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

Office of the Chief Counsel

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Washington, D.C. 20591

FEB 24 2014

Mr. Robert E. Cohn
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Dear Mr. Cohn:

This letter responds to the two questions you raised in your request for an interpretation of the applicability of 14 C.F.R. §121.1005(c) to persons who receive hazardous materials training from a 14 C.F.R. part 129 air carrier. We address each question separately.

Question 1

In your first question, you ask whether a part 121 air carrier may use an individual employed by a part 129 air carrier for handling hazardous materials in its own hazardous materials program, if the part 121 air carrier determines the foreign air carrier's training program is substantially similar to the part 121 air carrier's program and meets international hazardous training requirements, and the part 121 air carrier trains that individual only on differences between the part 121 air carrier's hazardous training program and the part 129 air carrier's program.

You state that a foreign air carrier should be viewed as another "certificate holder" as that term is used in §121.1005(c); therefore, Atlas Air, Inc. (Atlas Air) should be allowed to take advantage of the exception in §121.1005(c), which states that under certain specified conditions –

> A certificate holder that uses or assigns a person to perform or directly supervise a job function specified in §121.1001(a), when that person also performs or directly supervises the same job function for another certificate holder, need only train that person in its own policy and procedures regarding those job functions.

Because all of the arguments you advance in support of your request are based solely on your conclusion that the term "certificate holder," in the context of §121.1005(c), includes a foreign air carrier operating under 14 C.F.R. part 129, we focus our response primarily on that issue.

As discussed below, the answer to your first question is "no."

14 C.F.R. subpart Z – Hazardous Materials Training Program, prescribes the requirements applicable to each crewmember and person performing or directly supervising persons performing specified job functions involving any item for transport on board an aircraft. Section 121.1005(a) contains the following prohibition –

> [N]o certificate holder may use any crewmember or person to perform any of the job functions or direct supervisory responsibilities, and no person may perform any of the job functions or direct supervisory responsibilities, specified in §121.1001(a)[1] unless that person has satisfactorily completed the certificate holder's FAA–approved initial or recurrent hazardous materials training program within the past 24 months.

A foreign air carrier is not a "certificate holder" because the FAA does not issue air carrier operating certificates to part 129 foreign air carriers. Part 119 prescribes the types of air carrier certificates and operating certificates and the certification requirements an operator must meet in order to hold a certificate authorizing operations under part 121, 125, or 135. It also describes the operations specifications required for each kind of operation conducted under part 121 or 135. *See* §§119.1 and 119.31. Thus, the term "certificate holder" is consistently used in 14 C.F.R to refer to an operator who is the holder of a certificate issued under part 119. Additionally, the regulatory text of part 119 explicitly excludes operations conducted under part 129. *See* §119.1(d), "[t]his part does not govern operations conducted under part 91, subpart K (when common carriage is not involved) *nor does it govern operations conducted under part 129, 133, 137, or 139.*" (Emphasis added).

Notwithstanding the FAA's long-standing and well understood interpretation of the term, "certificate-holder," as well as the regulatory text of part 119, which explicitly excludes part 129 operators, you assert that the FAA in practice issues a "kind of certificate to a part 129 air carrier."[2] However, in a recent amendment of part 129, the FAA reiterated that foreign air carriers do not receive air carrier certificates under part 119, but are instead issued FAA operations specifications describing their operations in the United States in accordance with the operations specifications issued to them by the foreign civil aviation authority that is responsible for safety oversight of that air carrier's operations. In 75 FR 25127, the FAA stated –

> To fulfill its oversight responsibilities, the FAA issues operations specifications to foreign air carriers and foreign persons to ensure a common understanding of the scope of their operations. Operations specifications describe: (1) The scope of a foreign air carrier's operations into the United States, including any applicable authorizations and limitations; and (2) Maintenance responsibility for U.S.-registered aircraft operated by foreign air carriers and foreign persons within or outside the United States. *The foreign civil aviation authority is responsible for the certification*

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[1] The job functions involving any item for transport on board an aircraft listed in §121.1001(a) are acceptance; rejection; handling; storage incidental to transport; packaging of company material; or loading.

