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Until recently, Ports of Call, through its subsidiary Capital Air, Inc., operated as a membership air travel club under Part 125 of the Federal Aviation Regulations. We fully support efforts by the FAA to address issues with FAR Parts 125 and 135 in the forum of a joint industry and government Regulatory Review. Further, the conduct of this review is extremely timely in light of technological, economic and security issues facing the industry.

It would appear to us that the underlining mandate of the various Review Sub-committees is to be forward looking in their deliberations and to shape a future regulatory framework that meets the needs of an industry that is undergoing some of the most significant changes in its history. In actuality, both Parts 125 and 135, as amended, seem to have generally withstood the test of time with regards to safety. Notwithstanding, particularly in the case of Part 125, the level of safety that operators have enjoyed has not necessarily been attributed to the level of compliance demanded by the regulations but rather the level of compliance desired and maintained by the individual operators. For example, the fact that aircraft are only required to be maintained under an inspection program has not diminished the use of maintenance programs usually associated with large transport category aircraft. Most operators have more management in place than the Director of Operations and a Maintenance Coordinator required by the rules. Although only checking is required, operators have increasingly utilized the training to airline standards available through numerous Part 142 training centers. In my judgment, the industry has set a standard for itself that has ensured an acceptable level of safety in private carriage operations.

The problems with Part 125 are long standing and, to date, without resolution. In the preamble to the original Notice of Proposed Rulemaking for Part 125, the FAA suggested that the cost of certification under the new rules by operators previously certificated under Part 123 (Air Travel Clubs) would be offset by the ability of the new Part 125 operator to conduct charters. Whereas air travel clubs were strictly prohibited from carrying persons other than bonafide members, it appeared that the new rule would somehow permit a relaxation of that requirement in those instances where "holding out" is not involved. Over 20 years later, we are no closer to defining what constitutes "private carriage" as it relates to operations conducted under Part 125.

Handbook 8400.10, Volume 2, attempts to define private carriage as “carriage of persons or property for compensation or hire under a contractual business arrangement...which did not result from the operator’s holding out or offering service”. It further offers that “in this situation, the customer seeks an operator to perform the desired service and enters into an exclusive mutual agreement...” This same FAA Handbook cites Advisory Circular 120-12A, Private Carriage vs. Common Carriage of Persons or Property as being a source of additional guidance on this subject.

AC 120-12A has not been amended since April 24, 1986 and offers very little useful information for either the FAA or the operator when attempting to determine the legality of a proposed private carriage operation. It notes that the term “common carriage” as used in the FAA Act of 1958 is not defined. Both “common carriage” and “private carriage” are “common law terms” and the Advisory Circular suggests that “guidelines giving general explanations of...” these terms would be “helpful”. To my knowledge, no such definitions have been forthcoming during the ensuing 17 years. The FAA appears to have lost an opportunity with the promulgation of FAR Part 119 in 1995. In fairness, Part 119 defines “non-common carriage” and suggests that it is when “common carriage is not involved “or an operation is “private carriage.” However, as a practical matter, industry knowledge of what constitutes private carriage and therefore permissible operations under Part 125 was not advanced with the publication of Part 119.

It could be argued that virtually all operations conducted by operators certificated under Part 125 that do not involve persons or property incidental to the operator’s primary business (e.g. professional sports team owning and operating their own aircraft, membership travel clubs, etc.) are likely outside the intent envisioned by the framers of the rules. There are numerous brokers of charter services that advertise or otherwise hold out to the public to obtain charters. This is especially true with brokers that primarily manage the travel arrangements for college sports teams and entertainment groups. These brokers often enter into contract arrangements with operators certificated under Part 125 for transportation. Although there is perhaps more of an arms length transaction than normally experienced between the customer and the operator under Part 121 or Part 135, the net result is a charter having been acquired through holding out. Such arrangements are specifically cited in Advisory Circular 120-12A as examples of holding out. It is interesting to note that the Advisory Circular suggests that the number of contracts might be an indicator of whether an operator is holding out. It states that the “number of contracts must not be too great”, and where three contracts have been acceptable “18 to 24” have been determined to be holding out by a “common carrier”. That number spread and lack of definitive guidance is of little use to Part 125 operators contemplating offering their services under contract.

