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FAA OPERATION SPECIFICATION A008 – KILLING A FLEA WITH A SLEDGEHAMMER

I.

INTRODUCTION

Beginning in August of 2006, the FAA intends to implement (and apparently enforce) the requirements of FAA (Draft) Operation Specification A008 (the "Operation Specification" or "A008"). The Operation Specification, if implemented in its present form, is likely to disrupt the air taxi industry and put a number of air taxi operators out of business. The Operation Specification is an overreaction by the FAA to "solve a problem" when there were ample regulations and enforcement criteria to prevent the "problem" the Operation Specification is intended to address. This paper will examine the history leading up to the FAA's creation of the proposed Operation Specification.

II.

THE *DARBY* CASE

The genesis for the Operation Specification is the case of *Administrator v. Darby Aviation, d/b/a Alpha Jet International, Inc.*, NTSB Order Number EA-5159 (May 26, 2005) ("Darby"). *Darby* highlights the confusion that exists within the FAA's ranks about operational control. For example, while the Birmingham Flight Standards District Office ("FSDO") found that Darby possessed the requisite operational control over an aircraft leased to Darby with flight crew, the Teterboro FSDO reached the *opposite conclusion*. The fact that the Birmingham FSDO concluded that a business arrangement between Darby and Platinum Jet Management ("Platinum") satisfied Darby's obligations to maintain operational control over an aircraft as required by the Federal Aviation Regulations provided Darby absolutely *no protection* in litigation before the National Transportation Safety Board ("NTSB") when the FAA initiated an emergency order of suspension following an accident involving a flight that was allegedly operated under the authority of Darby's air carrier certificate.

On November 17, 2003, Darby and Platinum entered into a charter management agreement allowing Platinum to operate its aircraft under the authority of Darby's air taxi certificate. Platinum paid Darby a monthly "Part 135 certificate fee;" and the parties further agreed that in the event Darby provided a revenue flight, then 90% of the funds would go to Platinum and 10% of the funds would

go to Darby. Throughout the term of their relationship, Darby never provided such a flight. The pertinent facts were:

(a) Platinum provided the aircraft;

(b) Platinum maintained the aircraft;

(c) Platinum provided and paid for its own maintenance personnel;

(d) Platinum prepared and kept the maintenance records on the aircraft;

(e) Platinum employed and dispatched the flight crew;

(f) Platinum scheduled pilot and flight attendant training;

(g) Platinum conducted pre-employment and random drug testing;

(h) Platinum prepared and submitted TSA criminal history records;

(i) Platinum provided flight scheduling; and

(j) Platinum prepared and kept records of trip itineraries and flight manifests using Platinum letterhead on the documents.

Before Platinum was allowed to operate on Darby's air taxi certificate, a base inspection by FAA inspectors had to be accomplished and a proving run had to be accomplished as well. As a consequence of these activities by inspectors in the Birmingham FSDO, the relationship between Darby and Platinum was found to be appropriate and *in compliance* with the Federal Aviation Regulations.

On February 2, 2005, the aircraft leased by Platinum to Darby crashed at the Teterboro Airport. The aircraft had been dispatched with a captain who was not authorized to operate the aircraft on Darby's air taxi certifi-

cate. The captain indicated he believed it was a Part 91 flight, by reason of which such qualifications were unnecessary. Darby maintained the flight was not one of its flights, since the captain of the aircraft was not on Darby's air taxi certificate. Predictably, an extensive investigation ensued. The FAA brought an emergency order of suspension of Darby's air taxi certificate, claiming that Darby had "surrendered operational control of its certificate" to Platinum. In a hearing before Judge William R. Mullins on the FAA's emergency order of suspension, Judge Mullins reasoned that since the Birmingham FSDO performed a base inspection and was involved in the proving runs while the Teterboro FSDO was not, the conclusion of the Birmingham FSDO that Darby maintained the requisite operational control trumped the opinions of the Teterboro FSDO inspectors to the contrary. Accordingly, Judge Mullins refused to uphold the FAA's emergency order of suspension of Darby's air carrier certificate.

