NATIONAL TRANSPORTATION SAFETY BOARD

Office of Aviation Safety
Washington, D.C. 20594

Attachment 29 - FAA Correspondence

OPERATIONAL FACTORS

DCA11PA075

A. ACCIDENT

Operator:	Omega Aerial Refueling Services, Inc.
Location:	Point Mugu Naval Air Station, California
Date:	May 18, 2011
Airplane:	Boeing 707-321B, Registration Number: N707AR

B. NATIONAL TRANSPORTATION SAFETY BOARD (NTSB) OPERATIONS GROUP

Captain David Lawrence - Chairman
Senior Air Safety Investigator
National Transportation Safety Board
490 L'Enfant Plaza East S.W.
Washington, DC 20594

Captain John Banitt
B707 Flight Standardization Officer
Omega Air Refueling
700 N. Fairfax Street, Suite 306
Alexandria, Virginia 22314

Mr. Tony James
Air Safety Investigator
Federal Aviation Administration (FAA)
800 Independence Ave. S.W.
Washington, DC 20591

Mr. Michael Coker
Senior Safety Pilot
The Boeing Company
P.O. Box 3707 MC 20-95
Seattle, Washington 98124-2207

C. SUMMARY

On May 18, 2011, at approximately 1727 pm local time (0027 UTC), Omega Air flight 70, a Boeing 707-321B (N707AR), crashed on takeoff at the Point Mugu Naval Air Station[1], Point Mugu, California. The airplane impacted beyond the departure end of runway 21 and was destroyed by post-impact fire. All three flight crewmembers aboard escaped with minor injuries.

[1] Naval Base Ventura County.

D. TRAINING

Sent approximately 6/2010

U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave., SW.
Washington, DC 20591

Mr. Greg McGowan
Vice President-Operations
FlightSafety International
8972 Trinity Boulevard
Hurst, TX 76053

Dear Mr. McGowan:

Thank you for your letter of April 7 in which you express several concerns including: a lack of standardization by principal operations inspectors, in-flight observations required by Title14 of the Code of Federal Regulations (14 CFR) part 142, and a Federal Aviation Administration (FAA) policy prohibiting the use of a level A simulator to conduct proficiency checks. We're sorry our busy schedules did not allow us to meet with you earlier. We are pleased that you were able to meet with John McGraw, Deputy Director of the Flight Standards Service, on April 22 and John Allen, Director of the Flight Standards Service, on June 10. We acknowledge you also requested a legal interpretation and filed a Consistency and Standardization Initiative about these same concerns.

We are concerned about standardization issues in our field offices. The FAA takes steps to promote standardization, including the development of inspector procedures, weekly communication between FAA headquarters and regional field offices, and twice-yearly conferences with training center program managers. Personnel from FAA headquarters also provide guidance in response to specific requests and perform ad-hoc visits as requested by regional and field offices.

Existing regulations require an air carrier to prepare and keep current a written training program curriculum for each aircraft and for each crewmember required for each type of aircraft. The FAA does not agree it is necessary or appropriate to change this requirement and remove responsibility for the development of an air carrier's training program from the air carrier itself and to place this responsibility on a training center.

While we understand the difficulties you have encountered in scheduling in-flight training observations, the FAA values the practical experience provided to instructors by actual observation of line operations. We understand that you have agreed to identify the aircraft you believe should be eligible for line observation simulation scenarios. The Flight Standards Service has agreed to further discuss the issues surrounding these aircraft with you, your training center program manager, and the Air Carrier Training and Part 142 Training Center Branch. We believe this coordination will resolve this issue.

Finally, your understanding that 14 CFR section 61.58(e)(3) permits the completion of a proficiency check in a flight simulator not otherwise qualified and approved for landings is correct. As the rule states, this is permitted if the pilot holds a type rating in the airplane

represented by the simulator and the pilot has completed at least three takeoffs and landings (one to a full stop) as the sole manipulator of the flight controls in the type airplane for which the pilot-in-command proficiency check is sought. As you know, this only relates to proficiency checks required by section 61.58 and does not apply to checking requirements under parts 121, 135, 91K, 125, 133, and 137. We still encourage the use of the highest level of simulation (level C or above) where critical maneuvers can be demonstrated.

