

The Loss, Improper Relinquishment, or Surrender of Operational Control – Lessons Learned

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Indicia of Operational Control

- **Operational control - the exercise of authority over initiating, conducting or terminating a flight. 14 CFR § 1.1.**
- **Operators exercise operational control by making those decisions and performing those actions that are necessary to operate flights safely and in compliance with the regulations. FAA Order 8400.10, ¶ 1145 B.(1).**
- **Factors to consider when determining who is exercising operational control:**
 - Who scheduled crew & aircraft
 - Who accepted charter flights from the public
 - Who reviews weather & NOTAMs
 - Who performs flight planning
 - Who designates PIC for each flight
 - Who ensures that crews comply with flight & duty requirement prior to departure.
 - Who pays the flight crew.
 - Whether an obligation is placed on the air carrier, by lease or any other arrangement or mechanism, to use the aircraft owner's pilots.



Indicia of Operational Control - Continued

- Who specifies conditions under which a flight may be dispatched or released, e.g., weather minimums, flight planning, airworthiness of aircraft, aircraft loading, & fuel requirements..
- Who ensures that only trained & qualified crews are assigned to conduct flights.
- Who receives the revenue for the flights.
- Whether air carrier ensures that only those operations authorized by its op specs are conducted.
- Prior to departure, who ensures flight complies with the conditions specified in the release.
- When conditions specified for flight's release cannot be met, who ensures that flight is cancelled, delayed, re-routed, or diverted.
- Who monitors the progress of each flight, and initiating timely actions when the flight cannot be completed as planned, including diverting or terminating the flight.



Look at all Indicia of Operational Control, Not Just the Lease

- **A determination of who exercises operational control is not dependent solely on the wording of a lease or other agreement or arrangement.**
 - Leases cannot not be viewed in a vacuum.
 - A Lease, in and of itself, does not shift responsibility for operational control to the lessee.
- **Examination of the substance of a transaction, rather than the form, is essential to determine who exercises operational control.**
- **Courts look beyond the form of contractual agreements to the substance of the actual operations, sanctioning those who effectively operate for compensation or hire in violation of FAA safety regulations. FAA v. Landy, 705 F.2d 624, 632 (2nd Cir. 1983).**



Look at all Indicia of Operational Control, Not Just the Lease - Continued

- The facts and circumstances regarding the operation, not the language in the lease, determines which party exercised operational control of the flights. Administrator v. Ribler, 2 N.T.S.B. 606, 607 (1973).
 - Facts.
 - Respondent, who did not hold an air carrier certificate, owned 2 aircraft, which he leased to another entity.
 - A company arranged with Respondent to transport 15 drums from Miami to Jamaica using Respondent's aircraft and Respondent as PIC. Respondent was paid \$1,491.82.
 - Respondent also conducted a series of flights from the Bahamas to Florida, in which he was paid \$175 per flight to transport crawfish.
 - Although Respondent's aircraft was used on all of the flights and he was PIC, he contended that the flights were made under the auspices of another entity, who under the lease, was the operator of the aircraft.
- The Board found that the leases in question were illegal wet leases because they provided for both aircraft and pilot.



Ways to Lose, Relinquish, or Surrender Operational Control

- **Loss of operational control within the air carrier - hands-off management results in inadequate controls over its own operations.**
- **Loss of operational control within the air carrier - exercise of operational control by an unapproved person.**
- **Loss of operational control internally and externally, i.e., the mixed bag – hands-off management results in surrender of operational control to air carrier’s remote ostensible subsidiary.**
- **Loss of operational control externally – surrender of operational control to an uncertificated entity.**
- **Loss of operational control externally – air carrier’s illegal renting/franchising-out use of its air carrier certificate to an uncertificated entity.**



Hands-Off Management Equals Loss of Operational Control Within the Air Carrier

- **Administrator v. North Coast Aviation EA-3200.** Air carrier had inadequate controls over its own operation to stop violative flights authorized by its VP & DO.
- **Facts**
- **When air carrier empowers its VP & DO—a person with substantial control and responsibility over day to day operations—to conduct operations on its behalf, air carrier is responsible for violations committed by the VP & DO during the performance of the air carrier’s business.**
- **Air carrier’s failure to remove its VP and DO from authority or control, after learning that he committed serious safety violations during performance of air carrier’s business, shows that air carrier was unwilling or unable to act responsibly.**
- **Lesson Learned – Air carrier should have had adequate controls in place to remove such an official from a position of authority over flights conducted under the ostensible authority of its operating certificate.**



Exercise of Operational Control by Unapproved Person Equals Loss of Operational Control Within the Air Carrier

- **Administrator v. Aero Leasings, EA-5210.** Air carrier used an unapproved person to exercise operational control on three flights—a 2004 cargo flight carrying sheep and two 2005 passenger flights.
- **Facts**
 - Op Specs authorized only the DO and chief pilot to exercise operational control.
 - On the 2004 flight, the unapproved person used by air carrier to exercise operational control was a person the FAA would not have accepted in a management position due to his prior admitted violation history.
 - Aircraft used on the 2004 flight was unairworthy, i.e., it was reconfigured from a passenger to a cargo aircraft w/o approval.
 - Air carrier did not have FAA-approved or accepted operations or training procedures for safely transporting animals as cargo.
- **Lessons Learned.**
 - Air carrier only can use approved persons to exercise operational control on its behalf.
 - Where an air carrier conducted three flights for compensation or hire and permitted operational control to be exercised by persons not approved by the FAA to do so, revocation was the appropriate sanction.



