Federal Aviation Administration

Memorandum

Date: APR 29 2014

To: John S. Duncan, Director, Flight Standards Service (AFS-1)

From: Mark W. Bury, Assistant Chief Counsel for International Law, Legislation and Regulations (AGC-200)

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Subject: Legal Interpretation - Qualification Requirements for Pilot Assigned as Second in Command on a Part 121 Operation Requiring Three or More Pilots and Qualification Requirements for Pilot Who Relieves the Assigned Second in Command En Route

Background

This legal interpretation is provided in response to a request to the Flight Standards Service - Air Transportation Division (AFS-200) from the Flight Standards Service – Eastern Region (AEA-200) for guidance regarding the requirements of 14 C.F.R. § 121.432(a) and 14 C.F.R. § 121.543(b)(3)(ii) that, in part, constituted a request for a legal interpretation.[1] The request noted that certain operators rely on the requirements in § 121.543 instead of the requirements in § 121.432(a) for the qualification of second in command pilots (SIC).

AEA-200 also sought a request for guidance for transitioning into compliance with § 121.432(a), part 121 operators that train and qualify pilots under subparts N and O of part 121. The issue regarding a transition into compliance is a policy matter and as such is not addressed in this legal interpretation.

The Office of the Chief Counsel sought public comment on this legal interpretation because, while the existing legal interpretations with respect to the requirements in § 121.432(a) are clear,

[1] The Office of the Chief Counsel received a related request for a legal interpretation from Southern Air Inc. regarding the applicability of 14 C.F.R. §§ 121.432(a) and 121.543(b)(3)(ii) to pilots serving as SIC during the en route cruise portion of the flight only. Southern Air Inc. asked the following two questions:

(1) Is a takeoff and landing from the left seat during operating experience, required for a pilot who relieves the assigned SIC en route during the cruise portion of the flight?

(2) Is PIC proficiency training and evaluation required for pilots who relieve the assigned SIC by serving as SIC en route during the cruise portion of the flight?

Because this proposed legal interpretation addressed issues raised by both Southern Air Inc. and the Flight Standards Service, a copy of this memorandum will be provided to Southern Air Inc.

New York FSDO-15 indicated that these interpretations may not be consistently applied. Further, we sought comment on whether the interpretations are still appropriate. *See* 78 Fed. Reg. 67983 (Nov. 13, 2013).

We received 15 comments on the proposed legal interpretation. None of the comments addressed the issue of consistency in the application of the § 121.432(a) requirements. Two commenters proposed amending the existing legal interpretation regarding the requirements of § 121.432(a), and one commenter asked that the agency address the applicability of § 121.432(a) to operators using an approved Advanced Qualification Program (AQP) for pilot training.

The legal interpretation is adopted as proposed in the November 13, 2013 notice with minimal clarifying information. This legal interpretation addresses the legal requirements of §§ 121.432(a) and 121.543(b)(3)(ii); explains that § 121.543(b)(3)(ii) may not be used as a substitute for the requirements of § 121.432(a); and clarifies the implications of § 121.432 for operators that use AQP for pilot training and qualification.

Analysis of 14 C.F.R. § 121.432(a)

Part 121 requires a minimum of two pilots for every operation and states, "[T]he certificate holder shall designate one pilot as pilot in command and the other second in command." *See* 14 C.F.R. § 121.385(c). However, certain part 121 operations require more than two pilots due to the operating rules that address pilot flight duty and rest. *See* 14 C.F.R. part 117 and part 121, subparts R and S. By assigning one or more additional pilots to a long range flight, a certificate holder can ensure that the assigned pilot in command (PIC) and assigned SIC may each have an opportunity to rest during the flight if needed or if required to comply with the flight duty and rest requirements of parts 117 and 121.

In those instances in which a part 121 operation requires three or more pilots, § 121.432(a) establishes additional qualification standards for the assigned SIC. Specifically, § 121.432(a) states, "Except in the case of operating experience under § 121.434, a pilot who serves as second in command of an operation that requires three or more pilots must be fully qualified to act as pilot in command of that operation." This provision has appeared in part 121 since 1970. *See* 35 Fed. Reg. 84 (Jan. 3, 1970); 41 Fed. Reg. 47227, 47229 (Oct. 28, 1976) (redesignating § 121.432(c) as § 121.432(a) without any change).