The FAA is committed to continuous improvement. We thank you for your letter and the opportunity to review your concerns.

Sincerely,

Margaret Gilligan
Associate Administrator for Aviation Safety

cc:
AVS-1 (10-0415-56902-MJEN)
AFS-1
AFS-200
AFS-201A

U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave., SW.
Washington, DC 20591

Mr. Bruce N. Whitman
President and CEO
FlightSafety International
Marine Air Terminal – LaGuardia Airport
Flushing, NY 11371

Dear Mr. Whitman:

The Administrator has asked me to respond to your April 21 letter where you raised several issues, one of which concerns the use of level A and B simulators to accomplish Title 14 Code of Federal Regulations section 61.58 pilot-in-command proficiency checks.

Your interpretation that section 61.58(e)(3) permits the completion of the check ride in a flight simulator not otherwise qualified and approved for landings is correct. As the rule states, this is permitted as long as the pilot holds a type rating in the airplane represented by the simulator and the pilot has completed at least three takeoffs and landings (one to a full stop) as the sole manipulator of the flight controls in the type airplane for which the pilot-in-command proficiency check is sought. It should also be noted that this allowance is for section 61.58 checks only and may not be used to satisfy checking requirements under parts 121, 135, 91K, 125, 133, or 137. We have also communicated this information to other affected stakeholders.

We are reviewing the language of this rule to ensure it meets our intent and determine if additional action is necessary. We encourage the use of the highest level of simulation (level C or above) where critical maneuvers can be demonstrated.

The other matters described in the letter you attached and originally sent directly to me require more detailed analysis and investigation and will be included in our forthcoming response to Mr. McGowan's letter.

Thank you for your interest in aviation safety.

Sincerely,

Margaret Gilligan
Associate Administrator for Aviation Safety

CONCURRENCES
ROUTING SYMBOL: AFS20D
INITIALS/SIG: [redacted]
DATE: 6/16/10
ROUTING SYMBOL: AFS140
INITIALS/SIG:
DATE:
ROUTING SYMBOL: AFS-1
INITIALS/SIG:
DATE:
ROUTING SYMBOL: AVS-1
INITIALS/SIG:
DATE:
ROUTING SYMBOL: AFS760P
INITIALS/SIG: [redacted]
DATE: 6/16/10
ROUTING SYMBOL:
INITIALS/SIG:
DATE:
ROUTING SYMBOL:
INITIALS/SIG:
DATE:
ROUTING SYMBOL:
INITIALS/SIG:
DATE:

U.S. Department
of Transportation
Federal Aviation
Administration

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

AUG 13 2010

Greg McGowan
Flight Safety International
8972 Trinity Blvd.
Hurst, TX 76053

Dear Mr. McGowan:

This letter responds to the request for a legal interpretation that you mailed to this office on April 6, 2010. Specifically, you are seeking clarification regarding flight simulators and the pilot in command proficiency check required under 14 C.F.R. § 61.58. We have discussed your request with the Air Transportation Division of Flight Standards Service and coordinated a response through that office. Accordingly, we believe that a published legal interpretation is not necessary at this time.

If you have additional questions regarding this matter, please contact us at your convenience at [redacted].

Sincerely,

[redacted]

for Rebecca B. MacPherson
Assistant Chief Counsel, Regulations Division

U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of Accident Investigation and Prevention

800 Independence Avenue SW
Washington DC 20591

DEC 07 2011

David Lawrence
National Transportation Safety Board (NTSB), AS-30
490 L'Enfant Plaza East, SW
Washington, DC 20594

Dear Mr. Lawrence:

The Federal Aviation Administration (FAA) Flight Standards Service is providing the following response to your accident investigation information support request 11.434 pertaining to the accident involving Omega 70 that occurred on May 18, 2011, at Point Mugu, California. Specifically you asked:

NTSB Information Request 11-434:

Can a Part 142 instructor conduct Part 61 training and/or evaluation (check ride) for a type rating on an experimental B707 in-flight while the aircraft is being operated as a public aircraft on a military contract and conducting exercises for the US Navy?

