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

Office of the Chief Counsel

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

APR 19 2016

Ms. Rebecca B. MacPherson, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

Re: Legal Interpretation of 14 CFR §§ 25.855(a), 25.857(e), and 121.583

Dear Ms. MacPherson:

This is in response to your letter dated March 26, 2014, concerning the Federal Aviation Administration's (FAA) current policy regarding exemptions to Title 14 of the Code of Federal Regulations (14 CFR) part 25. You explained that the FAA has required operators to secure exemptions from part 25 requirements that are already addressed by § 121.583. Your particular concern was that these exemptions have re-imposed some of the very requirements that are regulatorily excepted under § 121.583.

In your letter, you explained that Kalitta Air Charters, LLC (Kalitta) is a part 121 operator of transport category aircraft engaged in operations that involve the transport of highly valued race and show horses. You stated that Kalitta uses Boeing Model 727 freighter airplanes with Class E cargo compartments. You further noted that the highly valued horses cannot be properly insured for air transport unless there are a sufficient number of qualified horse handlers on board. These horse handlers must travel in the Class E cargo compartment with the live horses being transported.

The FAA requires certificate holders, such as Kalitta, to obtain exemptions from §§ 25.855(a) and 25.857(e) in order to transport persons necessary for the safe handling of animals in Class E cargo compartments. In doing so, the FAA imposes conditions and limitations on these certificate holders, which are unique to supernumerary access to the Class E cargo compartment.

Your letter raises the following three questions:

(1) Must a certificate holder obtain exemptions from §§ 25.855(a) and 25.857(e) in order to transport supernumeraries in a Class E cargo compartment?

(2) When a certificate holder is transporting supernumeraries in a Class E cargo compartment pursuant to an exemption from §§ 25.855(a) and 25.857(e), may the

FAA issue conditions on that certificate holder, which exceed the conditions already covered by § 121.583?

(3) Must a certificate holder obtain an exemption from the requirement for an exit slide in § 25.809(f) at Amendment 25-0 in order to transport supernumeraries in a Class E cargo compartment when § 121.583 relieves the certificate holder from complying with § 121.310(a), which imposes the same requirement as § 25.809(f) at Amendment 25-0?

We respond to these questions in Sections I-III. Section I explains why Kalitta must obtain exemptions from §§ 25.855(a) and 25.857(e) in order to carry supernumeraries in a Class E cargo compartment. Section II explains why the FAA may impose conditions and limitations on Kalitta through exemptions from §§ 25.855(a) and 25.857(e), even when those conditions and limitations exceed the requirements in § 121.583. Lastly, Section III explains why Kalitta was required to obtain an exemption from § 25.809(f) at Amendment 25-0 when it obtained design approval for supernumerary accommodations on its Boeing 727.

I. Kalitta Must Obtain Exemptions from §§ 25.855(a) and 25.857(e)

Section 25.855(a) requires each cargo or baggage compartment to meet one of the class requirements of § 25.857.[1] Section 25.857(e) states that "[a] Class E cargo compartment is one on airplanes used only for the carriage of cargo."[2]

A Class E cargo compartment may only be used for the carriage of cargo. The cargo-only restriction is unambiguous when read in the context of the regulation in its entirety. Unlike the other cargo compartment classifications, which provide protections for any compartment occupied by crew or passengers, the Class E cargo compartment provides protections only for the flight crew compartment. In light of the safety measures mandated in response to a fire, the drafters of the requirement did not intend the compartment for the carriage of persons. Specifically, the design conditions of § 25.857(e)(3) require a means for the flight crew to shut off oxygen to, or within, a Class E cargo compartment in the event of a fire. Additionally, there must be a means to exclude hazardous quantities of smoke, flames, or noxious gases, but only from the flight crew compartment. Accordingly, based on the plain reading of § 25.857(e) and the design requirements in § 25.857(e)(2) through (e)(4), Class E cargo compartments are for the carriage of cargo only.

Section 121.583 authorizes Kalitta to carry certain persons aboard an airplane without complying with the passenger-carrying requirements, the passenger-carrying operation

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[1] Part 25 contains certification requirements for transport category airplanes. Although on its face the provision appears merely descriptive, by stating that a Class E cargo compartment "is" used only for carriage of cargo, this usage has historically been interpreted as mandatory by the FAA.