In 1978, based on the plain meaning of the regulatory text, the FAA issued a legal interpretation of § 121.432(a). This interpretation stated that § 121.432(a) requires a pilot who serves as SIC of an operation that requires three or more pilots to meet all PIC qualification requirements except for PIC operating experience. *See* Legal Interpretation 1978-27 (also referred to as "the Faberman interpretation"). Legal Interpretation 1978-27 has represented the agency's definitive interpretation of § 121.432(a) for over 35 years. Ultimately, the agency determined that while § 121.432(a) places a broad set of qualification requirements on SICs in crews of three or more, it also provides a broad exception from PIC operating experience.

Two commenters stated that Legal Interpretation 1978-27 incorrectly interpreted § 121.432(a) as providing an exception from PIC operating experience. According to commenters, the agency

added the exception language ("Except in the case of operating experience under § 121.434,...") in order to allow the SIC in a crew of three or more to complete PIC operating experience while serving as the SIC in a crew of three or more. Commenters assert that this approach is consistent with the operating experience requirements for PIC candidates in § 121.434 which allows a PIC candidate to serve as a required SIC while completing PIC operating experience. According to commenters, by carving out the PIC operating experience from SIC qualification requirements, the SIC will not be fully qualified as a PIC as required by § 121.432(a) and that the agency's existing interpretation of the exception language conflicts with the intent of the provision.

Although the agency maintains that the plain language of the regulatory text is clear, in light of comments received on the recent proposed legal interpretation suggesting that the history of the § 121.432(a) warrants a change to Legal Interpretation 1978-27, we provide a thorough examination of the history of § 121.432(a). In 1965, several part 121 regulations addressed the requirements for SICs in crews of three or more. *See* 14 C.F.R. §§ 121.419, 121.441, 121.449 (1965 ed.). Specifically, part 121 required SICs in crews of three or more to complete qualification and recurrent training and evaluation (proficiency checks) with the same content and frequency as PIC training and proficiency checks. *See* 14 C.F.R. §§ 121.419, 121.441, 121.449 (1965 ed.). At this time, part 121 did not contain a requirement for SICs in crews of three or more to complete PIC operating experience.

Subsequently, in a 1969 NPRM, "Training Programs, Airplane Simulators and Crewmember and dispatcher Qualifications; Flight Maneuvers" the agency proposed to amend part 121 and in doing so, explained that it intended to remove the repetitious stating of requirements for the SIC of a crew of three or more pilots. *See* 34 Fed. Reg. 6112, 6113 (Apr. 4, 1969) (proposing § 121.432(c), the predecessor to § 121.432(a)). Notwithstanding the NPRM preamble discussion, the agency included the following broad regulatory text as a replacement for the existing qualification and recurrent training and evaluation requirements for the SIC in a crew of three or more: "A pilot who serves as second in command of an operation that requires three or more pilots must be fully qualified to act as pilot in command of that operation."

Following the 1969 NPRM, in 1970, the agency issued a final rule in which it added the exception pertaining to PIC operating experience without explanation. *See* 35 Fed. Reg. 84, 87 (Jan. 3, 1970) (including final rule language identical to existing § 121.432(a)). The breadth of the SIC qualification requirement was discussed in the agency's response to a comment suggesting that the PIC certification requirement (the requirement for an ATP certificate) should be substituted for the proposed SIC qualification requirements. *See* id. In this context, the agency indicated that the qualification requirements for the assigned SIC in a crew of three or more were not limited to one particular aspect of PIC qualification as compared to the PIC certification requirement in § 121.437 and that the provision was intended to cover broader PIC qualification requirements. *See id.* However, at no point in the discussion of § 121.432 did the agency address the addition of the exception language.

Although we have provided this review of regulatory history for purposes of responding to comments on the proposed legal interpretation, we caution that a review of the regulatory history is only appropriate when the plain meaning of the regulatory text is ambiguous. After further analysis of § 121.432(a), we have determined that Legal Interpretation 1978-27 remains a valid

interpretation of the regulation based on the unambiguous regulatory text in § 121.432(a) excepting PIC operating experience from the qualification requirements for an assigned SIC in a crew of three or more pilots.

Even if the regulatory text of § 121.432(a) could be considered ambiguous, thus leading one to rely on regulatory history for purposes of interpretation, there is insufficient language in the regulatory text and regulatory history to support the interpretation sought by commenters. While the regulatory history indicates a requirement for broad qualification requirements, it does not foreclose an exception from these requirements. Further, an exception from these broad requirements does not, as commenters suggest, create a contradiction but rather a means by which to provide some limits within a broad regulatory construct. We would have to weave together too many lapses in the regulatory history and regulatory text itself to arrive at the interpretation offered by commenters. Accordingly, the § 121.432(a) interpretation recommended by commenters would require a change to the regulatory text of § 121.432(a).

