



FLIGHT-WATCH



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FAA BEGINS REIGN OF TERROR
ON AIR TAXI CERTIFICATE
OPERATORS UNDER AUSPICES
OF “OPERATIONAL CONTROL”
ISSUES

An earlier issue of FlightWatch (Vol. 168, May, 2006) featured an article discussing FAA “draft” Operation Specification A008. An aircraft accident at Teterboro, New Jersey involving aircraft that was on an air taxi flight when the captain thought it was a Part 91 flight presented questions of whether or not the certificate on which the aircraft was operated actually had operational control over the aircraft. See *Administrator v. Darby Aviation, d/b/a Alpha Jet International, Inc.*, NTSB Order No. EA-515 (May 26, 2005) (“*Darby*”).

The testimony in *Darby* evidenced the extent of confusion in the FAA about when an air taxi operator has operational control over a flight. While the Birmingham FSDO had found that the business arrangement between Darby and Platinum Jet Management (“Platinum”) satisfied the requirements of operational control, the Teterboro FSDO reached the opposite conclusion. The FAA is trying to eliminate confusion within its ranks and also within operators in the air taxi community about the circumstances when an air taxi certificate operator is exercising operational control and the circumstances when an air taxi certificate op-

eration is *not* exercising operational control. The ambitions of the FAA to eliminate this confusion and ensure that operational control remains in and with the air taxi operator is laudable. Representatives of the FAA have traveled about the United States conducting seminars explaining the FAA’s position on operational control as articulated in FAA (draft) Operational Specification A008. It would be desirable for the FAA to articulate the standards set forth in the Operational Specification before initiating enforcement action to establish the enforcement practices in cases, a body of case law or opinions that supports the FAA’s concerns about operational control in a post-*Darby* environment. Unfortunately, that has not been the case.

According to an FAA press release of May 12, 2006, the FAA revoked the Part 135 air carrier certificate of American Air Network (“AAN”). The essence of the FAA’s case against AAN was the contention that individuals without an air carrier certificate actually exercised operational control over the flights. In fact, the press release stated:

The FAA’s action is part of a national review of air tax operational control issues. In another case involving operational control issues, the FAA revoked the operating certificate of a company that permitted an uncertificated carrier to operate under its certificate when the certificate holder did not exercise operational control over those flights. That action followed a runway overrun accident at Teterboro, New Jersey, in 2005 (sic).

This case sends a clear message that the FAA will act when it finds evidence that any air carrier is engaged in the franchising or rental of its air carrier certificate. The Federal Aviation Regulations require that an air carrier maintain operational control of the aircraft and crews on its certificate.

As part of the FAA's "safety initiative", the FAA is arguing that lessors of aircraft that are operated on air carrier certificates of Part 135 operators are exercising operational control over the flights if the lessors (non-Part 135 operators): (1) pay the flight crews; (2) pay for maintenance on the aircraft; (3) pay for pilot training; (4) pay for pilot drug testing; (5) pay for aircraft insurance; and (6) agree to indemnify (hold harmless) the Part 135 operator in the event of damage to persons, property or the aircraft. More disturbing is the fact that the FAA maintains that it will **ignore the language in the contracts** and look at how the operation functions, **according to the FAA's newly articulated views of operational control.**

This new perspective on operational control as viewed by the FAA should be troubling and disturbing for aviation lawyers. The FAA's position means that lawyers can do their best to draw aircraft leases and related documents to comply with the regulations. However, if the FAA finds that the "conduct" of the operation evidences a divestiture of operational control from the air taxi operator to the owner of the aircraft or other persons or entities without a 135 certificate, then all the lawyering involved in drafting the documents is meaningless. Prudent businessmen and investors go to avia-

tion lawyers to ensure the legality of their business and protect their investments. If the FAA's perspective on the conduct of the operation can defeat the language in carefully drafted documents, then businessmen and investors have no assurance that the FAA will not come in, impose an emergency cease and desist order, ground the aircraft and impose substantial civil penalties. The FAA's new safety initiative in the post-*Darby* environment presents aviation lawyers with new challenges as they attempt to insure that their clients will not be put out of business by allegations of violations of the Federal Aviation Regulations.

While the FAA has embarked upon a course of action finding alleged violations of the Federal Aviation Regulations where aircraft owners lease their airplanes to air taxi certificate holders, a Federal District Court Judge has recently employed language in a Memorandum Opinion and Order that may be inconsistent with the FAA's new safety initiative. In the case in question, an air taxi operator leased an aircraft to an air ambulance company, and the air ambulance company paid: (1) monthly lease payments, (2) insurance premiums, (3) maintenance expenses, and (4) all related expenses to keep the aircraft in an air worthy condition. While the FAA, according to its policy guidance may view these payments by the non-135 certificate holder as a divestiture of operational control, the judge declared that the situation required the Part 135 operator to "...retain regulatory operational responsibility to the FAA for the aircraft." *Addison Express, LLC v. Medway Air Ambulance, Inc.*, U.S.D.C. Northern District of Texas, Dallas Divi-

sion, Civil Action File No. 3:04-CV-1954-H, Memorandum and Order May 19, 2006, p.5, ftnt.4.

The only thing certain about operational control is that nothing is certain. When aircraft leases and documents carefully crafted by lawyers can be disregarded based upon conduct as viewed by the FAA, according to its newly articulated policy, then the certainty of investment in air taxi operations by investment bankers, businessmen and individuals becomes very problematic.

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