[2] Sections 25.855(a) and 25.857(e) prohibit the carriage of persons in a Class E cargo compartment. Therefore, an aircraft type certificated in accordance with these regulations would not have seats. In order to carry persons, including supernumeraries, in a Class E cargo compartment, an operator must obtain an exemption from §§ 25.855(a) and 25.857(e) allowing the operator to install seats in the Class E cargo compartment.

requirements, and the requirements pertaining to passengers specified in § 121.583(a).[3] However, the regulation does not specifically authorize the carriage of such persons in a Class E cargo compartment. Nor does the regulation relieve Kalitta from complying with the cargo-only restriction of § 25.857(e). To interpret § 121.583 as permitting supernumeraries to travel in a Class E cargo compartments would nullify the prohibition in § 25.857(e) on persons traveling in Class E cargo compartments.[4]

For the Class E cargo compartment, there is no conflict between the certification requirements of §§ 25.855(a) and 25.857(e), and the operating provisions of § 121.583. Prior to operating under part 121, an aircraft must obtain a design approval by complying with the applicable airworthiness standards of part 25. If a certificate holder wants its airplane to obtain a design approval with a Class E cargo compartment, that certificate holder must comply with §§ 25.855(a) and 25.857(e). As a practical matter, an airplane that has a design approval with a Class E cargo compartment will not have seats, absent an exemption from §§ 25.855(a) and 25.857(e), because § 25.857(e) prohibits the carriage of passengers in a Class E cargo compartment. Section 121.583(b)(3) requires an approved seat for each supernumerary. Accordingly, § 121.583 does not conflict with part 25, and, therefore, does not authorize Kalitta to carry supernumeraries aboard a Class E cargo compartment because there are no seats in the Class E cargo compartment for the supernumeraries. A Class E cargo compartment may contain seats for supernumeraries only by virtue of an exemption from §§ 25.855(a) and 25.857(e).

When §§ 25.855(a), 25.857(e), and 121.583 are read together, § 121.583 authorizes Kalitta to carry supernumeraries aboard an airplane but such persons may not be carried in a Class E cargo compartment without an exemption from §§ 25.855(a) and 25.857(e). This conclusion is consistent with Civil Aeronautics Board (CAB) discussions.

CAB Discussions

The CAB neither intended nor contemplated the carriage of supernumeraries in Class E cargo compartments. The intent of § 121.583 was that supernumeraries would be co-located with the crew. Furthermore, the CAB never intended for § 121.583 to relieve all-cargo operators from complying with the airworthiness standards in §§ 25.855(a) and 25.857(e).

A review of the historical antecedents of these provisions is helpful for determining the CAB's intent. In August of 1958, the CAB issued an NPRM regarding the carriage of persons other than "crewmembers" and "passengers" aboard all-cargo aircraft. Draft

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[3] Part 121 contains the operating requirements for part 119 certificate holders authorized to conduct operations under part 121.

[4] "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989). "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. U.S.*, 556 U.S. 303, 314 (2009). Likewise, all parts, provisions, and sections of 14 CFR must be read together in order to best ascertain and give effect to their meaning.

Release No. 58-16, 23 Fed. Reg. 6836 (Sept. 5, 1958). In the NPRM, the CAB proposed to amend the operating rules to permit cargo-carrying airplanes to carry certain cargo attendants without complying with certain passenger-carrying airplane requirements. Additionally, the CAB proposed to amend the requirements governing admission to the flight deck to permit the admission and seating of supernumeraries on the flight deck without requiring additional seats for the individuals elsewhere in the cargo airplane.[5] In proposing to amend the flight deck requirements, the CAB explained "it is apparent that cargo compartments generally, due to their design and intended function, are not suitable for extended occupancy by individuals performing these duties in connection with cargo." The CAB's intent that supernumeraries be co-located with the crew is also evident in the proposed regulatory text, which stated that the supernumeraries had to be "seated so as to preclude interference with the control of the airplane."[6] Accordingly, the CAB intended for the supernumeraries to be seated on the flight deck. Furthermore, at this point in time, the CAB could not have intended supernumeraries to sit in Class E cargo compartments because Class E cargo compartments did not yet exist.