The FAA appealed Judge Mullins' decision to the NTSB, arguing that it did not have to prove a violation of the Federal Aviation Regulations. The FAA maintained that an emergency order of suspension is akin to a request for a 709 checkride under 49 C.F.R. § 44709(a). In other words, if the FAA has reason to question the competence or safety of a certificate-holder, then all it has to prove is that the incident in question "raises a question over its qualifications to hold its certificate, without regard to the likelihood that the lack of competence played a role in the incident." *Administrator v. Darby Aviation, d/b/a Alpha Jet International, Inc.*, NTSB Order Number EA-5159 (May 26, 2005), p. 18.

The NTSB agreed with the FAA's legal analysis that it was not incumbent upon the FAA to prove a violation in order to suspend, on an emergency basis, Darby's air carrier certificate. Moreover, the NTSB chose not to give meaning to the determination made by the Birmingham FSDO that the relationship between Darby and Platinum satisfied the requirements for operational control under the Federal Aviation Regulations.

III.

THE FAA'S WET LEASE POLICY GUIDANCE OF OCTOBER 25, 2005

It has become fashionable for the FAA to publish "guidance" or documents denominated as an "interpretation" of the Federal Aviation Regulations in the Federal Register to abolish a body of case law that has evolved over several decades. A major premise of American jurisprudence has been that the law will be properly formed and evolved as a consequence of conflict between two well-informed and competent advocates who represent parties with competing interests or diametrically opposed perspectives on an issue. This is akin to debate in an academic community involving a thesis and an antithesis where educated peers of the debaters decide which argument is true and which argument is false. The FAA's publication of a "policy guidance" or an "interpretation" undermines this basic tenet of American jurisprudence. Rather than the law being formed by a tribunal considering the merits of conflicting arguments, the FAA, after considering comments in response to its policy guidance or interpretation decides how the law or policy will be articulated or applied. In effect, one advocate in a debate has the final authority to determine the outcome of the contest. This approach to the development of aviation safety initiatives and policies is pernicious and undemocratic. However, the FAA maintains it possesses the authority to

(in effect) *legislate* policies and safety initiatives in this questionable manner based on 49 U.S.C. §§ 44709(b)(3) which provides:

> When conducting a hearing under this subsection, the (National Transportation Safety) Board is not bound by findings of fact of the Administrator but *is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public* related to sanctions to be imposed under this section *unless the Board finds an interpretation is arbitrary, capricious or otherwise not according to law.* [Italics supplied].

The FAA has exploited this declaration by Congress by publishing guidance and interpretations in the Federal Register, which overturned decades of well-reasoned case law.

The FAA's *Wet Lease Policy Guidance* was published in 70 Federal Register 61684 on October 25, 2005 (the "Policy Guidance"). (70 Fed. Reg. 61684 (October 25, 2005)) [Docket Number: FAA-2005-22765]. The focal point of the FAA's Policy Guidance was the *Darby* case, which (the reader will recall) did not involve proof by the FAA that any violation of the Federal Aviation Regulations had occurred. Rather, all the FAA proved in *Darby* was whether or not a question had been raised about the qualifications of Darby. Nevertheless, the FAA went on to declare in its Policy Guidance that the "illegal operator" had held itself out to the public as a legitimate air carrier. (70 Fed. Reg. 61685). While, over many years, the FAA has published advisory circulars and bulletins explaining operational control, the Policy Guidance appeared to venture into new territory. The Policy Guidance spoke in terms of "inadequate operational control." (70 Fed. Reg. 61685). The Policy Guidance maintained that a wet lease (i.e., the lease of an aircraft with at least one pilot) from an aircraft owner to an air taxi operator was illegal even though there was no finding made in *Darby* of a violation of the Federal Aviation Regulations. (70 Fed. Reg. 61685).

