Flight Department Company

FEDERAL AVIATION DECISIONS

Interpretation 1989-22

FAD Digest of Interpretations:

FAR 91.181(b)
"Flight department companies" organized solely for the purpose of owning and operating aircraft do not fall within the coverage of FAR § 91.181 since the regulation requires that transportation by air be "incidental" to the company's business.

FAR 91.181(b)
The "major enterprise" or "primary business" test set forth in the definition of commercial operator in FAR § 1.1 has not been abandoned with respect to those operations listed in § 91.181(b).

Source of Interpretation: Letter to John Craig Weller from Donald P. Byrne, Acting Assistant Chief Counsel, dated August 8, 1989.

This is in response to question one of your letter of April 10, 1989. wherein you requested a legal interpretation of Subpart D of Part 91 of the Federal Aviation Regulations (FAR) and also responds to your followup letter of July 17, 1989.

We regret the delay in responding to your inquiry but the branch responsible for that interpretation has a very heavy volume of high priority matters, including safety rulemaking, Congressional inquiries, and requests under the Freedom of Information Act. Your inquiry came at a particularly busy time as the attorney responsible for the interpretation was in the process of responding to the remand of the Aman decision issued by the Seventh Circuit Court of Appeals. The agency's response was issued on May 26, 1989. Additionally, because of the Court's opinion in Aman, that attorney has had to respond to over 30 Congressional requests for information concerning the status of the Age 60 rule. The work on the response to the Courts remand taken together with the work required to answer all of the Congressional and similar inquires consumed almost all of the responsible attorney's time from the date of your first request to the date of your followup. Moreover, we have recently learned that the petitioners have filed a notice of appeal in that case.

In your letter of April 10, 1989, you state that many corporations have decided to place their flight departments into separate companies. You refer to these as "flight department companies" and indicate that their function is limited solely to air transportation operations. You argue that a "flight department company" which operates within the parameters of Section 91.181 cannot be construed to be a commercial operator. For the reasons below, we disagree.

Subpart D, Sections 91.181 through Sections 91.215 of the FAR prescribes operating rules, in addition to those prescribed in other Subparts of Part 91, governing the operations of large and turbojet powered multiengine airplanes. Subpart D specifically authorizes an operator to receive a very specific quantum of

compensation for operations that would otherwise require some type of operating certificate. To operate pursuant to Subpart D of Part 91, the operation must come within one of the enumerated qualifications set forth in Section 91.181 (b)(l) through (b)(9).

Operations which may be conducted in accordance with paragraphs (b)(l) through (b)(9) include, when common carriage is not involved, the carriage of company officials, employees, and guests of the company on an airplane operated by that company "when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air)."

There is no better settled rule of statutory construction than that which has become known as the plain meaning rule. When the promulgators' intention is so apparent from the face of the regulation that there can be no question as to its meaning, there is no reason for construction. Language that is clear, as is the case with Section 91.181, must be held to what it plainly expresses. Specifically, Section 91.181 (b)(5) allows the carriage of company officials, employees, and guests on a company aircraft provided the carriage is - *"incidental"* - to the company's business. Clearly, when the redactors adopted the concept of ''incidental,'' they contemplated that the company's aviation activities would be secondary to the overall business of the company.

The business structure you describe, viewed as a whole, does not fit the literal language of FAR 91.181(b)(5), which does not provide for "flight department companies." Additionally, it is clear that these "flight department companies" are organized solely for the purpose of owning and operating aircraft. If so, they do not fall within the coverage of Section 91.181 since that regulation requires that transportation by air be "incidental" to the company's business. In order for these "flight department companies" to conduct the operations you describe, they must obtain an appropriate operating certificate.

The ''major enterprise'' or ''primary business'' test set out in the definition of commercial operator in Section 1.1 has not been abandoned with respect to those operations listed in Section 91.181(b). Notice 71-32 (published in the Federal Register on October 7,1971 (36 F.R. 19507)), proposed new Subpart D and made this clear in discussing the carriage of goods as incident to a primary business. The notice states:

> The decision to apply Subpart D to the carriage of goods incident to a primary business in not intended to change the applicability of Part 121 to those operations which involve primarily the transportation of cargo by aircraft from one point to another solely for the purpose of sale. Such transportation is considered to be a major enterprise in itself, and may not be conducted with a large aircraft by a person who does not hold an operating certificate issued under Part 121.

This policy was reiterated in the preamble to Amendment 91-101 as follows:

> Although this change in policy (permitting the carriage of property in furtherance of a business) permits a greater use of an airplane as an incident to a business, it does not change the FAA policy in regard to the carriage of goods or property by airplane when such carriage is the primary business of the operator of the airplane. When such carriage is in fact a major enterprise in itself, it may not be conducted by any person unless he holds an operating certificate under Part 121 or 135, as applicable.

The preamble also applies the primary business test to operations by a subsidiary corporation whose sole purpose is to provide transportation to the parent corporation, a subsidiary or other corporation.

In conjunction with the foregoing, none of the operations you describe to be conducted by the "flight department companies" in question one, of your letter, may be conducted under Subpart D of Part 91. As you are aware, you have the option of petitioning the FAA for rulemaking to amend Section 91.181 in accordance with FAR 11.25.

As stated above, the branch responsible for that interpretation has a very heavy volume of high priority matters and, therefore, cannot respond to both of your inquiries at this time. We anticipate a response to your second question within 120 days.

We hope that this satisfactorily responds to question one of your letter.