FAR Part 119 is a relative newcomer on the scene regarding certification. In attempting to assure the traveling public that there was “one level of safety” the promulgation of this rule did little to actually bring Parts 121, 125 and 135 into closer alignment. Although management requirements were generally strengthened, operational rules are generally referenced back to Parts 121 and 135. Further, the attempt to further define the various

classes of operators and carriers falls woefully short of what was needed. Part 119 contains definitions for: on demand operation, supplemental operation, commuter operation, direct air carrier, domestic operation, flag operation, supplemental operation, scheduled operation, and non common carriage. Interestingly, FAR 119(b) makes references to those operators authorized by the FAA to conduct operations as a "US commercial operator" although Part 119 makes no effort to define this class of carrier. There is a definition of "commercial operator" in Special Federal Aviation Regulation (SFAR) 38-2.

If there is a common thread in this regulatory confusion, it is SFAR 38-2. Prior to the implementation of SFAR 38-2, the certification basis for operators and air carriers involved gross weight. If an aircraft was "large" i.e. greater than 12,500 pounds maximum certificated gross takeoff weight, it was operated under Part 121. Aircraft below that weight were governed by the rules of Part 135. Aircraft operated today under Part 125 generally fell under the rules of Part 91, Subpart D although, admittedly, this created many of the same problems regarding allowable operations that we experience in administering Part 125. SFAR 38-2 introduced the concept of numbers of seats and payload capacity as the appropriate basis for certification. Assuming that shift in philosophy was warranted, the introduction of executive configured airline type aircraft demands that this entire area be thoroughly investigated. Further, operators who are unable to afford a Challenger, Learjet or Gulfstream aircraft now have literally thousands of used airliners to choose from to commence operations. By lowering the maximum zero fuel weight of a Boeing 727 to meet the SFAR 38-2 seating and payload requirements, they could conceivably operate under Part 135. The regulatory review committee needs to evaluate whether the rules of Part 135 and the operator management, training and infrastructure that is typical of operators certificated under Part 135 will ensure the level of safety necessary for these type operations.

I believe that investigating the applicability of Parts 125 and 135 is the most important undertaking of your committee. The types of aircraft, including seating and payload, need to be addressed within the rules to ensure that there are appropriate levels of safety built into the regulations. Should it be permissible for a Boeing 727 or any other large transport category aircraft to be modified from its original type certificate to meet seat and payload certification rules and operate under Part 135? Should a Boeing Business Jet be permitted to operate with the minimal management, crew training and certificate management requirements incorporated in Part 125. Are the rules of Part 125 adequate to address operations that often carry prominent politicians, professional sports teams and high profile entertainers? Because Part 125 operators are not required to be "citizens" some FAA certificated operators are the primary transport for heads of state.

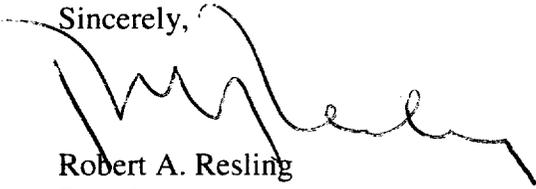
Part 125 incorporates some interesting regulatory phenomena that I consider to be omissions or oversights. The Transportation Security Administration (TSA) basically assumed the role of the FAA Civil Aviation Security function with the publishing of the Part 1502 Final Rule on February 22, 2002. This rule and the other transportation security regulations codified in 49 CFR Parts 1500 through 1699 do not address operations conducted under Part 125. The only surveillance or contact between the new TSA and

Part 125 operators will likely take place to the extent that these operators utilize airports certificated under Part 139 or process passengers at facilities having approved security programs. Since Part 125 operators do not have to be US citizens, there are some obvious security issues that need to be addressed.

Almost immediately following the tragedies of September 1, 2001, the FAA issued SFAR 92 requiring reinforced cockpit doors. This rule, as amended, has been fully implemented for this class of carriers. The rule did not apply to operations conducted under Part 125 or Part 129 (foreign air carriers). The failure to include foreign air carriers raises serious security concerns; however, they are outside the scope of this regulatory review. As previously pointed out, operations under Part 125 often include incentive groups, politicians, entertainment groups, etc. that closer investigation would likely reveal were arranged through persons holding out their services to the public. Unlike an operator utilizing their aircraft in furtherance of their own business, there is exposure from illegal behavior from these charters. In short, the lack of understandable guidance (e.g. AC 120-12A) coupled with complicated certification categories (e.g. SFAR 38-2, Part 119) has created a situation where there is little difference in the conduct of private and public charters but diverse safety and security regulations applicable to each (e.g. Part 125, 135).

Thank you for the opportunity to provide input to this important regulatory review.

Sincerely,



Robert A. Resling  
President