U.S. Department
of Transportation
Federal Aviation Administration

Office of the Chief Counsel

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Washington, D.C. 20591

DEC 4 2009

Marshall S. Filler, Esq.
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117 North Henry Street
Alexandria, VA 22314-2903

Dear Mr. Filler:

This is in response to your letter of August 5, 2009, to Mr. James Jelinski on behalf of Columbia Helicopters Peru, SAC (CHP) requesting an interpretation of "common carriage" as used in 14 CFR Part 129.

In your letter, you state that CHP is a Peruvian company authorized to conduct external-load operations in Peru. CHP operates U.S.-registered helicopters[1] exclusively for the purpose of performing external-load operations and does not transport property for compensation or hire inside the helicopter. You also state that CHP does not transport persons for compensation or hire.

You suggest that if CHP is not engaged in passenger-carrying operations and does not transport cargo inside the helicopter, CHP is not engaged in air transportation, which by definition includes common carriage. Therefore, CHP's operations would not constitute "common carriage" under §129.1, and the maintenance requirements of §129.14 would be inapplicable to CHP's U.S-registered helicopters conducting external-load operations solely outside the United States.

Discussion

Part 129 applies to foreign air carriers and foreign persons operating U.S.-registered aircraft in common carriage. U.S.-registered aircraft operated solely outside the United States in common carriage by a foreign person[2] or foreign air carrier must comply with § 129.1(b), which states:

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[1] CHP operates two Boeing -234 helicopters, registration N242CH, serial number MJ-023, and registration N241CH, serial number MJ-016 for compensation or hire (July 9, 2009 letter from James Jelinski to L. Vargas).

[2] For the purpose of part 129, "[f]oreign person means any person who is not a citizen of the United States and who operates a U.S.-registered aircraft in common carriage solely outside the United States." 14 C.F.R §129.1(c)(1).

> In addition to the operations specified under paragraph (a) of this section, §§129.14, 129.20, 129.24 and subpart B also apply to U.S.-registered aircraft operated solely outside the United States in common carriage by a foreign person or foreign air carrier.

The FAA's intent in promulgating §129.14 was to interpret the term common carriage "as that term is customarily understood in the United States." *See* FR 50 FR 50588 (1985). Although Title 14 CFR does not explicitly define "common carriage," Advisory Circular (AC) No. 120-12A ("Advisory Circular"), "Private Carriage Versus Common Carriage of Persons or Property" describes common carriage as "(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation or hire." In *Woolsey v. National Transportation Safety Board*, 993 F.2d 516 (5th Cir. 1993), the court noted that the Advisory Circular's guidelines are not only consistent with the common law definition, but entirely appropriate within the aviation context.[3]

Other definitions set forth in part 119 provide guidance on the types of aircraft operations that may be characterized as common carriage. "Operations not involving common carriage" and "noncommon carriage" are defined in part 119. Section 119.3[4] provides:

> *When common carriage is not involved or operations not involving common carriage* mean any of the following:
>
> (1) Noncommon carriage.
> (2) Operations in which persons or cargo are transported without compensation or hire.
> (3) Operations not involving the transportation of persons or cargo.
> (4) Private carriage.

"Noncommon carriage" means "*an aircraft operation* for compensation or hire that does not involve a holding out to others." (*See* §119.3. Emphasis added.) Conversely, an aircraft operation (transportation of passengers or cargo) for compensation or hire that involves "holding out" to others would constitute "common carriage."

In the letter to Mr. Jelinski, there is no discussion of whether CHP holds itself out to the public as willing and able to provide rotorcraft external-load operations, which is a critical distinction between private carriage and common carriage. (*See* AC 120-12A, "Carriage for hire which does not involve 'holding out' is private carriage.") For the purpose of this response, we assume CHP does not dispute this aspect of its operations.

Section 119.25 provides that all rotorcraft operations for compensation or hire must be conducted under the air carrier certification rules of part 135. Under §119.1(d), there is an exception to the air carrier certification and operating rules for nonpassenger-carrying rotorcraft external-load operations conducted under part 133. This provision appears to be

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[3] "The Advisory Circular correctly points out that the crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or a definable segment of the public as being willing to transport for hire, indiscriminately." *Id.*

[4] The definitions of §119.3 apply to subchapter G.

the crux of your contention that external load operations do not constitute common carriage.[5]

Rotorcraft external-load operations can be common carriage to the extent that those operations meet the four-part test of the AC - persons *or property* are transported from place to place for compensation or hire, and there is a willingness to provide the service indiscriminately. There is no exception for property carried only outside the aircraft in making this analysis. Therefore, in reviewing CHP's operations to determine whether the operations CHP describes would satisfy the common carriage test in the AC and the relevant court decisions, the distinction to be made is whether the property is moved (*i.e.* transported) from place to place, not whether the property is carried inside or outside the helicopter.