Loss of Operational Control Internally & Externally - Surrender of Operational Control to Air Carrier's Ostensible Subsidiary.

- **Administrator v. Air Maryland (AM), EA-2951.** Air carrier had inadequate controls over its own operation, resulting in the surrender of operational control to its ostensible subsidiary, located in Buffalo, NY.
- Air carrier failed to maintain operational control of flights conducted by its remote Buffalo Division (BE).
- BE operated flights under AM's Air Carrier Certificate.
- **Facts**
- **Indicia that loss of operational control existed.**
 - BE kept own records, own accounts payable & receivable, checking account in own name,
 - Profits were divided 90% BE 10% AM
 - BE's checks made no mention of AM
 - Passengers never heard of AM, understood flights were operated by BE
 - Invoices thanked passengers for flying with BE.



Loss of Operational Control Internally and Externally - Continued

- BE put an aircraft that crashed back into Part 135 service after AM' CEO told BE not to do so.
- **AM's CEO ignored signals that its ostensible Buffalo Division was operating comp or hire flights as if it held an Air Carrier Certificate. CEO did little to involve or inform self in the running of the putative Buffalo Division.**
 - Before AM & BE signed their Operations Agreement, CEO knew that BE was sending out invoices in its own name
 - CEO learned that BE falsified Flight manifest to appear to meet insurance requirement.
- **Lessons Learned.**
 - AM's hands-off management, which resulted in inadequate controls, is no excuse for failing to maintain responsibility for operational control of flights conducted by its remote Buffalo Division.
 - At first indication that a problem exists, deal with it.
 - Cancel the deal, if necessary.



Loss of Operational Control – Surrender to an Uncertificated Entity

- **Adm. v. Darby, EA-5159.** Darby entered into an illegal “Charter Management Agreement” with Platinum Jet Management, an uncertificated entity, allowing Platinum to exercise operational control over passenger flights for comp or hire.
- Under the agreement, Darby did not maintain responsibility for operational control of its flight operations.
- Darby op specs authorized Darby to conduct operations under business name AlphaJet International.
- Darby’s op specs and manual did not list Platinum as authorized to exercise operational control.



Surrender of Operational Control to Uncertificated Entity - Continued

- **The Board held that Platinum, not Darby:**
 - Controlled the initiation, conduct, and termination of each individual flight listed in the emergency order.
 - Provided the crew and aircraft.
 - Controlled crew and aircraft scheduling.
 - Accepted charter flights from the public, handled flight planning, and exercised many of the operational control functions that should have been the sole province of Darby, the certificated air carrier, e.g., Platinum designated the pilot-in-command for each flight and specified the conditions under which the flight could be released, such as weather minimums, flight planning, airworthiness of aircraft, aircraft loading, and fuel requirements.
- **Each of the functions that Platinum performed represented areas in which Darby surrendered operational control.**



Surrender of Operational Control to Uncertificated Entity - Continued

- **Further Board findings:**
 - FSDO’s knowledge and approval of the character of the management agreement does not preclude the Administrator from taking a position that differs from the FSDO.
 - Administrator can, and indeed should, overrule the FSDO’s position if she believes it is incorrect or may be inconsistent with safety.
- **Lesson Learned – An air carrier should not be driven by its business practices or business model to create an environment in which an uncertificated entity operates flights for compensation or hire under the apparent authority of the air carrier’s certificate.**



Relinquishing Operational Control to Uncertificated Entities

- **Administrator v. American Air Network (AAN).** AAN illegally rented-out use of its air carrier certificate to uncertificated entities.
- **AAN lacked the necessary systems and information to make responsible operational control decisions regarding flights in air transportation ostensibly conducted under its air carrier certificate.**
- **AAN did not have adequate systems to track flights for comp or hire, pilot records, or aircraft maintenance; it merely asserted that it “made sure” the dbas’s pilots and aircraft complied with Part 135.**



Relinquishing Operational Control to Uncertificated Entities Continued

- **Factors evidencing the illegal renting/franchising-out of AAN's Air Carrier Certificate.**
 - Listing the names of the owners or lessors of each aircraft (more than one dozen) on AAN's op specs as dbas
 - Each entity listed on AAN's op specs held itself out as an air carrier.
 - AAN received a flat monthly management fee (e.g., \$2,000) for each aircraft.
- **Lessons Learned - While it might be a profitable business venture, an air carrier may not rent/franchise-out use of its air carrier certificate to uncertificated entities because safety is compromised when the certificated air carrier is unwilling or unable to maintain operational control over commercial operations.**



Conclusions

- **If a deal looks too good to be true, step back carefully and examine it.**
 - An air carrier's business model or business practices should not create an environment in which an uncertificated entity operates flights for compensation or hire under the apparent authority of the air carrier's certificate.
- **Use only approved persons to exercise operational control on the air carrier's behalf.**
- **Have adequate controls in place to ensure that officials in a position of authority over part 135 flights are conducting those flights in accordance with safety regulations.**
- **Management of your operations should never be lackadaisical. Hands-off management is not a legitimate excuse for failing to maintain operational control.**



Enforcement Guidance and Policy