In April of 1959, the CAB added a new "Class E" cargo compartment to § 4b.383 to provide for all-cargo operations.[7] The Class E cargo compartment was located in the main cabin of the airplane. The fire protection provisions for the Class E cargo compartment required a means for the crew to shut off oxygen to, or within, the Class E cargo compartment, further showing that the CAB did not intend to permit the carriage of persons. Likewise, the design conditions for the Class E cargo compartment required only a means for excluding hazardous quantities of smoke, flames, or noxious gases from entering the flight crew's compartment. In the preamble, the CAB stated, "... this amendment will make fire prevention requirements for all-cargo aircraft more realistic, without any material reduction in safety." The safety requirements for Class E compartments were intended to provide protections only for the flight crew. There was no reference to supernumeraries or to any protections provided for them. If the CAB had anticipated that supernumeraries would be allowed to occupy Class E compartments, the statement that the rule's effect was "without any material reduction of safety" would have been disingenuous at best, given that the

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[5] At the time the NPRM was adopted, the operating rules authorized the admittance of certain persons to the flight deck but required seats in the passenger compartment to be available for the use of these persons.

[6] The CAB also stated "if a seat on the flight deck is not available, the individual authorized to perform a specific duty in connection with cargo must have a seat available elsewhere in the cargo airplane." However, this statement does not reflect an intent for such persons to be seated in a cargo compartment given the CAB's earlier acknowledgement that cargo compartments are not suitable for extended occupancy by cargo attendants.

[7] Cargo Compartment Classification "E" For All-Cargo Operations, 24 Fed. Reg. 3153 (Apr. 23, 1959). In December of 1958, the CAB issued an NPRM proposing an amendment to the fire protection provisions for cargo compartments because it appeared that the effective provisions at the time were not "sufficiently flexible for realistic application to all-cargo airplanes." Draft Release No. 58-1C, 24 Fed. Reg. 128, 132 (Jan. 7, 1959). The provisions, which were §§ 4b.382 and 4b.383 at that time, prescribed specific fire protection criteria for the different type compartments specified in § 4b.383. The classifications for the different type of cargo compartments ranged from Class A through Class D. § 4b.383; *see* Cargo Compartment Classification "E" For All-Cargo Operations, 24 Fed. Reg. at 3153 (explaining the different classifications of cargo compartments). However, these classifications for cargo compartments were realistically inapplicable to all-cargo aircraft. *Id.*

supernumeraries would be subjected to oxygen deprivation and "hazardous quantities of smoke, flames, and noxious gases" in the event of a fire.

In May of 1959, shortly after the CAB added "Class E" for all-cargo operations,[8] the CAB issued a Special Civil Air Regulation on the Carriage of Persons Other than "Crew members" and "Passengers" Aboard All-Cargo Aircraft.[9] When the CAB issued SR-432 in 1959, authorizing the carriage of supernumeraries aboard all-cargo aircraft, the CAB did not intend for supernumeraries to travel in Class E cargo compartments.[10] Rather, the CAB intended for supernumeraries to be seated on the flight deck.

The CAB amended the admission of flight deck requirements to permit the admission and seating of supernumeraries on the flight deck when seats were not otherwise available in the airplane. The CAB stated:

> On the question of a suitable seat and safety belt for special cargo attendants separate from the flight deck, it is to be noted that many cargo compartments, due to their design and intended functions, either do not have seats for occupants or are not suitable for extended occupancy. Consequently, to achieve the objective of this regulation it has been determined that such cargo attendants must be authorized to enter and be seated elsewhere on the airplane when they otherwise qualify to be aboard a cargo airplane and a seat is not available or suitable in the cargo compartment. Therefore, this Special Civil Air Regulation permits such cargo attendants to be seated on the flight deck as well as in the cargo compartment, if such seat is located so as to preclude interference with the flight crew members in the performance of their duties.

Although the CAB specifically stated that this new regulation "permits such cargo attendants to be seated on the flight deck as well as in the cargo compartment," the term "cargo compartment" would not have included the Class E cargo compartment, because there were no airplanes with Class E cargo compartments at the time SR-432 was adopted.[11] Furthermore, the CAB acknowledged that many cargo compartments do not have seats for

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[8] Cargo Compartment Classification "E" For All-Cargo Operations, 24 Fed. Reg. at 3153.

[9] SR-432, Special Civil Air Regulation; Carriage of Persons Other than "Crew Members" and "Passengers" Aboard All-Cargo Aircraft, 24 Fed. Reg. 4366 (May 30, 1959).

[10] Because the CAB added "Class E" to § 4b.383 only one month prior to adopting SR-432, aircraft were not yet type certificated with the Class E cargo compartment requirement in their certification basis. Accordingly, Class E cargo compartments did not exist in aircraft operating at the time SR-432, the predecessor to § 121.583, was adopted.

