



# *NTSB Forum*

## *Public Aircraft Oversight: Ensuring Safety for Critical Missions*

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# Topics



- *Context*
- *Milestones*
- *Current Law & DoD Policy*
- *Takeaways*



# Context



- ***Under US domestic law, aircraft are civil or public***
  - *A ‘civil aircraft’ is defined in the negative; that is, any aircraft that is not public is civil*
  - *The term ‘public aircraft’ refers to an aircraft operated by or for a government in certain circumstances*
- ***Treating aircraft owned and/or operated by the armed forces as ‘public’ (or ‘state’ in an international context) has not posed much of a problem***
- ***The issue of under what circumstances a civil aircraft under contract to DoD might become a public aircraft has been an issue for decades***
  - *Distinction is critical, as FAA safety oversight of aircraft extends only to civil aircraft*
  - *Oversight of a public aircraft falls on the governmental entity contracting for the aircraft*
- ***FAA position has been that it is the use to which the aircraft is put that determines whether it is civil or public***
  - *If performing a DoD mission, it is public unless the law allows otherwise*
  - *Applies regardless of the length of the ‘public use’—an hour, a day, or a month*



# Milestones



- *Dec 85- Arrow Air DC-8 mishap at Gander, Newfoundland*
  - *Prompted passage of 10 USC 2640 in 1986*
    - *Created the DoD Commercial Airlift Review Board (CARB)*
    - *Requires that DoD inspect and certify as safe air carriers providing charter air transportation for members of the armed forces*
    - *Complements rather than replaces FAA safety oversight responsibilities; however, seen by some as muddying the waters regarding who has primary safety oversight responsibility*
    - *CARB process extended by DoD directive to cargo transportation and ‘operational support services’ (such as target-towing, range instrumentation services, etc) , but still limited to civil aircraft*
  - *DoD concerns resulted in attempts—eventually successful—to revise the statutory definition of public aircraft to exclude aircraft chartered by DoD to provide transportation unless the Secretary of Defense designates their operation to be in the national interest*



# Milestones (cont.)



- *Dec 94 – Phoenix Air Learjet 35A mishap – Fresno, CA*
  - *Onboard fire traced to electrical modifications made by Phoenix to perform a USAF contract to train Air National Guard pilots*
  - *FAA asserted safety oversight was the USAF’s responsibility since the Learjet was a ‘public aircraft.’ USAF contract required Phoenix maintain FAA certification throughout performance, and to have any aircraft modifications approved by the FAA*
  - *Phoenix was approved by the CARB to provide air transportation services to DoD, but approval did not extend to other services*
  - *Prompted a requirement that DoD components contracting or arranging for ‘operational support services’ be responsible for ensuring an adequate safety oversight program is in place, regardless of who performs it*



# Current Law and DoD Policy



- *Current law creates three instances in which aircraft contracted by DoD to provide a service may be considered public aircraft, depending on their use--*
- *1) Aircraft chartered to provide transportation to the armed forces:*
  - *‘Public aircraft’ IF the Secretary of Defense designates their operation ‘as being required in the national interest.’ [49 USC 40125(c)(1)(C)]. Otherwise they retain their civil status*
  - *Secretary of Defense has not delegated the authority to make this designation, and DoD practice has been to NOT make this designation*
  - *DoD directives require providers of air transportation services to have and maintain FAA certification throughout contract performance. Aircraft modifications must be FAA approved or waivers obtained [DODI 4500.53]*
  - *Comment:*
    - *Approach is consistent with long-standing USG policy regarding the status of USG-contracted aircraft internationally: they are civil aircraft unless and until the USG designates them to be state aircraft—something which is rarely done*



# Law and DoD Policy (cont.)



- 2) Aircraft chartered to provide other commercial air service:
  - ‘Other commercial air service’ defined as an operation in US territory that the FAA Administrator determines to be available ‘for compensation or hire to the public’ and that complies with ‘all applicable civil aircraft rules under title 14, Code of Federal Regulations’ [49 US 40102(41)(E)]
  - Treatment the same as with aircraft acquired to provide transportation—public only if the Secretary of Defense designates operation ‘as being required in the national interest’
  - Secretary of Defense has not delegated the authority to make this designation, and DoD practice has been to NOT make this designation
  - Key is determining what qualifies as an ‘other commercial air service’
    - If the FAA determines the activity qualifies, the aircraft remains a civil aircraft unless the Secretary of Defense makes the required designation
    - If the FAA determines the activity does not qualify, the aircraft will be treated as a public aircraft
    - Procedure for DoD to request a FAA determination has yet to be developed



# Law and DoD Policy (cont.)



- 3) Aircraft used only for DoD that are not owned or operated by DoD, and not chartered to provide transportation or other commercial air service to the armed forces [49 USC 40102(a)(41)(A) & (E)]
  - Essentially, an ‘all others’ category that would include exclusive use by DoD not covered within the definition of ‘transportation or other commercial air service’
  - There is no prerequisite designation of ‘national interest’ by the Secretary of Defense to make the aircraft a ‘public aircraft’
  - Ensuring safety oversight is the responsibility of the contracting DoD component; however DoD Instruction leaves little discretion to allow contract aircraft to operate as public aircraft
    - DoD Instruction [DoDI 4500.53] requires the DoD component contracting for ‘operational support services’ to develop a safety oversight program or confirm FAA or CAA oversight, but...
    - The same Instruction requires Component heads to ensure contract aircraft have and maintain commercial certification; that there will be FAA and/or CAA safety oversight; and , that special equipment be approved by the FAA/CAA



# Takeaways



- *In practice, air transportation and other commercial air services acquired by DoD are nearly always going to be ‘civil’ rather than ‘public’*
  - *CARB certification may be required, but primary safety oversight responsibility remains with FAA*
  - *‘Public’ designation is rare and currently made only by Secretary of Defense*
  - *Consistent with USG practice regarding ‘state’ aircraft*
  - *TBD: mechanism to request/receive FAA Administrator’s determination regarding ‘other commercial air service’*
- *Other contract aircraft operations continue to be problematic*
  - *DoD Contracting Officers (COs) have on occasion declared that operations other than ‘transportation or other commercial air service’ are ‘public’ but—*
    - *Federal Acquisition Regulations (FARs) & Defense FARs (DFARs) contain no guidance on when this may/should be done, or the significance of doing so*
    - *COs have not been delegated the authority to designate public aircraft under contract to DoD to be state aircraft when operating internationally, creating a potential disconnect if operating outside the US*



# Parting Shot



*Uh Oh – This is gonna hurt!*

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