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FAA REBUFFS AMBITIONS OF AIRPOOLER

The Ambitions of AirPooler, Inc.

AirPooler sponsors a website that connects pilots and passengers to save money over commercial fares with pilots saving money on the operation of their aircraft. Before the founders of AirPooler set up this program, they would have been well-advised to have conducted some basic research. This is not the first time a scheme of this nature has been attempted.

On April 16, 1976, a Letter of Interpretation was issued by DeWitt T. Lawson, Jr., Esq., Acting Regional Counsel for the Western Pacific Region, to David Brown, President of Trans-Share Corporation (TSC). TSC developed a scheme virtually identical to that of AirPooler except it did not use a website. TSC created a Share-A-Flight membership card and membership agreement whereby people could telephonically make TSC aware of their travel needs and pilots could do like-wise to match passengers and pilots for "share the expense flights" that they believed were authorized by then FAR 61.18(b). Today, that same regulation exists and is codified as 14 C.F.R. §61.113(b) that allows a private pilot, for compensation or hire, to act as the pilot-in-command of an aircraft if (1) the flight is only incidental to the business or employment of the pilot, and (2) the aircraft does not carry passengers or property for compensation or hire. Historically, this regulation has been interpreted on the basis that the pilot is going to fly anyway to a destination or that the pilot and the passengers have a joint and common interest in flying to a common destination. In such a case, the pilot, under 14 C.F.R. §61.113(c) "may not pay less than the pro-rata share of the operating expenses of a flight with passengers provided the expenses involve only fuel, oil, air-port expenditures, or rental fees."

TSC's Share-A-Flight membership program was found to run afoul of FAR §61.18 (dealing with the limitations im-posed upon private pilots) and FAR §135.1 (commercial operations requiring an air carrier certificate).

Much like the current fad of AirPooler, the literature of TSC noted that there were 200,000 privately owned aircraft registered in the United States and between June 1974 and June 1975, 39.8 million empty private aircraft seats flew the skies of the United States on inter-city trips. Further, the TSC literature indicated that while there were 505 airports that served airline flights, there were 12,400 airports that served general aviation. The TSC Share-A-Flight membership program was sold as an energy saving concept on the basis that light aircraft consumed less fuel than air carrier or jet aircraft and can fly more direct flights to more cities than those available in air carrier transportation.

The FAA, in 1976, concluded that the enterprise of TSC in the form of the Share-A-Flight membership program effectively made the pilots commercial operators as defined in 14 CFR §1.1 and further the FAA took the position that the structure would render the flights indirect air carriers subject to the jurisdiction of the then Civil Aeronautics Board.

Not surprisingly, on August 13, 2014, Mark W. Bury, Esq., Assistant Chief Counsel for International Law, Legisla-tion and Regulations of the FAA, dispatched a letter to Rebecca B. MacPherson, Esq. of the law firm of Jones Day represent-ing AirPooler in which the FAA asserted that the envisioned scheme of AirPooler ran afoul of the limitations imposed on private pilots under FAR §61.113 and also constituted commercial operations requiring an air carrier certificate under 14 C.F.R. Part 119.

The FAA's Position on AirPooler

The FAA, just like its position in the TSC Share-A-Flight membership program nearly 38 years ago, took the position in the letter to Ms. MacPherson that regulatory issues were raised under FAR §61.113 dealing with the limitations on private pilots and FAR Part 119 dealing with commercial operators. While there is no regulatory delineation of private carriage versus common carriage, there is FAA Advisory Circular 120-12A that expresses these concepts such that common carriage is understood as (1) a holding out of a willingness (2) to transport persons or property (3) from place to place (4) for compensation or hire." In fact, this definition of common carriage has been approved as appropriate within the aviation context. See *Woolsey v. National Transportation Safety Board,* 993 F.2d 516 (5th Cir. 1993).

It is common knowledge that it is not necessary to make a profit in order for there to be compensation, this concept having been expressed by the FAA in a preamble to a Notice of Proposed Rulemaking in 1963. See 28 Fed. Reg. 8157 (August 8, 1963) where the FAA wrote:

> The ordinary meaning of "compensation" includes the act of making up for whatever has been suffered or lost through another, and the act of remuneration. Sharing expenses would appear to be prohibited when "for hire or compensation" is prohibited so that an exception to the rule is necessary to preserve the traditional right to share expenses, and which right has not been found objectionable.

In light of the definition of "compensation," as explained above, it is the FAA position that private pilots enjoy a very narrow authority to operate under FAR §61.113. For example, §61.113(b) specifically uses the words "compensation or hire." In other words, the private pilot is receiving compensation to engage in the flight, but his authority to do so is limited such that the flight may only be incidental to his business or employment and the "aircraft does not carry passengers or property for compensation or hire." In point of fact, the language in FAR §61.113(b) appears to be self-contradictory, since on the one hand, the FAA recognizes that the pilot is receiving compensation and then on the other hand says the aircraft is not employed for compensation or hire. Whatever the case, despite the confusing language in §61.113, the fact remains that the FAA views the right of a private pilot to share the expenses with passengers is a very narrow exception to the general rule that a private pilot may not do so. This position of the FAA is underscored in the legal interpretation of August 13, 2014.

Like the 1976 legal interpretation involving TSC's Share-A Flight membership program, the FAA in its August 13, 2014 interpretation said once again that the scheme effectively makes each pilot a commercial operator requiring an air carrier certificate under FAR Part 119. According to the FAA, even if the airman possesses an airline transport pilot certificate or commercial pilot certificate, in the absence of possessing a Part 119 air carrier certificate, the scheme is still improper.

Turning to the definition of "common carriage" involving a holding out to the public to transport passengers for compensation, the FAA concluded that the AirPooler concept is effectively an illegal air carrier operation, the FAA noting:

> Although the pilots participating in the AirPooler website have chosen the destination, they are holding out to the public to transport passengers for compensation in the form of a reduction of the operating expenses they would have paid for the flight. This position is fully consistent with prior legal interpretations related to other nationwide initiatives involving expense-sharing flights. See Legal Interpretation of DeWitt Lawson (Acting Regional Counsel) to D. David Brown (Apr. 16, 1976)…

Conclusion

The ambitions of AirPooler to save resources and allow passengers the benefit of using empty airplane seats, while commendable, is nothing new. Just like the ambitions of TSC with the Share-A-Flight membership program in 1976, the FAA has once again rebuffed these ambitions. While AirPooler may avail itself of litigation in an appropriate court of jurisdiction, one can reasonably anticipate that the court would sustain the position of the FAA and conclude that AirPooler's program presents two problems: (1) the authority of a private pilot to share the expense with passengers under 14 C.F.R. §61.113 and (2) the necessity of pilots engaged in such operations to possess an air carrier certificate as required by 14 C.F.R. Part 119.

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