FAA Response:

This response is limited to the context of civil aircraft operations. To the extent your inquiry appears to question whether training under 14 CFR part 61, provided by a 142 training center instructor, may be accomplished during a public aircraft operation, your inquiry does not provide enough information for the FAA to provide a complete public aircraft operation analysis.

For civil aircraft operations, the answer is no. Pursuant to 14 C.F.R. § 142.57, each aircraft used in part 142 training operations must have an FAA standard airworthiness certificate or a foreign equivalent acceptable to the Administrator. The only exceptions to this

requirement are for aircraft used for flight instruction and solo flights in a curriculum for agricultural aircraft operations, external load operations, and similar aerial work operations.

Further information on permissible use of aircraft in part 142 curriculums is contained in Federal Aviation Administration (FAA) Order 8900.1 Volume 3, Chapter 54, Section 6, *Part 142 Training Centers: Evaluate Training Programs, Curriculums, Flight Training Equipment, and Recordkeeping Requirements*, paragraph 3-4435. (Enclosed)

If you require additional information, please contact Ms. Kimberly Burtch, Accident Investigation Division, [redacted].

Sincerely,

[redacted]

Robert Drake
Acting Manager, Accident Investigation Division

Enclosure

U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of Accident Investigation and Prevention

800 Independence Avenue SW
Washington DC 20591

JUL 29 2011

David Lawrence
National Transportation Safety Board (NTSB), AS-30
490 L'Enfant Plaza East, SW
Washington, DC 20594

Dear Mr. Lawrence:

The Federal Aviation Administration (FAA) Flight Standards Service is providing the following information in response to your accident investigation information support requests 11.438 and 11-455 pertaining to the accident involving Omega 70 that occurred on May 18, 2011, at Point Mugu, California. Specifically you asked:

NTST 11-438: Request any LOAS allowing instructions from the Pan Am International Flight Training Academy to conduct training or examinations in Omega aircraft during civil and or public aircraft operations.

FAA Response: The Washington Flight Standards District Officer (FSDO) could find no record of a letter of authorization (LOA) allowing Pan Am International Flight Training Academy to conduct training in Omega aircraft.

NTSB 11-455: Reference the 4/18/2007 Eastern Region Flight Standards Division (AEA-FSDO-27) briefing paper dated 4/18/2007; NTSB requests all AFS-1 responses to Atlas Air Inc. and Evergreen International Airlines regarding Omega Aerial Refueling Services public aircraft operations outside the continental U.S. as an experimental aircraft.

FAA Response: A search of AFS-140 and AEA-200 correspondence database was conducted and revealed no correspondence from AFS-1 to Atlas Air Inc. or Evergreen International Airlines regarding Omega Aerial

Refueling Services public aircraft operations outside the continental United States as an experimental aircraft.

If you require additional information, please contact Ms. Kimberly Burtch, Accident Investigation Division, [redacted].

Sincerely,

[redacted]

B. Hooper Harris
Manager, Accident Investigation Division

E. OMEGA OPERATIONS LEGAL INTERPRETATION

Federal Aviation Administration

Memorandum

Date: SEP 29 2011

To: Robert Drake, Acting Manager, Accident Investigation Division, AVP-100

From: Rebecca MacPherson, Assistant Chief Counsel for Regulations, AGC-200

Subject: NTSB Request for Interpretation on Omega Air Refueling Accident

In June 2011, as part of the National Transportation Safety Board's (NTSB) investigation of the accident involving a refueling tanker owned by Omega Air Refueling Services, Inc. (Omega), my office was asked whether the accident aircraft was operating in public aircraft operation status at the time of the accident. We received the information that allowed us to make this determination on September 20.

The aircraft, a Boeing 707-321B, U.S. registration N707AR, was a converted tanker aircraft operating with an experimental airworthiness certificate. On May 18, 2011, the aircraft collided with terrain during takeoff from Naval Base Ventura County, Point Mugu, California. The aircraft sustained significant damage from the impact with the ground and the post crash fire. The three crewmembers escaped with minor injuries. The aircraft is owned and was being operated by Omega under contract with the U.S. Navy (Navy) to provide air-to-air refueling services.

