Our Second priority is boosting membership. All current members should have received a membership questionnaire. We encourage you to complete and return it. The better we can learn to serve our current membership, the more new members we can hope to attract. We will also be reaching out to new members through both mass-mailings and more grass roots approaches. One of the more critical positions we will be filling in the Committee will be that of Membership Vice-Chair. Please let us know if you are interested.

We both look forward to serving the Committee as Co-Chairs and hope we can count on many of you to step up to the plate and take a more active role in the Aviation Litigation Committee. We are confident you will find it to be a rewarding experience that is well worth the effort.

Finally, we strongly encourage your attendance at our upcoming business breakfast at the April Section meeting in Washington and the Committee's own mid-year meeting in New York, scheduled for June 20, 1997 at the Marriott Financial Center, New York City. All the best. ■

Gary Robb and Rick Alimonti

WHEN DOES A "CIVIL AIRCRAFT" BECOME A "PUBLIC AIRCRAFT"?

By Paul A. Lange

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I. INTRODUCTION

You may have heard the term "public aircraft". You may even have a notion of what it means. The designation of "public aircraft", however, carries with it far reaching ramifications which have important and potentially serious effects upon the operator(s) of that aircraft. Unfortunately, the distinction between these two designations is not always clear for reasons which will be addressed in this article.

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II. A SHORT HISTORY

One might remember from law school the constitutional law cases where an employee of some governmental entity (Federal, State or local) needed to operate a motor vehicle in the course and scope of his or her employment. Due to various infractions, the state in which the employee was licensed to drive either suspended or revoked that person's license. The question then arose as to whether that same individual could still operate motor vehicles for the governmental agency (such as the U.S. Postal Service), despite not even being permitted to drive him or herself to work. Similarly, issues date back to the beginning of powered flight as to whether and the extent to which aircraft performing various governmental purposes should be regulated.

At the outset, aircraft have traditionally been designated either civil or public. The great majority of operable aircraft are civil - the airliners, corporate jets, charter and light aircraft for private use with which we are all familiar. Nonetheless, there are other aircraft, such as those operated by the military, that have purposes which may not allow them to comply with various safety regulations promulgated by the Federal Aviation Administration ("FAA").[1] For instance, one would not expect to require a military pilot on a bombing run to comply with the civil regulation prohibiting the dropping of objects from aircraft. Similarly, one would also not expect a civilian firefighting aircraft acting as a water bomber to comply with that same regulation or with regulations which would otherwise prohibit that aircraft from flying into the midst of a raging forest fire. Aircraft operated by law enforcement agencies also have their own specialized requirements which are varied.[2]

In order to provide separation between all aircraft, the FAA has long had the responsibility for regulating airspace.[3] Beyond airspace issues, however, the FAA essentially had no authority to regulate public aircraft.[4] On October 25, 1994, a statutory change in the definition of public aircraft became law as part of the Independent Safety Board Act Amendments of 1994.[5] That statutory change required a new approach by the FAA in order for it to implement such.[6] Though no new operational or airworthiness regulations were written, the definition of "public aircraft" was changed in Section 1.1 of the Federal Aviation Regulations ("FAR's").[7] Also changed was FAR 11.25(b)(3)[8] to reflect the FAA's new authority to grant exemptions to this statute in certain circumstances.[9] A fairly extensive advisory circular was then published which provides guidance as to how the FAA intends to interpret the new law in various factual circumstances.[10] The advisory circular is probably the most useful of all the referenced documents due to its depth. Nonetheless, it is still far from complete in certain circumstances. Moreover,

[1] See generally 59 FR 63154, December 7, 1994; Administrator v. DeChant, 2 NTSB 2183 (1976); Administrator v. Martin, NTSB Order EA-3423 (1991).

[2] Id. See also 60 FR 5074, January 25, 1995 and FAA Advisory Circular 00-1.1, "Government Aircraft Operations", April 19, 1995; 60 FR 20142; 1995 WL 234477 (F.R.).

[3] See FAA Chief Counsel's office legal intrepretation dated October 22, 1991 from Donald P. Byrne to Daniel W. Williams.

[4] Id. See also citations set forth at Footnote 1, infra.

[5] 49 U.S.C. 40102(A)(37); Pub. L. 103-411 (1994), 108 Stat. 4236.

[6] 59 FR 63154; 60 FR 5074.

[7] 14 CFR 1.1.

[8] 14 CFR 11.25(b)(3).

[9] 60 FR 5074.

[10] FAA Advisory Circular 00-1.1, "Government Aircraft Operations", April 19, 1995.

there are not yet any appellate opinions issued by the NTSB or Federal Courts which interpret the new statute and regulations, nor are there any legal interpretations issued by the FAA in this regard. Accordingly, one must carefully evaluate each case involving a potential public aircraft in order to determine whether such is in fact subject to these provisions.