Analysis of 14 C.F.R. § 121.543(b)(3)(ii)

The assigned SIC is a required flightcrew member and as such may only leave his or her duty station for purposes of rest during the en route cruise portion of the flight, if relief is provided by a pilot who meets the requirements identified in § 121.543(b)(3)(ii) to act as SIC of the aircraft during the en route cruise portion of the flight.[2] *See* 42 Fed. Reg. 37417, 37420 (July 21, 1977). Once a relief pilot assumes the responsibilities of the assigned SIC, the relief pilot becomes a "required" flightcrew member within the meaning of § 121.543 and must remain at that duty station until relief is provided in accordance with § 121.543(b)(3)(ii).

To relieve the assigned SIC during the en route portion of a flight (the only time the assigned SIC may leave their duty station), a pilot must meet the part 121 SIC qualification requirements, except for the recency of experience requirement in § 121.439 (three takeoffs and landings within 90 days). *See* § 121.543(b)(3)(ii). In contrast with § 121.432(a), which adds PIC qualification requirements to serve as the assigned SIC in a crew of three or more pilots, the relief pilot requirements in § 121.543(b)(3)(ii) do not identify any additional qualification requirements for service as SIC en route. Accordingly, the pilot relieving the assigned SIC during the en route portion of the flight need not meet the additional SIC qualification requirements identified § 121.432(a).

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[2] Section 121.543(b)(3)(ii) allows a required flightcrew member to leave the assigned duty station if the crewmember is taking a rest and relief is provided, "In the case of the assigned second in command, by a pilot qualified to act as second in command of that aircraft during en route operations. However, the relief pilot need not meet the recent experience requirements of § 121.439(b)." The agency notes that the requirements for PIC relief are independent from the requirements for SIC relief. Requirements for PIC relief for purposes of rest during the en route cruise portion of the flight can be found in a separate paragraph, § 121.543(b)(3)(i). An assigned PIC may only be relieved by a pilot who holds an airline transport pilot (ATP) certificate and appropriate type rating. *See* 14 C.F.R. § 121.543(b)(3)(i). Further, the PIC relief pilot may be either a fully qualified PIC or an SIC qualified to act as PIC en route. *See* id. An SIC qualified to act as PIC en route means an SIC who has completed all PIC qualification requirements except for the following: 6-month recurrent training required by § 121.433(c)(1)(iii); the operating experience required by § 121.434; the takeoffs and landings required by § 121.439; the line check required by § 121.440; and the 6-month proficiency check or simulator training required by § 121.441(a)(1). *See* id.

With this legal interpretation, we clarify that § 121.543(b)(3)(ii) may not be used as a substitute for the qualification requirements in §121.432(a). The assigned SIC in a part 121 operation that requires three or more pilots must satisfy the PIC qualification requirements in accordance with § 121.432(a). However, the § 121.432(a) requirements do not apply to a pilot who relieves the assigned SIC for a period of time en route. Finally, we note that the exception to the recency requirement in § 121.543(b)(3)(ii) applies only to a pilot who relieves the assigned SIC during the en route cruise portion of the flight.

Applicability of Analysis to Pilots Training Under Advanced Qualification Programs (AQP)
Finally, one commenter asked that the agency address the applicability of § 121.432(a) to operators using an approved AQP for pilot training. Air carriers that conduct operations under part 121 may train and qualify crewmembers and aircraft dispatchers in accordance with the provisions of current subparts N, O, and P. Also, as established in subpart Y of part 121, the agency allows part 121 operators to use alternative methods to train and qualify pilots in accordance with an approved AQP. To obtain approval of an AQP, an air carrier must develop a Qualification Standards Document that specifies which requirements of parts 61, 63, 65, 121, or 135, as applicable, will be replaced by the AQP curriculum. *See* 14 C.F.R. § 121.909. Each requirement contained in part 61, 63, 65, 121, or 135 that is not specifically addressed in an approved AQP curriculum continues to apply to the certificate holder.

Accordingly, the SIC qualification requirements of § 121.432(a) apply to all assigned SICs in part 121 operations that satisfy the applicability criteria in § 121.432(a) (i.e., part 121 operations that require a crew of three or more pilots). This means that if an operator uses an AQP for pilot training, the SIC must be fully qualified to serve as PIC (except for PIC operating experience) in accordance with the operator's AQP PIC qualification requirements.