[2] Because there is no ambiguity in the regulatory text of subpart Z and §121.1005(c) in particular, we do not address each of the secondary arguments included in your letter, except to note that the term "certificate-holder" in §129.109(b) requires clarification, and the FAA will make those editorial changes at an appropriate time.

> *and the continuing oversight of the air carrier or foreign person's operations in accordance with applicable ICAO standards.* (Emphasis added)[3].

It should be noted that Atlas Air raised similar concerns in its comments on the Notice of Proposed Rulemaking (NPRM) that introduced the recent part 129 amendment. As discussed in a comment on the NPRM, Atlas Air suggested that –

> [t]he second exception in proposed §121.803(c), [§121.1005(c)] limiting the retraining required of persons working for other certificate holders in certain circumstances, would permit certification only from another certificate holder with the same will-carry [hazardous materials] status. Atlas believed this would put it at a distinct disadvantage around the world by prohibiting the acceptance of foreign carriers' certifications, which represent a large segment of Atlas' business.[4]

Thus, in its comments on the NPRM, it appears that Atlas Air correctly understood that the term "certificate holder," as used in the proposed rule, did not include foreign air carriers, and that the exclusion of foreign air carriers would prohibit "the acceptance of foreign carrier's certificates."

When it issued the final rule, the FAA responded to Atlas Air's comments by emphasizing that the effect of the exemption would be to "minimize the training burden on part 121 and part 135 operators." For example, "a worker initially performing work for a certificate holder with an operations specification prohibiting the acceptance of radioactive material may not have received in-depth training in the transport of radioactive materials. However, if that worker performs a job function listed in §121.1001 or §135.501 for or on behalf of an additional certificate holder that does accept radioactive material, the worker must be trained on the regulations pertaining to such materials. Therefore, a part 121 or part 135 operator using a person trained under another part 121 or part 135 operator's approved [hazardous materials] training program (both with the same will-carry or will-not carry status) only has to train that person in the way it complied with the regulations."[5] In other words, Operator A would only be required to train that employee on any additional information not covered by Operator B's training program, in accordance with Operator A's hazardous materials training program.

Most importantly, Atlas Air could not satisfy the condition specified in §121.1005(c)(1) requiring the "other certificate holder" to verify that the person (to be used by the first certificate holder) has "satisfactorily completed hazardous materials training for the specific job function under the other certificate holder's FAA-approved hazardous material training program under Appendix O of [part 121]." The FAA does not approve the training programs of foreign air carriers, including hazmat training, which is the responsibility of the foreign civil aviation authority that has safety oversight of that air carrier. As proposed by Atlas Air, the part 129 air carrier would become, "the other certificate holder," but that

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[3] 75 FR 25127 at 25128.
[4] *See* 70 FR 58796 at 58804.
[5] *See* 70 FR 58796 at 58804.

operator would never ever have an FAA-approved training program under part 121, Appendix O, because that would exceed the scope of the regulation and FAA's international obligations. *See generally*, ICAO Annex 18, the Technical Instructions for the Safe Transport of Dangerous Goods by Air, ICAO Doc. 9284, and FSIMS, Volume 2, Chapter 2, Section 6. *Also see*, 49 U.S.C. 40105(b) requiring the Administrator to "act consistently with obligations of the United States Government under an international agreement ... and consider applicable laws and requirements of a foreign country."

Based on the lack of any ambiguity in the text of §121.1005(c) as amplified by the comments in the preamble to the final rule implementing that provision, there is no reasonable basis to conclude that a part 129 operator was inadvertently excluded from coverage under the rule. The FAA considered these arguments before finalizing the rule and reasoned that the limited exception for using untrained workers for loading hazmat at a foreign location under the direct visual supervision of trained personnel would provide adequate relief. *See* §121.1005(f).[6] A part 121 or 135 air carrier may use this exception when "operating at a foreign location where the country requires the certificate holder to use persons working in that country to load aircraft [only]." If the foreign country does not impose such a requirement, presumably, the part 121 or 135 air carrier could use a person trained under its own FAA-approved hazmat training program, or take advantage of the exception contained in §121.1005(c) to use employees who have appropriate hazmat training under another part 121 or 135 air carrier's FAA-approved training program, supplemented by differences training.

Thus, for the reasons stated above, the answer to your first question is "no," and, at your request, the FAA will process your Petition for Exemption in accordance with 14 C.F.R. part 11.