In a letter to Rachel B. Trinder, November 29, 1996 (enclosed), the FAA addressed CHP's concerns directly in responding to an inquiry regarding whether external-load operations conducted under part 133 should be considered air carrier operations. The FAA stated:

> A part 133 operation might be in "air transportation" to the extent that common carriage [holding out] is involved, payment is made and something is transported in the external load operation from, for example, one state to another. Thus ... if someone holds out to be ready to transport property, for compensation, in an external load operation across state lines, and actually conducts those kinds of operations, that person is engaged in interstate air transportation and is an air carrier....I read nothing in the former Federal Aviation Act of 1958 or in its recodification into the United States Code that suggests that a different conclusion should be reached simply because the property being transported is located outside of the aircraft, as opposed to inside the aircraft.

The FAA reached a similar conclusion in *Victor Anderson*, Legal Interpretation 1997-13 (June 26, 1997):

> The transportation of cargo under part 133 in an external load operation can be a "common carriage" operation. However, the certification requirements for common carriage operations under part 133 and [common carriage operations under] part 135 remain distinct. A person must be appropriately certificated for external load operations under part 133, regardless of whether those operations are in "common carriage," unless specifically excepted. That same person would also have to be certificated under part 119 for common carriage operations in which people or cargo are carried inside the aircraft unless specifically excepted in the regulations.

Part 129 contains no exception for nonpassenger-carrying external-load operations conducted for compensation or hire, where there is a willingness to provide such transportation indiscriminately (*i.e.*, as a common carrier). Accordingly, a foreign person using a U.S.-registered aircraft in conducting a common carriage external load operation

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[5] Because these operating rules are inapplicable to CHP's operations in Peru, we do not address how part 133 applies to CHP's operations in Peru, even if Peru's operating regulations are similar to part 133. The focus of this response is limited to whether CHP's operations meet the definition of common carriage.

solely outside the United States must comply with §§129.14, 129.20, 129.24 and subpart B of Part 129. Under §129.14(a), each foreign air carrier and each foreign person operating a U.S.-registered aircraft within or outside the United States in common carriage shall ensure that each aircraft is maintained in accordance with a program approved by the Administrator.

The continuing airworthiness requirements of §129.14(a) are consistent with the obligations of the United States as the State of Registry under the Convention on International Civil Aviation ("the Chicago Convention") and the annexes thereto.[6] Annex 8 to the Chicago Convention[7] establishes airworthiness standards for helicopters over 750kg (or 1653 lbs) intended to be used for carriage of passengers or cargo in international *air navigation,* which may include common carriage. While Annex 8 contains no specific airworthiness requirements pertaining to helicopters conducting external load operations in common carriage, a decision by the FAA to apply the continuing airworthiness standards of part 129 to U.S.-registered helicopters used in such operations would not be inconsistent with U.S. obligations as the State of Registry for such aircraft under the Chicago Convention and Annex 8.

For all of the above reasons, we cannot conclude that CHP's operations do not constitute common carriage requiring compliance with §129.14. This response was prepared by Lorna John, Senior Attorney in the Regulations Division of the Office of the Chief Counsel and coordinated with the Air Transportation Division of the Flight Standards Service and within the Office of the Chief Counsel. Please contact us at (202) 267-3921 if we can be of further assistance.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations, AGC-200

Enclosure

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[6] The Annexes to the Chicago Convention contain Standards and Recommended Practices for the operation of civil aircraft in international air navigation and are established by the International Civil Aviation Organization (ICAO). Under Article 37 of the Chicago Convention, the United States has undertaken to conform its rules and regulations for civil aviation to "the highest practicable degree" with the standards and recommended practices established by ICAO in the annexes to the Chicago Convention.

[7] Minimum standards for helicopters are contained in Annex 8.IVB.A.1.2. "The Standards of this part shall apply to helicopters over 750 kg (1,653 pounds) maximum certificated take-off mass intended for the carriage of passengers or cargo or mail in *international air navigation."* Emphasis added. These airworthiness standards do not distinguish between aerial work (including external load operations), general aviation, or international commercial air transportation.