III. THE NEW DEFINITION

Though cumbersome on its face, the changes to the law ultimately seem almost deceptively simple when fully analyzed. Essentially, the 1994 statute changed the definition of "public aircraft" to specifically exclude government aircraft which are used to transport passengers.[11] As one might expect, there are exceptions to this rule which are set out to some extent in the statute, to a greater extent in the regulations and to an even greater extent in the advisory circular. With all the additional writing, however, the guidance can tend to become somewhat muddled. Additionally, since there was previously little guidance from the FAA in this area, the foregoing do tend to create additional questions of interpretation. The actual language of the change to FAR 1.1 (which mirrors the statute) is as follows:

> Public aircraft means an aircraft used only for the United States Government, or owned and operated (except for commercial purposes), or exclusively leased for at least 90 continuous days, by a government (except the United States Government), including a State, the District of Columbia, or a territory or possession of the United States, or political subdivision of that government; but does not include a government-owned aircraft transporting property for commercial purposes, or transporting passengers other than transporting (for other than commercial purposes) crewmembers or other persons aboard the aircraft whose presence is required to perform, or is associated with the performance of, a governmental function such as firefighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management; or transporting (for other than commercial purposes) persons aboard the aircraft if the aircraft is operated by the Armed Forces or an intelligence agency of the United States. An aircraft described in the preceding sentence shall, notwithstanding any limitation relating to use of the aircraft for commercial purposes, be considered to be a public aircraft for the purposes of this Chapter without regard to whether the aircraft is operated by a unit of government on behalf of another unit of government, pursuant to a cost reimbursement agreement between such units of government, if the unit of government on whose behalf the operation is conducted certifies to the Administrator of the Federal Aviation Administration that the operation was necessary to respond to a significant and imminent threat to life or property (including

[11] 60 FR 5074.

natural resources) and that no service by a private operator was reasonably available to meet the threat.

IV. WHAT DOES IT ALL MEAN AND WHY SHOULD IT CONCERN YOU?

The changes set forth above required that many typical governmental flights suddenly needed to be operated under Part 135 of the FAR's. A specific example is that intra governmental reimbursement for a routine, government operated passenger carrying flight (such as carrying a governor to an administrative meeting) is now considered an operation for "compensation or hire" which would require the governmental entity operating the flight to hold an air carrier certificate pursuant to Part 135, etc. of the FAR's.[12] In that interpretation of the term "compensation or hire" has vexed many over the years despite relatively extensive case law and other interpreting language, such is likely to become even more difficult when cases begin being litigated on whether a particular government flight was operated for compensation or hire. Though the foregoing example would arguably be the most onerous in terms of compliance, governmental entities will also need to comply with all airworthiness and training regulations that they could have previously ignored. Another example is the problem of FAR limitations imposed on the operation of surplus military aircraft, many of which are owned and used extensively by various governmental entities.

Interestingly, the FAA's advisory circular on Government Aircraft Operations states that

> Rather than speaking of a particular aircraft as public aircraft or civil aircraft, it is more precise to speak of particular operations as public or civil in nature. Example: An aircraft owned by a state government is used in the morning for a search and rescue mission. During the search and rescue operation, the aircraft is a public aircraft. Later that same day, however, the aircraft is used to fly the governor of the state from one meeting to another. At that time, the aircraft loses its public aircraft status and must be operated as a civil aircraft.[13]

This statement appears potentially contrary to the regulatory language permitting an aircraft owned by a commercial entity to be operated as a public aircraft only if leased to a government for at least 90 continuous days. Accordingly, difficult circumstances could easily be imagined in various circumstances where aircraft are owned and operated by commercial entities on behalf of a governmental entity, but on a sporadic basis.

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[12] 60 FR 5074.

[13] FAA Advisory Circular 00-1.1, "Government Aircraft Operations", Chapter 1(d), entitled "Operational Nature of Definition", April 19, 1995; 60 FR 20142; 1995 WL 234477 (F.R.).

[14] Administrator v. Noyes, FAA Docket No. 96EA 010012, NTSB Docket No. SE 14393 (1996); Administrator v. Air Response, Inc., FAA Docket No. 96EA 010011 (no NTSB Docket number assigned) (1996).