Question 2

In your second question, you state that –

> Because the language of FAR § 121.1005(c) refers only to a "certificate holder," a U.S. air carrier should be able to provide only differences training when the U.S. air carrier uses an individual who has received hazmat training by the holder of a Part 145 repair station certificate, so long as the U.S. air carrier has reviewed the hazmat training program of the repair station to ensure that it satisfies hazmat training requirements.

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[6] The exception in §121.1005(f) applies "if a certificate holder operating at a foreign location where the country requires the certificate holder to use persons working in that country to load aircraft. In such a case, the certificate holder may use those persons even if they have not been trained in accordance with the certificate holder's FAA approved hazardous materials training program. Those persons, however, must be under the direct visual supervision of someone who has successfully completed the certificate holder's approved initial or recurrent hazardous materials training program in accordance with this part. This exception applies only to those persons who load aircraft."

You base this inference on the statement that §121.1005(c) uses the "unmodified" term "certificate holder," and the preamble to the final rule "clearly confirms that Part 145 certificate holders are covered by this provision [§121.1005(c)]." Therefore, you suggest that a "U.S. air carrier should be able to contract for an employee of a Part 145 certificated repair station to provide hazmat handling services, and train that individual only in areas that were not already covered by training provided by the repair station."

As discussed in the response to Question 1, the term "certificate holder" in §121.1005(c) refers only to a part 121 or 135 air carrier. Moreover, the term "repair station" is used to distinguish the hazmat training requirements of a part 145 repair station from the responsibilities of the part 121 or 135 air carrier. *See* for example, § 121.1005(e), which requires a "certificate holder" to ensure that each "repair station performing work for, or on the certificate holder's behalf" receives notice of the certificate holder's hazmat policies. The air carrier's policies must be provided in writing to the repair station, along with the air carrier's operations specifications authorizing the particular hazmat operation.[7] The repair station must then ensure that its employees are properly trained in accordance with the part 121 or 135 certificate holder's training program when performing the functions specified in the rule on behalf of a part 121 or part 135 air carrier. Thus, §145.165(b) prohibits "a repair station employee from performing or directly supervising a job function listed in §121.1001 or § 135.501 for, or on behalf of the part 121 or 135 operator including loading of items for transport on an aircraft operated by a part 121 or part 135 certificate holder, *unless that person has received training in accordance with the part 121 or part 135 operator's FAA approved hazardous materials training program.*" (Emphasis added).

In commenting on §145.165 as proposed in the NPRM, one commenter urged the FAA to create an exception to the rule that would allow the repair station to receive acknowledgement from the air carrier that its training program is adequate. The commenter argued that such a provision would permit the certificate holders and repair stations the flexibility to require specific training, if deemed necessary. The FAA rejected the recommendation that air carriers approve a repair station's training program, and reemphasized that as long as the repair station performs or directly supervises a job function listed in §121.1001 for, or on behalf of a part 121 or part 135 operator, such as loading the certificate holder's aircraft, the repair station must train its employees under the FAA's hazmat training requirements.[8]

Thus, the policy you propose in Question 2 is not only prohibited by §121.1005(e) and §145.165(b), but the FAA rejected a similar proposal when it issued the final rule in 2005. For these reasons, as well as the explanations given for our response to Question 1, the answer to your second question is also "no."

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[7] Section 121.1005(e) states that "[a] certificate holder must ensure that each repair station performing work for, or on the certificate holder's behalf is notified in writing of the certificate holder's policies and operations specification authorization permitting or prohibition against the acceptance, rejection, handling, storage incidental to transport, and transportation of hazardous materials, including company material. This notification requirement applies only to repair stations that are regulated by 49 CFR parts 171 through 180 [Hazardous Materials Regulations]."

[8] *See* 70 FR 58796 at 58810.

This response was prepared by Lorna L. John, Senior Attorney in the Regulations Division of the Office of the Chief Counsel and coordinated with the International Programs and Policy Division of the Flight Standards Service, the Air Transportation Division of the Flight Standards Service, the Office of Hazardous Materials Safety, and other Divisions in the Office of the Chief Counsel. If we can be of further assistance, please contact us at (202) 267-3073.

Sincerely,

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