Federal Aviation Administration

Memorandum

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To: Les Smith, Manager, Air Transportation Division, AFS-200

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

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Subject: Clarification of 14 C.F.R. § 119.53 – Wet Leasing of Aircraft and Other Arrangements for Transportation by Air.

This memorandum is in response to your April 16, 2012 request for interpretation of 14 C.F.R. § 119.53 pertaining to the wet leasing of aircraft and other arrangements for transportation by air. In your request you ask four questions arising from a situation in which an air carrier, authorized to conduct domestic and flag operations, sought to conduct flights on behalf of another certificate holder under the provisions of § 119.53(e). The questions are addressed below.

Question 1

May a part 121 certificate holder that is authorized only to conduct supplemental operations conduct a substitute operation under § 119.53(e) on behalf of a certificate holder that is authorized to conduct domestic, flag, and supplemental operations?

To conduct an operation for another certificate holder, § 119.53(e) requires, in part, that a certificate holder be "authorized under its operations specifications to conduct the same kinds of operations"[1] as the other certificate holder. The regulatory history is clear on this point. The FAA stated in the notice of proposed rulemaking proposing this section that "a certificate holder may not contract to perform any flight it is not authorized to perform by its own operations specifications." 60 Fed. Reg. 16230, 16262 (Mar. 29, 1995). To perform the flights the substitute carrier "must have operations specifications authorizing it to perform domestic, flag, or commuter rules [operations] just as the original certificate holder would have." *Id.* The FAA reemphasized in the final rule that operators under § 119.53(e) needed to conduct substitute operations under the same operations specifications as the original certificate holder. *See* 60 Fed. Reg. 65832, 65884 (Dec. 20, 1995). Accordingly, a part 121 certificate holder that only holds

[1] "*Kind of operation* means one of the various operations a certificate holder is authorized to conduct, as specified in its operations specifications, *i.e.*, domestic, flag, supplemental, commuter, or on-demand operations. 14 C.F.R. § 110.2.

authorization to conduct supplemental operations could conduct a substitute operation under supplemental rules, but would not be able to conduct substitute operations under domestic or flag rules.[2]

Question 2

May a certificate holder that is authorized to conduct domestic and supplemental operations conduct a substitute operation under § 119.53(e) outside of the United States, on behalf of a certificate holder who is authorized to conduct flag operations?

As discussed in the answer to the first question, a certificate holder conducting a substitute operation under § 119.53(e) must be authorized under its operations specifications to conduct the same kinds of operations as the original certificate holder. Therefore, a certificate holder that is not authorized to conduct flag operations may not conduct substitute flag operations for another certificate holder.

Question 3

Does § 119.53(e) permit a part 119 certificate holder to conduct substitute operations for a foreign air carrier that conducts operations under part 129? You also asked what is the regulatory basis, if any, for a "charter agreement" that would allow a part 119 certificate holder to conduct operations utilizing the flight number and call sign of a part 129 foreign air carrier?

A part 119 certificate holder could conduct substitute operations for a foreign air carrier under the terms of § 119.53(e). The text of the regulation provides that a certificate holder may conduct an operation for a foreign air carrier under part 129 if the substitute carrier: (1) holds applicable Department of Transportation economic authority, if required, and (2) is authorized under its operations specifications to conduct the same kinds of operations as the foreign air carrier that arranges for the substitute operation. *See* § 119.53(e).

Regarding your question on the basis of a charter agreement, a charter is an agreement whereby a person provides lift capacity to another person for a defined period of time or number of flights. *See* Memorandum to Jeffrey Rosen, General Counsel U.S. Department of Transportation, from Andrew B. Steinberg, Chief Counsel, FAA (May 18, 2004). In contrast a lease is an agreement in which exclusive legal possession of the aircraft is transferred from one party to another.[3] We are unable to make a determination regarding whether the operations are performed under a lease or a charter without having reviewed a copy of the underlying agreement.

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[2] Section 119.53 also requires that the substitute air carrier: (1) hold Department of Transportation economic authority if required for the operation; (2) conduct the operation "in accordance with the same operations authority" as the arranging certificate holder; and (3) conduct the operations "between airports for which the substitute certificate holder holds authority for scheduled operations or within areas of operations for which the substitute certificate holder has authority for supplemental or on-demand operations."

[3] Note that the Department of Transportation's rules on leases by foreign air carriers or other foreign persons of aircraft with crew defines any agreement in which an aircraft is furnished by one party to another as a lease regardless of "whether the agreement constitutes a true lease, charter arrangement, or some other arrangement." 14 C.F.R. § 218.1.

Question 4

Can an operations specification, such as A345 be issued to grant authority to conduct a kind of operation, in lieu of granting such authority in operations specification A001, and without a certificate holder meeting the certification requirements for that kind of operation, or the proving flight requirements of §§ 119.33(c) and 121.163(b)?

A certificate holder cannot be authorized to conduct a kind of operation unless it meets the regulatory requirements to conduct that kind of operation. One of those requirements is that it meets the aircraft proving requirements of §§ 119.33(c) and 121.163(b). *See* § 119.33(c) ("[E]ach applicant for operations specifications authorizing a new kind of operations that is subject to § 121.163 . . . shall conduct proving tests as authorized by the Administrator . . . ."); § 121.163(b) ("Unless authorized by the Administrator . . . a certificate holder must conduct at least 50 hours of proving tests . . . for each kind of operation it intends to conduct.").

There is no legal requirement dictating which operations specification must be used to indicate that the authority has been granted. Authority for maintaining the operations specification system lies with the Flight Standards Service.