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May 8, 1990