[11] There were no airplanes with Class E cargo compartments at the time SR-432 was adopted, and for several years thereafter, because no airplane had been type-certificated with Amendment 4b-10, the class E cargo compartment requirement, in its certification basis.

occupants and are not suitable for extended occupancy.[12] Accordingly, the CAB neither intended nor contemplated the carriage of supernumeraries in Class E cargo compartments.

Additionally, based on the history of §§ 25.855, 25.857(e), and 121.583, the CAB never intended for § 121.583 to relieve all-cargo operators from complying with the airworthiness standards in §§ 25.855(a) and 25.857(e). SR-432 and SR-432A, the predecessors regarding supernumeraries to § 121.583, only exempted operators from complying with passenger-related requirements of CAR Parts 40, 41, and 42, which were the operating parts that were later consolidated into part 121. SR-432 and SR-432A contained no reference to the counterpart airworthiness standards of CAR Part 4b, which were later consolidated into part 25. Given the CAB's obvious awareness of the existence of those standards, it can only be concluded that the CAB did not intend for SR-432 to override the airworthiness standards.

The FAA's response to an error that would have relieved operators of compliance with part 25 also demonstrates that the operating rules do not undermine part 25. When the FAA recodified SR-432A as § 121.583 in 1964, the FAA made an inadvertent change in the regulatory text that had the effect of relieving operators from complying with the airworthiness standards of part 25.[13] The relieving language of § 121.538 stated, "[w]hen authorized by the certificate holder operating the airplane, any of the following persons may be carried aboard an airplane engaged in the carriage of cargo only, without complying with the passenger-carrying or passenger-service airplane requirements of this **chapter**." 29 Fed. Reg. at 19222 (emphasis added). Because new part 25 was codified in the same CFR chapter as part 121,[14] this inadvertent change had the effect of relieving operators from complying with the passenger-carrying or passenger-service airplane requirements of part 25.

The FAA corrected this error in 1970 by Amendment 121-67, which revised the relieving language by replacing "this chapter" with references to specific sections of part 121. Carriage of Persons Without Compliance With Passenger-Carrying Requirements, 35 Fed. Reg. 14611, 14612 (Sept. 18, 1970).

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[12] The CAB did not provide any further discussion of what renders a cargo compartment "not suitable for extended occupancy." But if they had considered Class E compartments in this context, they may have recognized that Class E compartments, which provide no protections for occupants and which are designed to suppress fires by depriving them of oxygen, would not be suitable for extended occupancy without additional requirements to protect the occupants.

[13] In 1961, the FAA undertook recodification of CAR Parts 40, 41, and 42, and related regulations into a new compilation of operational rules, part 121. In the notice announcing this action, the FAA stated, "This notice proposes no substantive changes in the regulations and is not a notice of proposed rulemaking subject to the Administrative Procedure Act." Proposed Recodification, 26 Fed. Reg. 10698 (Nov. 15, 1961). But in the final recodification, there was a significant change in the exemption language. 14 CFR Parts 1, 40, 41, 42 and 121, 29 Fed. Reg. 19186 (Dec. 31, 1964).

[14] The recodification of CAR Part 4b into part 25 was published the week before at 29 Fed. Reg. 18289 (Dec. 24, 1964).

II. If the FAA Grants Exemptions from §§ 25.855(a) and 25.857(e), the FAA May Impose Conditions and Limitations in those Exemptions that Exceed the Requirements Set Forth in § 121.583(b)-(e) for Occupants of Class E Cargo Compartments

Section 121.583 authorizes Kalitta to carry certain persons aboard an airplane without complying with the passenger-carrying requirements, the passenger-carrying operation requirements, and the requirements pertaining to passengers specified in § 121.583(a). When Kalitta carries persons pursuant to § 121.583(a), Kalitta must comply with the aircraft and operating requirements set forth in §§ 121.583(b)-(e), which are intended to provide an adequate level of safety for supernumeraries carried under § 121.583(a). However, the requirements set forth in § 121.583(b)-(e) do not account for the safe transport of supernumeraries in Class E cargo compartments.

When Kalitta carries persons in a Class E cargo compartment under exemptions from §§ 25.855(a) and 25.857(e), Kalitta must comply with the conditions and limitations in those exemptions. The FAA may impose conditions and limitations in those exemptions that exceed the requirements of § 121.583(b)-(e). The CAB's discussions confirm this conclusion.

