

When can an on-demand charter really be a scheduled flight?

At the recent 2007 NATA Air Charter Summit, jaws dropped when an attorney with the Federal Aviation Administration (FAA) explained to attendees that the manner in which many empty legs are posted or otherwise offered to the public may in fact violate the FAA's rules prohibiting scheduled service in turbine-powered aircraft under Part 135.

As part of a broader discussion involving the future of brokers, Joe Conte, manager of the operations law branch within the FAA Chief Counsel's office, touched on a subject gaining attention within the agency – defining what is and, more importantly for Part 135 operators, what is not a schedule. In recent years, operators have found methods to alert consumers to available empty-leg flights (also called positioning, one-ways and deadheads). But operators should proceed with caution because, according to Conte and a 2006 FAA legal interpretation, these flights may in fact meet the definition of a "schedule" and therefore **must** be conducted under Part 121 if a turbine-powered aircraft is used.

Current regulations define a scheduled operation as one where the operator holds out to the public, in advance, the departure location, departure time and arrival location. In the 2006 interpretation, the FAA expanded upon what conditions might lead to a determination that an on-demand operator has conducted an operation meeting the three elements of a schedule.

During his presentation, Conte noted that when an on-demand operator offers the use of an "idle aircraft" that includes a relatively brief departure window and if the operator states the location where the aircraft must arrive the FAA will likely consider the operator to have "held out" the flight and to have operated on a scheduled basis. Importantly, beginning with the introduction of Part 119, all scheduled operations using turbine-powered aircraft must be conducted under Part 121.

As a result of the information presented during the Air Charter Summit, NATA heard from many operators concerned about the legal status of their empty-leg flight offerings. The association is providing this guidance to help operators better understand the current regulatory environment.

This document should not be construed to be legal advice with regard to any specific advertisement or aircraft operation. It is merely intended to provide information to aid operators in understanding the current issues surrounding the status of empty-leg flights and how the FAA may evaluate such flights. Operators are encouraged to consult appropriate legal counsel with specific questions about their empty-leg flight offerings.

To begin, a review of the relevant FAA definitions and their origins is appropriate.

Part 119

In 1997, a new set of FAA regulations took effect that dramatically changed the regulatory environment for all air carriers. Commonly known as the "Commuter Rule," the new 14 CFR 119 (Part 119) reclassified the certification and operations specifications requirements for air carriers. The most significant change was that scheduled commuter operators previously operating under Part 135 were transitioned to Part 121. As part of this transition, the FAA restricted the ability of Part 135 on-demand operators to conduct even occasional scheduled

operations. Under today's rules, an on-demand operator may conduct scheduled flights in an airplane under these limited conditions:

1. The airplane used must be piston-powered or turbo-prop (i.e. **not** turbojet);
2. The airplane used must have a maximum seating capacity of 9 passenger seats or fewer;
3. The airplane used must have a maximum payload of 7,500 pounds or less; and
4. The operator is limited to conducting fewer than five round trips per week between any two points.

Therefore, whenever a turbojet airplane is used in an operation that meets the definition of a scheduled operation, that flight **may not** be conducted under Part 135 under any circumstances. Scheduled flights in turbojet-powered airplanes **must** be conducted under Part 121 regulations.

The restrictions outlined above are articulated in the definition of "on-demand operation," while the three elements of a schedule are found within the "scheduled operation" definition. Both definitions can be found at §119.3 and are reprinted below.

On-demand operation

On-demand operation means any operation for compensation or hire that is one of the following:

(1) Passenger-carrying operations conducted as a public charter under part 380 of this title or any operations in which the departure time, departure location, and arrival location are specifically negotiated with the customer or the customer's representative that are any of the following types of operations:

(i) Common carriage operations conducted with airplanes, including turbojet-powered airplanes, having a passenger-seat configuration of 30 seats or fewer, excluding each crewmember seat, and a payload capacity of 7,500 pounds or less, except that *operations* using a specific airplane that is also used in domestic or flag operations and that is so listed in the operations specifications as required by § 119.49(a)(4) for those operations are considered supplemental operations;

(ii) Noncommon or private carriage operations conducted with airplanes having a passenger-seat configuration of less than 20 seats, excluding each crewmember seat, and a payload capacity of less than 6,000 pounds; or

(iii) Any rotorcraft operation.

(2) Scheduled passenger-carrying operations conducted with one of the following types of aircraft with a frequency of operations of less than five round trips per week on at least one route between two or more points according to the published flight schedules:

(i) Airplanes, other than turbojet powered airplanes, having a maximum passenger-seat configuration of 9 seats or less, excluding each crewmember seat, and a maximum payload capacity of 7,500 pounds or less; or

(ii) Rotorcraft.

(3) All-cargo operations conducted with airplanes having a payload capacity of 7,500 pounds or less, or with rotorcraft.

Scheduled operation

Scheduled operation means any common carriage passenger-carrying operation for compensation or hire conducted by an air carrier or commercial operator for which the certificate holder or its representative offers in advance the departure location, departure time, and arrival location. It does not include any passenger-carrying operation that is conducted as a public charter operation under part 380 of this title.

Discussion

Any empty-leg flight offered (either directly or through a broker) by an on-demand operator is subject to a possible determination by the FAA that the operator is offering scheduled service without holding proper authority (i.e. a Part 121 certificate), and is therefore in violation of the regulations, when the operator offers the departure date, departure location and arrival location and if such flight will be in a turbine-powered airplane.

So how *can* an operator offer empty leg flights without running afoul of the regulations? The FAA interpretation asserts that any time the three elements (departure location, departure time and arrival location) are “held out” for a passenger-carrying operation, it is a scheduled operation.

