U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

Mr. Gregory Denning
Director of Operations
ELAN Express, Inc.
3815 North Mulford Road
Rockford, IL 61114

AUG 4 2011

Dear Mr. Denning:

This letter is in response to your May 3, 2011 request for legal interpretation of a specific scenario regarding employees of a part 125 certificate holder that also work part-time for a part 121 certificate holder.

You presented a scenario in which pilots, flight attendants, and mechanics, employed by a part 125 operator, also work part-time for a part 121 certificate holder. These employees are on the part 125 operator's payroll, but are not on the part 121 certificate holder's payroll. You stated that the two companies are managed and operated on separate certificates owned by unrelated entities. Each company has its own discrete scheduling and flight release process. You also stated that the pilots are "fully trained and qualified" under the part 121 air carrier's approved training program. You indicated that when flying for the part 125 certificate holder the pilots would be operating an aircraft owned by one LLC that is used exclusively by the part 125 certificate holder. Likewise, when flying for the part 121 certificate holder, the pilots will be operating an aircraft owned by another LLC that is used exclusively by the part 121 certificate holder.

You asked the question whether the employees must be placed on the payroll of the part 121 certificate holder, or could they remain solely on the payroll of the part 125 certificate holder?[1] Under this scenario, the part 125 certificate holder would pay the employees for their work conducting part 121 operations for the part 121 certificate holder. Based on the facts as presented above, we conclude that the employees could be paid by the part 125 certificate holder for conducting operations for the part 121 certificate holder.

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[1] In framing your question you referenced an FAA "FAQ" document pertaining to part 135 operations and referred, as does the FAQ, to "Tier 1" and "Tier 2" employees. *See* Operational Control, NATA/NBAA Frequently Asked Questions (Feb. 11, 2008), *available at* http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/info/all_infos/media/135op_control_qa.pdf. We note that the "Tier 1" and "Tier 2" references are not regulatory language and are used in the FAQ for illustrative purposes. Accordingly, we will answer your question without reference to the terms "Tier 1" and "Tier 2" employees.

FAA regulations require separation of part 125 and part 121 certificate holders. First, 14 C.F.R. § 125.11 prohibits persons that hold a part 121, 129, or 135 certificate from holding a part 125 certificate. Likewise, part 125 certificate holders, unlike part 121 operators, are prohibited from conducting operations resulting from "directly or indirectly" holding out to the public to furnish transportation. *See* § 125.11(b). Finally, part 125 certificate holders may not operate, or list on their operations specifications, any aircraft listed on operations specifications or other required aircraft listing under part 121. *See* § 125.11(c).

Sharing of personnel between the two certificate holders, as proposed in your letter, raises two questions regarding potential commingling of the certificate holders. First, which certificate holder is in operational control of the flights conducted under part 121? Second, does the sharing of personnel indicate that the two certificate holders are not separate as required by part 125 regulations?

The first question, whether the part 121 operator would have operational control of its flights when operated by crewmembers paid by the part 125 certificate holder, must be addressed because § 125.11(c) prohibits part 125 certificate holders from operating an aircraft listed on a part 121 certificate holder's operations specifications. Operational control, with respect to a flight, "means the exercise of authority over initiating, conducting or terminating a flight." § 1.1 (definition of operational control). Determinations of operational control are fact-specific and are made on a case-by-case basis. *See* Legal Interpretation to Leonard Kirsch, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (June 17, 2011).

A key inquiry in evaluating operational control is whether the aircraft used in the operations are dry or wet leased. This can be determined by assessing: (1) the source of the aircraft used in the operation and, (2) the source of the flight crewmembers that operate the aircraft. *See* Legal Interpretation to George C. Douglas, Jr., from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (July 21, 2009). The aircraft in your scenario is owned by an LLC, is listed on the part 121 certificate holder's operations specifications, and is not used by the part 125 certificate holder. The pilots would be supplied for the part 121 operation by the part 125 certificate holder. We can make this determination because the pilots are employed, and would be paid to conduct the part 121 operations, by the part 125 certificate holder. Because the part 121 certificate holder is obtaining the pilots from one source, and the aircraft from another, we can determine that the aircraft is obtained through a dry lease. *See* Legal Interpretation to Douglas ("A dry lease of an aircraft is one in which the owner provides the aircraft and the lessee supplies his or her own flight crew and retains operational control of the flight.").

Additionally, you noted that the part 121 air carrier maintains its own scheduling and flight release process. These factors, as presented to us in your letter, indicate that the part 121 certificate holder would have operational control of the flights conducted by the pilots who are being paid by the part 125 certificate holder.

The second question raised is does the sharing of personnel indicate that the two companies are not separate as required by part 125 regulations? Part 125 certificate holders are prohibited from conducting common carriage operations that result from holding out to the

public to furnish transportation. § 125.11(b). Such operations, because they are conducted in large airplanes, would normally be conducted under a part 119 certificate authorizing part 121. Section 125.11 was established, in part, to "ensure that no subterfuges are utilized by contract or other means to feed common-carriage-generated transportation to [p]art 125 certificate holders." *See* 45 Fed. Reg. 67214, 67217 (Oct. 9, 1980).

The FAA has previously determined that, in a situation where a parent company held a part 135 certificate, and its subsidiary was applying for a part 125 certificate that the sharing of common facilities and personnel between the two companies could raise "a serious question . . . as to whether the [p]art 125 applicant can, in fact, conduct an operation which does not 'result directly or indirectly from any persons holding out to the public to furnish transportation.'" *See* Legal Interpretation to G. Todd Norvell, from John J. Callahan, Deputy Assistant Chief Counsel (June 16, 1989) (quoting § 125.11(b)). While sharing of personnel or facilities would not be an automatic determinant that the two certificate holders are impermissibly comingled, the burden lies with the certificate holder to "demonstrate that it is able to conduct its operation without a direct or indirect holding out by any person to the public to furnish such transportation." *See id.*

Therefore, from the information provided to us, we conclude that because the part 121 carrier is providing the aircraft used in the part 121 operations, and the flight crewmembers are eligible under part 121 rules to operate the aircraft for that carrier, then those flight crewmembers may be paid for flight time by the 125 certificate holder. However, we also recommend exercising caution before taking measures in addition to the scenario described here that could indicate that the companies are, in-fact, interrelated to the point where the part 125 company is impermissibly conducting part 121 common carriage operations without holding the appropriate operating certificate.

This response was prepared by Dean E. Griffith, Attorney in the Regulations Division of the Office of the Chief Counsel, and was coordinated with the Air Transportation Division and the General Aviation and Commercial Division of Flight Standards Service. Please contact us at (202) 267-3073 if we can be of additional assistance.

Sincerely,

Michael E. Chase

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