Prior to 1959, the general practice in cargo operations was to carry aboard animal handlers as crewmembers because they were necessary for the safety of the flight. 24 Fed. Reg. 4366. However, when cargo attendants were carried aboard a cargo airplane to or from their specific duty assignments, they were considered passengers. *Id.* As a consequence, the cargo airplane was subject to passenger operation rules, which imposed an unreasonable burden upon air carriers engaged in all-cargo operations. *Id.* Cargo attendants, such as animal handlers, were not intended to fall within the normal accepted category of air carrier passengers. *Id.* Therefore, in 1959, the CAB issued Special Civil Air Regulation 432 (SR-432). *Id.*

SR-432 relieved air carriers engaged in all-cargo operations from complying with certain passenger-carrying requirements when carriers had aboard cargo attendants, such as animal handlers. *Id.* However, to provide cargo attendants with an equivalent level of safety, SR-432 issued special conditions of operation, consisting of aircraft and operating requirements.[15] *Id.; see* Carriage of Persons without Compliance with Passenger-Carrying Requirements, 35 Fed. Reg. 1053 (Jan. 27, 1970) (discussing the history of SR-432). However, these requirements did not apply to the carriage of persons in Class E cargo compartments, because the CAB intended supernumeraries to be seated in the flight deck or to be co-located with the crew. 23 Fed. Reg. 6836; 24 Fed. Reg. 4366.

The special conditions of operation, which apply to certificate holders carrying persons under § 121.583(a), are contained in § 121.583(b)-(e). However, the aircraft and operating

[15] In 1964, the FAA incorporated SR-432A as § 121.583 with no substantive changes. 29 Fed. Reg. 19186 (Dec. 31, 1964). In 1970, the FAA amended § 121.583 to reorganize the special conditions of operation contained in § 121.583, and to add additional requirements to ensure an adequate level of safety. 35 Fed. Reg. 1053.

requirements in § 121.583(b)-(e) do not account for the safe transport of persons in Class E cargo compartments. Operators are prohibited from carrying persons in a Class E cargo compartment absent exemptions from §§ 25.855 and 25.857(e). Accordingly, when the FAA permits a certificate holder to carry persons in a Class E cargo compartment under exemptions from §§ 25.855 and 25.857(e), the FAA may impose conditions and limitations in those exemptions that exceed the requirements in § 121.583(b)-(e) to ensure an adequate level of safety for the carriage of supernumeraries in Class E cargo compartments.

III. Kalitta Must Obtain an Exemption from the Requirement for an Exit Slide at § 25.809(f), Amendment 25-0

An aircraft must meet the airworthiness standards in its certification basis in order to obtain design approval. 14 CFR § 21.17. An aircraft issued an airworthiness certificate on the basis of compliance with such a design approval can only be operated if it continues to conform to its design approval. Therefore, an aircraft cannot be operated unless it continues to meet the airworthiness standards in its certification basis. 14 CFR §§ 91.7(a) and 121.153(a)(2).

The requirement for an exit slide at § 25.809(f), Amendment 25-0 is in Kalitta's aircraft's certification basis.[16] If Kalitta's Boeing 727 no longer complies with § 25.809(f), Amendment 25-0, Kalitta must have an exemption from § 25.809(f), Amendment 25-0 in order for its Boeing 727 to meet its certification basis. Accordingly, when Kalitta obtained design approval for supernumerary accommodations on its Boeing 727, Kalitta was required to obtain an exemption from § 25.809(f), Amendment 25-0 because its Boeing 727 no longer complied with the requirement. Without complying with the requirements in its aircraft's certification basis, Kalitta cannot legally operate the Boeing 727 under any part of 14 CFR under its current standard airworthiness certificate.