Therefore, if an operator sets only two of those three elements, it is likely that the FAA will not deem the flight to have been a scheduled operation. If any one of the three elements is of the customer’s choosing, then the flight can be viewed as an on-demand operation.

During the informal discussion with NATA members during the Air Charter Summit, Conte was clear that if only two elements are held out and the third is at the customer’s discretion a schedule does not exist. However, he cautioned that the third element must genuinely be determined by the customer. This position is supported by the 2006 FAA legal interpretation. When pressed on the issue of “departure time” windows, Conte indicated his belief that the agency would not likely deem a five-day departure window as establishing a departure time element, but that a 48-hour window (or less) would likely be deemed to be establishing a departure time.

Specifically the interpretation states:

"Having a time set within which the aircraft must leave satisfies the ‘departure time’ element."

"The shorter the departure window..., the more it looks as though this is a scheduled operation."

As an example, an operator may list on a Web site that an aircraft is available for a charter from Springfield, IL (SPI) to Lexington, KY (LEX) within a specified three-day window. If a customer calls to book this flight, that customer must be allowed to depart at a time of their choosing. The operator cannot during this phone conversation explain that the aircraft is only available for the listed price if it departs within the next 24 hours.

Similarly, if an operator defines a departure location and time but establishes a broad arrival destination Conte indicated that the agency would again likely deem the flight to have been an on-demand operation.

No specific information on the exact meaning of departure location and arrival location has been given, and there does not appear to be any prior interpretations or guidance on the precise meaning of the terms, leaving the FAA with additional opportunity for interpretation.

NATA cautions operators attempting to avoid being deemed to offer a schedule by using vagueness in defining locations, unless the precise departure and/or arrival airports are truly subject to the customer's desire. For example, offering a flight from Southern California to the New York area when in fact the customer will be required to meet the aircraft at Carlsbad (CRQ) for a flight that will land at Teterboro (TEB) is not likely to pass FAA review. However, if the offer was genuine in that the customer could specify any Southern California airport (that the aircraft could legally use) and any airport in the greater New York area for arrival, the FAA could very easily approve, particularly the greater the window of opportunity for departure time.

Operators should ask themselves, how would the customer who booked an empty-leg flight answer these questions if they were posed by an FAA inspector after flight completion?

Did you choose your departure airport, departure time and/or arrival airport?

Did you believe you had any flexibility in determining these factors?

Ultimately, in any potential investigation the FAA is likely to review the totality of the circumstances in deciding whether a schedule was held out to the public.

Q & A

- 1. If I only offer two elements of a schedule on a Web site and then verbally communicate the third element, I haven't published a schedule so aren't I still legally operating the flight under Part 135 on-demand rules?**

Example: Web site offers a GV as available for a flight from VNY to HPN, but no departure time/window is noted. A customer contacts the operator (directly or via a broker) and is told that the flight is indeed available for the quoted price but only if it departs VNY within the next 24 hours.

Answer:

Based upon information in FAA legal interpretations and comments offered by the FAA, this type of operation could be determined to be a scheduled operation. The three elements that define a schedule are all present (departure location – VNY, arrival location – HPN, departure time – within 24 hours). That only two were “published” and the third element (time) was a verbal statement is irrelevant. Note that the regulations do not require a schedule to actually be “published” in order for one to exist. Even though an exact departure time was not specified, the passenger is limited and must leave within the specified 24-hour window. The FAA has indicated that the narrower the departure window is, the more likely it is that the operator will be deemed to be holding out a scheduled flight in situations similar to the example.

- 2. What if I have an airplane, based at TEB, that is at VNY (the result of a one-way booking) and I offer the aircraft via a broker to any customer willing to depart VNY within the next 24 hours on an eastbound flight?**

Answer:

It is likely that you have not met the “arrival location” element necessary for establishing a schedule. Based upon FAA information, you have likely established the other elements – departure location and departure time. In order to avoid the third element, arrival location, the customer must truly be able take the aircraft to *any* eastbound location (Denver, Chicago, Little Rock, Nashville, Richmond, Baltimore, etc.) of *their* choosing, so long as the operator and aircraft can legally go to that destination (i.e. the runway is long enough for the airplane to land safely).

- 3. The empty-legs are really just a posting of my future Part 91 flights unless and until someone books the flight. Therefore, isn't it true that I have not “held out” a scheduled flight?**

Answer:

You may certainly argue that the flights posted are only listing of future Part 91 flights. However, the concern is over what ultimately happens with regard to a specific flight and the level of control over any of the three elements that the customer was actually able to exercise. These evaluations can be done post-flight.

The most important regulatory determination is whether a “scheduled operation” (as defined in §119.3) occurred. So, while you may argue that the empty-leg posting did not per se violate FAA regulations (particularly if the flight is never booked by a customer), the FAA could still evaluate any flight operation after-the-fact to determine the conditions of the flight and which party determined each of the three elements that comprise a schedule.

- 4. I have a customer that booked a charter flight with us, but will not utilize the full capacity of the airplane and indicated a willingness to “share the flight” with other passengers to reduce costs. Can I advertise this flight? Can I verbally steer customers that call to book flights to this arrangement?**

Answer:

The FAA has stated that even if the initial customer’s flight is purely an on-demand charter, the act of telling other third-parties about that flight could constitute holding out a schedule to those additional customers. That the first customer was on-demand does not influence an FAA finding that the additional customers were sold a scheduled flight. The FAA’s position is that whenever the three elements establishing a schedule are present a schedule is indeed being offered. The FAA has stated it is irrelevant “how” the schedule is presented to the customer – verbally, Internet, advertisements or any combination thereof.



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