ACTION: Legal Interpretation July 1, 1992

Assistant Chief Counsel, ACE-7

Manager, Wichita Flight Standards
Office Thru: Manager, General
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250

This replies to your recent letter asking whether a pilot service/aircraft rental arrangement qualifies as a Part 91 operation. Based on the following, the proposed arrangement does not qualify as a part 91 operation. It requires a Part 135 air carrier operating certificate, and all pilots must be qualified.

We understand that a Part 135 certificate holder occasionally rents one of its Part 135 aircraft to the public on a short term basis. The people who rent the airplanes from the lessor aren't pilots, and want to hire a pilot to take them on their appointed rounds. Because of a scarcity of pilots in McPherson, Kansas, the aircraft lessee will occasionally hire a pilot who is an employee of the certificate holder to perform Part 91 pilot service in the same aircraft. These pilots are not always qualified under Part 135. For purposes of this opinion, I will assume that the aircraft rental agreement, not provided, purports to make the lessee the aircraft operator.

Issues have been raised as to the level of service the customer expects when using the aircraft and pilot service, and the need for clarification of the arrangement for determining regulatory compliance. You have presented us with a document, drawn by the Part 135 certificate holder and entitled "pilot services", purporting to seek the customer's agreement that the operations are considered Part 91 operations, and not air charter or air taxi operations. We understand that the aircraft lessor not only drafts the contract, but that he and the lessee complete the pilot rental contract. We also understand that, in some cases, the pilot may not even be aware of the terms of the contract. For instance, in the copy you have supplied to us, you say that the lessor inserted the letters "neg" for the price the pilot is to be paid. When asked, the pilot could not tell you what "neg" meant, as he indicated that the lessor completed the contract with the aircraft lessee without consulting him.

Part 135 of the Federal Aviation Regulations (FAR) [14 CFR Part 135] regulates, inter alia, commercial operations involving the carriage of persons or property for compensation or hire, unless

specifically accepted under FAR 135.1(b). The operations here do not fall within one of the exceptions listed.

Therefore, our discussion turns to whether these are commercial (charter) operations regulated by Part 135, or whether they are the private operations of the aircraft lessee conducted under Part 91. That determination depends upon who has operational control of the aircraft.

Obtaining both a flight crew and an airplane from the same source (wet lease) is usually considered conclusive evidence of carriage for compensation or hire. Administrator v. Poirier, NTSB Order No. EA-2512 (April 13, 1987), citing Golden Eagle Aviation. Inc., 1 NTSB 1028 (1971). The Golden Eagle case involved two contracts for air transportation: one for pilot service, and one for the airplane. Wichita State University (WSU) leased a large airplane from one party, through the Respondent, and pilot services from the Respondent, a Part 135 certificate holder. The case alleged violation of Part 121 rules, and sought revocation of the 135 certificate. The rental contract purported to make WSU the operator of the aircraft. Respondent claimed he was not the operator of the aircraft that WSU was. The Board indicated, however, that WSU's ignorance of airplane operations, its apparent intention to acquire an entire transportation package, and Respondent's exercise of complete control over all phases of the operation, which required aviation expertise, dictated a finding that the Respondent was the operator. The revocation order was upheld.

The following facts indicate that operational control has been retained by the Part 135 operator/aircraft lessor.

1. The lessor arranged for the pilot service. This is unusual, and speaks against the lessee being his own operator. The lessee usually is a pilot and, if not, usually finds and hires his own pilot, as he is supposed to be the operator.

2. The pilots are the aircraft lessor's own employees. This shows continued control over the airplane and its crew, contrary to any written aircraft lease.

3. The lessor also prepared the pilot service contract. This is odd, as the aircraft lessor should have no part of a pilot service contract - unless he intends to retain operational control.

4. The lessor negotiated the pilot contract with the aircraft lessee without the pilot's knowledge. This indicates that the lessee intended to acquire, and lessor intended to provide, a

complete transportation package. We don't view the fact that the payments are made directly to the employees as detracting from the lessor's control. After all, the aircraft lessor wrote and negotiated the pilot services contract.

5. The lessor's primary business is that of a Part 135 operator, and his pilot service contract provides for the same services generally provided by a charter pilot. As in Golden Eagle the lessor here is providing a total transportation package to the lessee, consistent with his certificate operations.

6. The decisions the customer is making here are those normally made by any charter customer concerning who is to be transported, to and from which points, and at what times. Nothing indicates that the lessee does more. If the lessees here, as in Golden Eagle are ignorant of airplane operations, it is entirely possible that they do not know the difference between Part 91 and Part 135 operations, or between air taxi or charter operations and private operations referenced in the lessor's contract.

The lessor/Part 135 operator has the same operational control he has under his certificate, except that, here, his pilots aren't always qualified. The facts demonstrating the lessor's continued operational control eliminate the distance from those operations which his contract seeks to create. Based upon the above, it is my opinion that the operations described require a Part 135 certificate. The pilots must be current and qualified, and the operations must comply with all applicable Part 135 regulations.

Original Signed By:

Timothy C. Titus