A recent real life example illustrates the confusion on this point.[14] In this situation, the U.S. Marshall's Service contacted a Part 135 air charter service seeking transportation of an infamous prisoner following a highly publicized criminal trial. The Part 135 operator accepted the assignment. For security reasons, the Marshalls refused to tell the operator where it would refuel, demanded that no flight plan be filed, that there be no flight following and that the flight be conducted under VFR if at all possible in order to avoid contact with anyone outside the aircraft. The flight was conducted without incident. Some time later, however, the FAA brought an emergency order of revocation against the pilot (along with a related civil penalty action of significant amount against the company), alleging that checking off a box on the flight manifest form indicating that such was a Part 91 flight constituted falsification of records. The FAA believed that the flight fell within the requirements of Part 135, and that appropriate Part 135 rest requirements had not been met. They therefore charged the pilot with violating flight and duty time regulations in addition to the falsification charges.[15]

Though the FAA brought severe and extreme action against both the pilot and company, it nonetheless withdrew these actions for policy reasons shortly before the NTSB hearing was to begin.[16] Applying the language of the relevant documents to these facts, the advisory circular states that "prisoners who are being transported aboard an aircraft are associated with the performance of a law enforcement function." This guidance would appear to indicate that the aircraft in these circumstances could properly be operated as a public aircraft, despite the fact that it was not "exclusively leased for at least 90 continuous days by a government". Therefore, Part 135 flight, duty and rest rules should not apply and the described flight was therefore subject only to Part 91. Since there is no case law on point, however, it appears that the FAA did not wish an opinion to be issued on these facts. This indicates disagreement within the FAA itself as to whether the described flight constituted a Part 135 operation for compensation or hire or whether it was a public aircraft at the time, subject only to Part 91. Such disagreement clearly causes difficulty for operators who merely wish to comply with the rules, in that they may be subject to similar enforcement proceedings depending upon how a particular FAA office ultimately determines its enforcement policies in these areas at a given time.

One final point to keep in mind is that two NTSB cases indicate that a public aircraft defense is considered jurisdictional and that it must therefore be raised as an affirmative defense at the trial level, raised prior to closing argument.[17] Though the Board was reversed on appeal in one of those cases, such should nonetheless be addressed as an affirmative defense wherever possible in an overabundance of caution.

V. CONCLUSION

Though the FAA provides guidance on when it would consider a particular flight to be that of a public aircraft, that guidance does not go far enough. In

[15] Id.

[16] Id.

[17] Administrator v. Larson, Docket No. CP-14, NTSB Order EA-4408, 1995 WL 623835 (1995); Administrator v. Galloway, Pulley and Williams, NTSB Order EA-2939, 6 NTSB 1108 (1989); rev'd on appeal at NTSB Order EA-3491, 1992 NTSB Lexis 39, 1992 WL 40517.

particular, the FAA needs to determine how it intends to treat commercial operators who perform individual flights of an enumerated governmental function for some governmental entity. Clearer guidance on how operators should interpret these laws would save a great deal of time and expense for both operators and the FAA by allowing each to avoid unnecessarily crossing swords. Obviously, creation of "secret law" is in no one's best interests and should be avoided at all costs. ■

ALL COMMITTEE VICE-CHAIRS AND SUB-COMMITTEES UP FOR GRABS

Along with the change in Committee Chair Positions, all Vice-Chair and Sub-Committee terms are now completed. If you are listed on the back cover of this newsletter in either capacity, this is the last time your name will appear unless your appointment is renewed. The current Sub-Committee Chair appointments are: Membership, Programming, Air Cargo, Airline Liability, Computer Use, Damages, Ethics, Evidence, Insurance Issues, Pretrial Procedure, Product Liability, Trial Practice and Techniques, Warsaw Convention, and FAA Enforcement. We also welcome suggestions for additional posts. One of our primary concerns is locating an Assistant Editor for our newsletter, who will assist Mark in soliciting and editing articles for the newsletter. Please contact either Rick or Gary immediately if this important and high-profile position interests you.

If you are a current Vice-Chair and would like to be considered for renewal, please write to Rick Alimonti c/o Haight, Gardner, Poor & Havens, 195 Broadway, New York, New York, 10007 or Gary Robb c/o Robb & Robb LLC, One Kansas City Place, 1200 Main Street, Suite 3900, Kansas City, Mo., 64105. In your letter please set forth your prior work for the Committee and your vision of your role as a Vice-Chair in your area for the next year. If you would like to be considered for a first time Vice-Chair position, please write to either of us and set forth some of your goals and proposals for your one year appointment. If you have any questions, Rick can be reached at 212-341-7071 during business hours, and Gary at 816-474-8080. We look forward to hearing from you. There will be no "honorary" positions. All Vice-Chairs will be expected to take an active role in the Committee, and to submit an Action Plan with goals, guidelines, and deadlines. If you're up to the challenge, give us a call or drop us a line. Your efforts will benefit the entire Committee and certainly will be brought to the attention of the Section leadership. We look forward to hearing from you and welcoming a new and activist group of Sub-Committees to the Aviation Litigation Committee.

Regardless of whether or not you wish to renew your position as a Vice-Chair or Sub-Committee member, we would like to express our deepest gratitude for your unselfish dedication to the Litigation Section and the Aviation Committee. ■

Dear Readers: We welcome the submission of articles, expert and consultant reports, case verdicts and settlement notices, seminar brochures and other aviation-related presentations from our readers, both foreign and domestic. If you would like to submit an article for publication in the Aviation Litigation News, please forward the article to the Editor as noted on the front cover of this newsletter.