Because § 25.809(f), Amendment 25-0 is explicitly required by § 121.310(a) and because § 121.583(a) relieves Kalitta from the requirements of § 121.310(a), Kalitta believes that the FAA should not require an exemption from § 25.809(f), Amendment 25-0. Section 121.583(a) explicitly relieves Kalitta from complying with § 121.310(a), which requires that "[e]ach passenger-carrying landplane emergency exit (other than over-the-wing) that is more than 6 feet from the ground with the airplane on the ground and the landing gear extended, must have an approved means to assist the occupants in descending to the ground." Section 121.310(a) requires the assisting means for a floor-level emergency exit to meet the requirements of § 25.809(f) of this chapter in effect on April 30, 1972, which requires the

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[16] "Section 25.809(f) at Amendment 25-0" refers to the requirements of § 25.809(f)(1) of this chapter in effect on April 30, 1972. Section 121.310 states "[t]he assisting means for a floor-level emergency exit must meet the requirements of § 25.809(f)(1) of this chapter in effect on April 30, 1972, except that, for any airplane for which the application for the type certificate was filed after that date, it must meet the requirements under which the airplane was type certificated." (emphasis added). Section 25.809(f) at Amendment 25-0 requires, in pertinent part, that each passenger emergency exit greater than six (6) feet from the ground must have an automatically deployed slide or equivalent to assist the occupants in reaching the ground with collapsed landing gear legs.

assisting means for each passenger emergency exit to be a self-supporting slide or equivalent.

If the FAA were to interpret § 121.583, which is a part 121 operating rule, as relieving Kalitta from complying with § 25.809(f), Amendment 25-0, which is an airworthiness standard in the Boeing 727's certification basis, the FAA would be allowing an air carrier to operate contrary to the "minimum standards" established in part 25.[17] Furthermore, such a conclusion would fail to take into account the difference between certification and operating rules.

Part 121 contains the operating requirements for part 119 certificate holders authorized to conduct operations under part 121. Part 25 contains certification requirements for transport category airplanes. The airworthiness standards of part 25 do not presuppose operation under any particular part. *See* Legal Interpretation, Letter to Gary M. Roberts from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (September 30, 2008). A part 25 airplane may be operated under part 91, 121, 125, 129, or 135. *Id.* Therefore, Kalitta's Boeing 727 must comply with § 25.809(f), Amendment 25-0 regardless of whether Kalitta plans to operate it under § 121.583. The operating rule in § 121.583 relieves Kalitta only from the operating rules explicitly referenced in § 121.583(a). The relief provided by § 121.583 does not extend to any airworthiness standards or provisions in a Type Certificate Data Sheet.

The fact that § 121.583(a) relieves operators from complying with operating rules that reference certification requirements does not relieve operators from complying with those certification requirements. When the FAA adopts a new certification rule, i.e., an airworthiness standard, that airworthiness standard applies only to type certificates for which application is made after the rule's effective date. It, therefore, imposes requirements only on future generations of aircraft because the type certification process typically takes several years between the date of application and the issuance of the type certificate and introduction of the aircraft into service. If as a matter of policy the FAA determines that existing operators (typically air carriers, in keeping with the statutory mandate) should be required to comply with a new airworthiness standard to raise the level of safety in the existing fleet, this objective is achieved by adopting a new operational rule that imposes that same standard on existing aircraft.

These principles explain why certain operating rules, such as § 121.310(a), require operators to comply with certification requirements, such as § 25.809(f), Amendment 25-0, as these regulations apply to different generations of aircraft. When the FAA adopted § 25.809(f)

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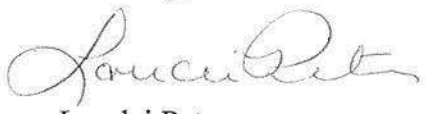
[17] By statute, the airworthiness standards establish "**minimum** standards required in the interest of safety … for the design, material, construction, quality of work, and performance of aircraft." 49 U.S.C. § 44701(a)(1) (emphasis added.) This is the authority under which the FAA adopts airworthiness standards in part 25. In adopting regulations for air carriers, the FAA is required to consider "the duty of an air carrier to provide service with the **highest possible degree of safety** in the public interest."[17] 49 U.S.C. § 44701(d)(1)(A) (emphasis added.) Accordingly, the airworthiness standards establish a baseline of safety, while the operational rules for air carriers frequently impose more stringent requirements. Air carriers are not allowed to operate at a level below that established by the airworthiness standards. 14 CFR § 121.153(a)(2).