The Policy Guidance maintained that aircraft owners could only dry lease their aircraft to air taxi operators. (Fed Reg. 61686). However, the Policy Guidance contradicted itself by declaring that a wet lease from the aircraft owner that provided the pilots would be appropriate in the event there was a "written acknowledgement" signed by the air carrier, the aircraft owner and the pilots, declaring that the airmen would serve only as the agents of the air carrier during all Part 135 operations. (70 Fed. Reg. 61685). Having declared earlier that *written documents and contracts were not material* and that the FAA would evaluate situations involving wet leases on a case-by-case basis looking at the particular facts of the case, the FAA, again, contradicted itself by declaring:

> An acknowledgement that the pilots are the carriers' agents *(even where*

> *the pilots remain the employees of the owner, as evidenced, for example, by the owner's issuance of IRS Form W-2's)* helps reduce any confusion as to which party has the authority and the responsibility to conduct a safe for-hire flight. (70 Fed. Reg. 61685; Italics supplied).

While the *self-contradictory terms* of the Policy Guidance should be disturbing to any air carrier which leases aircraft from owners who may also make their pilots available to operate the aircraft under the air carrier's certificate, the FAA is about to adopt far more ominous and troublesome "guidance" for air taxi operators in the form of the Operation Specification.

IV.

THE OPERATION SPECIFICATION

The bottom line as far as the FAA is concerned is that beginning in August of 2006 an air taxi operator must either own all of the aircraft it operates or, if the aircraft are leased, the aircraft must remain in the legal custody of the certificate holder and must remain in the air taxi operator's "exclusive possession or custody during all Part 135 flights." (The Operation Specification, par. 2). With regard to pilots, the FAA maintains each pilot must be in the direct employ of the air taxi operator or be an "agent during every aspect of the Part 135 operations, including those aspects related to any pre-flight duties." (The Operation Specification, par. 1). Further, "[e]ach pilot must be specifically listed by name and airman certificate number on a list of pilots maintained by the certificate holder at it's (sic) main base of operations… (The Operation Specification, par. 2)." Citing 14 CFR §§ 135.25, the FAA asserts that at least one aircraft that satisfies the pertinent requirements "must remain in the certificate holder's exclusive legal possession and actual possession." (The Operation Specification, par. 3). An air taxi operator may not operate under a fictitious name. (The Operation Specification, par. 4).

The Operation Specification again complains about wet leases and the fact that lessor should not dictate to the lessee (the air taxi operator) who can fly the airplanes on the trips. The Operation Specification warns air taxi operators about the danger of transferring, surrendering, or abrogating or sharing operational control responsibility with any other party. Additionally, the FAA maintains "…the certificate-holder may not wet lease from or enter into any wet leasing arrangements with any person not authorized by the FAA to engage in common carriage operation under Parts 121 or 135 of the Federal Aviation Regulations…" (The Operation Specifications, par. 5).

According to the Operation Specification, at least one management person must determine before a flight that the crewmember is qualified, that the aircraft is airworthy, and that the flight can be initiated and conducted or terminated in accordance with Part 135 of the Federal Aviation Regulations. (The Operation Specifications, par. 6). Finally, the failure of the pilot to comply strictly with the Part 135 requirements may subject the air carrier to legal enforcement action. (The Operation Specifications, par. 7).

Finally, it is very important to note that the FAA has been continuously changing the Operation Specification. Currently, it is advancing its seventeenth (17^{th}) draft of the document. The National Business Aircraft Association ("NBAA") is working hard to ameliorate burdens imposed by this moving target

sponsored by the FAA. With this ever-changing Operation Specification scheduled to take effect in August of 2006, air taxi operators must be experiencing a level of concern in attempting to comply with this constantly-evolving "safety initiative."

V.

CONCLUSION

The function of all government organizations is to perpetuate their own existence. Recent history suggests that the function of the FAA is to enlarge and magnify its power at every available opportunity. It is curious that a case that did not involve any proof of a violation of the Federal Aviation Regulations is going to have such far-reaching and draconian effects on the air taxi industry. Precisely why the air taxi industry is in need of the Operation Specification remains unexplained by the FAA. Rather, a case that involved a lack of coordination and communication between the air taxi operator and the lessor of the aircraft resulting in the dispatching of the aircraft with an unqualified captain has now become transformed into a mandate embodied in the Operation Specification. Respectfully, the Operation Specification will have significant adverse effects on the industry as the FAA undertakes to solve a problem that was never serious in the first instance.

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