Amendment 25-0, it applied only to future generations of aircraft. Because § 25.809(f) did not apply to aircraft that were already type certificated, the FAA adopted § 121.310(a), which required existing operators to comply with the requirement at § 25.809(f) Amendment 25-0. However, imposing the requirement of § 25.809(f) Amendment 25-0 by virtue of an operating rule, §121.310(a), did not make § 25.809(f) Amendment 25-0 a part of the existing operator's aircraft's certification basis. The effect of these principles is that the provision in § 121.583 that relieves certain operators from complying with § 121.310(a), which requires compliance with § 25.809(f), Amendment 25-0, applies only to aircraft that do not have § 25.809(f), Amendment 25-0 in their certification basis. If an aircraft does not have § 25.809(f), Amendment 25-0 in its certification basis, then that aircraft's operator may avail him or herself of the relief from the requirement in § 121.310(a) to meet § 25.809(f), Amendment 25-0.

Furthermore, to be airworthy, an airplane must conform to its type design. Because § 25.809(f), Amendment 25-0 is in the Boeing 727's certification basis, Kalitta must either comply with § 25.809(f), Amendment 25-0 or obtain an exemption from the requirement. If Kalitta were to operate its Boeing 727 without complying with § 25.809(f), Amendment 25-0 and without obtaining an exemption from § 25.809(f), Amendment 25-0, Kalitta would be in violation of § 121.153(a)(2), which prohibits a certificate holder from operating an aircraft unless that aircraft meets applicable airworthiness requirements. Kalitta would also be in violation of § 91.7(a), which prohibits the operation of an aircraft unless it is in an airworthy condition.

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Katie Patrick, Attorney, Regulations Division of the Office of the Chief Counsel, and coordinated with the Transport Airplane Directorate (ANM-100), the Aircraft Engineering Division of the Aircraft Certification Service (AIR-100), and the Air Transportation Division of the Flight Standards Service (AFS-200).

Sincerely,



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March 26, 2014

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ADVANCE COPY SENT VIA E-MAIL

Re: Conflict between 14 CFR 121.583 and conditions imposed on exemptions to part 25 related to the carriage of supernumeraries

Dear Mark:

Kalitta Air Charters, LLC is a part 121 operator of transport category aircraft engaged in supplemental operations. A significant part of Kalitta's operations involves the transport of highly valued race and show horses. The company uses Boeing Model 727 freighter airplanes with Class E cargo compartments. Because of the animals' value (often times in excess of one million dollars), they cannot be properly insured for air transport unless there are a sufficient number of qualified handlers on board. The FAA has long recognized the need for animal handlers in non-passenger operations as necessary to assure the safe handling of animals. 14 CFR §121.583, *Carriage of persons without compliance with the passenger-carrying operation requirements of this part*, specifically exempts the operator from certain operating requirements that would otherwise apply by providing a regulatory exception. Many of these operating requirements have corollary aircraft design requirements in 14 CFR part 25. As a consequence, the FAA has required operators to secure exemptions from part 25 requirements that are already addressed by §121.583. Of particular concern is that these exemptions have reimposed some of the very requirements that are regulatorily excepted under §121.583. Kalitta would appreciate the opportunity to meet with the FAA to discuss its concerns with the FAA's current exemption

policy regarding exemptions to part 25 and to explore an approach that does not reimpose restrictions specifically excepted under §121.583.

The FAA has long recognized the need for supernumeraries aboard cargo flights. Prior to 1959 cargo attendants, including animal handlers, were often carried in cargo airplanes as crewmembers because they were considered essential for the safe operation of the flight.[1] In 1958, the United States government started requiring supernumeraries to escort classified cargo or to serve as security or honor guards. Since these individuals were not necessary for the safe operation of the flight, the FAA reconsidered its characterization of supernumeraries as crewmembers and instead recognized them as passengers.[2] However, the FAA also recognized that it was unreasonable to impose all of the limitations on these flights that would typically apply to passenger-carrying operations. Thus the FAA initially issued Special Civil Air Regulation SR-432 which exempted the operator from several operating rules that required continued compliance with aircraft design requirements. SR-432 was amended by SR-432A to increase the categories of individuals who could fly in these operations, and when part 121 was adopted in 1964, SR-432A was recodified as 14 CFR §121.583 with no substantive change.[3] Section 121.583 has been amended from time to time since then to address new requirements that are unsuitable to aircraft used primarily for cargo operations.

In 2010, John Duncan, then manager of the FAA's Air Transportation Division, became concerned that the FAA was inconsistently applying §121.583, resulting in inconsistent oversight. The FAA's Office of the Chief Counsel largely resolved this issue in a May 6, 2011 legal memorandum to Mr. Duncan. As noted in that memorandum, when carrying individuals under §121.583, the carrier need not meet the passenger requirements of §§121.157(c) (*Aircraft certification and equipment requirements, C-46 type airplanes: passenger-carrying operations*), 121.285 (*Carriage of cargo in passenger compartments*), 121.291 (*Demonstration of emergency evacuation procedures*), 121.309(f) (*Emergency equipment, megaphones*), 121.310 (*Additional emergency equipment*), 121.313(f) (*Miscellaneous equipment, locking flightdeck door*), 121.317 (*Passenger information requirements, smoking prohibitions, and additional seatbelt requirements*), 121.391 (*Flight attendants*), 121.547 (*Admission to the flight deck*), 121.571 (*Briefing passengers before takeoff*), 121.573 (*Briefing passengers: extended overwater operations*), and 121.587 (*Closing and locking of flightcrew compartment door*).

In exchange for providing relief from these regulatory requirements, the FAA imposed additional requirements on these operations, thus assuring that the safety concerns addressed by

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[1] 35 Fed. Reg. 1053 (January 27, 1970).

[2] Id.

[33] Id.

the excepted provisions were adequately addressed given the nature of the operation and the likely aircraft configuration. Thus, while the carrier need not provide a means for emergency evacuation such as a slide, each person must have unobstructed access to the pilot compartment or to a regular or emergency exit. Rather than installing the required signage related to smoking, safety belt use, and emergency procedures, the pilot in command must notify all persons on the airplane when smoking is permitted and when seat belts must be fastened, and must ensure that each person aboard the flight has been orally briefed on all applicable restrictions and safety procedures. Likewise, each seat must be equipped with a suitable safety belt. Procedures for the safe carriage of covered individuals must be incorporated into the carrier's operations manual. Admission to the flight deck is governed by §121.583(e) rather than §121.547. Finally, there is no requirement for lockable and reinforced cockpit doors because security vetting may be accomplished prior to flight.

The FAA has processed several exemptions from part 25 when transport category aircraft are used to transport the type of cargo contemplated by §121.583 and are carrying supernumeraries also contemplated by that section. While some of these exemptions reference §121.583, none of them recognize that §121.583 already addresses some of the same safety markings and equipment addressed by the exemption. It is highly questionable that such exemptions are required when already contemplated by the express exception to the corresponding operational requirement. Where there is a direct overlap between the design and operating requirements, no exemption authorization should be required. Additionally, while a design requirement not addressed by §121.583 would require an exemption, a condition of granting that exemption should not be the reintroduction placards or equipment that is expressly excepted under §121.583. Yet that is precisely what is happening. As a condition of granting an exemption from the definition of a Class E cargo compartment in §§ 25.855(a) and 25.857(e),[4] the FAA is requiring the installation of exit slides, placards, and warning systems – all items that an operator need not maintain under §121.583, and none of which are related to the stated purpose behind limiting the definition of a Class E cargo compartment to cargo.

While Kalitta currently holds an exemption to §§ 25.855(a), 25.857(e) and 25.1447(c)(1), the FAA has gone well beyond any safety justification related to these provisions, imposing

[4] Section 25.857(e) states that "[a] class E cargo compartment is one on an airplane used only for the carriage of cargo...." In its exemptions, the FAA has maintained that the requirement that Class E cargo compartments be used only for all-cargo operations is related to the current means of complying with the definition of a Class E compartment, i.e., the sealing of the compartment from the flightdeck and the subsequent rapid decompression of the aircraft. However, it is equally appropriate to read this introductory clause in the context of §25.857 as a whole. Paragraphs (a), (b) and (c), which set forth the requirements for class A, B and C cargo compartments, respectively, all have introductory language referring to "cargo or baggage compartments". Thus, the restriction in paragraph (e) could refer to the fact that class E compartments are not intended for the carriage of baggage rather than implying that §121.583 is not available when a class E compartment is used in the absence of an exemption.

significant and needless cost on the carrier. Additionally, some of the conditions, while arguably related to the relevant regulatory provisions, impose cost without providing a meaningful safety benefit. Kalitta already has authorization from the FAA in the form of an engineering authorization (EA No. 2008-01-09) and Form 8110-3 which it believes adequately addresses any risk to passengers seated in its aircrafts' cargo compartment.

We are requesting a meeting with appropriate FAA staff to discuss a possible resolution of Kalitta's concerns in a manner acceptable to both the FAA and the carrier. I would appreciate it if your office would take the lead in setting up the meeting.

Regards,

Rebecca B. MacPherson