Based on the information available to us, we believe the flight to have been a public aircraft operation within the meaning of the statute, the positions of the parties, and Federal Aviation Administration (FAA) guidance material.

The applicable statutory provisions are 49 USC §40125, Qualifications for Public Aircraft Status, and the definition of public aircraft found in 49 USC §40102(a)(41).

The Omega flight was operating as a contract air-to-air refueling operation to the Navy. FAA records indicate that operation of these aircraft by a civil operator has for many years been the subject of much discussion between the Department of Defense, the Federal Aviation Administration, and various Congressional interests. As configured, the aircraft was not eligible for a standard civil airworthiness certificate to operate as a refueling-for-hire commercial operation. No civil standards exist for such an aircraft or the operation.

Accordingly, Omega applied for and was issued an experimental airworthiness certificate for the purpose of market surveys in accordance with Title 14 of the Code of Federal Regulations, §21.191. However, operation of the aircraft as a refueling aircraft was considered possible as a public aircraft operation, since there are no civil standards that would apply to its use as such. This understanding and the desire of the Navy to use the services of Omega led to the eventual operation of the aircraft under the presumption that the Navy refueling operations would be contracted public aircraft operations, with the Navy ultimately responsible for the aircraft and its operations when operated under the contract.

Following the request by the NTSB, the FAA sought to confirm with both Omega and the Navy that the Omega refueling flights were considered public aircraft operations. Omega replied to FAA inquiries on July 21; an answer from the Navy concerning the accident flight was transmitted to my office on September 20. Both parties confirm that they believe the accident flight was intended to be conducted as a public aircraft operation.

The subject operation meets the basic tests as a public aircraft operation under the statute. The aircraft was being operated under contract with the Navy; both parties understood that a public aircraft operation with the Navy being responsible was intended; no persons were on board other than required crewmembers; and the purpose of the flight was governmental, since the air-to-air refueling was for Navy aircraft operations and is a military-only capability.

The only matter that might be at issue is the statutory provision under which the Navy was contracting with Omega. It is not clear to us whether the Navy believes it was conducting a public aircraft operation in accordance with 49 USC 40102(a)(41)(E) since that concerns aircraft "chartered to provide transportation or other commercial air service," neither of which fit the Omega operation. The Navy may be using its authority under 40125(c), the provision that covers the armed forces. As a matter of course, the FAA must rely on the various entities of the Department of Defense to draw the proper conclusions under that part of the statute, since the FAA has little cognizance of day to day operations of military aircraft and their contractors pursuant to Title 10 or the other authority designated in the statute. Since both the Navy and the Omega consider the accident flight to have been a valid public aircraft operation, we find no immediate evidence that it should be considered anything else.

This opinion takes no position on the continued operation of Omega refueling flights with its other aircraft, and a review of Omega's civil operations by the FAA is continuing to the extent that the agency has authority over them as a civil aircraft operation. The Navy has previously represented to the authorities in the United Kingdom that Omega operations there were public aircraft operations. While the Navy did not seek the FAA's opinion on that position, the FAA Office of the Chief Counsel reads the statute as authorizing public aircraft operations only within U.S. airspace, since outside those limits, international laws apply that do not allow for such status.

This response was prepared by Karen Petronis, Senior Attorney for Regulations, in my office, and was coordinated with the General Aviation and Commercial Division of the Office of Flight Standards. If you have any further questions regarding this opinion, please direct them to Karen Petronis.

Federal Aviation Administration

Memorandum

Date: November 22, 2011

To: Robert Drake, Acting Manager, Accident Investigation Division, AVP-100

From: Mark Bury, Deputy Assistant Chief Counsel, AGC-7

Subject: Public Aircraft Operation Outside of U.S. Airspace

Your office has requested that the Office of the Chief Counsel render its opinion on whether an aircraft operating as a public aircraft operation is limited to operation in U.S. airspace, or whether it may operate through certain corridors to military warning areas beyond the 12-mile territorial sea of the CONUS and remain in public aircraft status.

Public aircraft status, a creation of U.S. law, ceases to exist beyond the territorial limits of the United States. If a public aircraft operation leaves U.S. territorial airspace, it must operate as either a civil or state aircraft. Operations as a U.S. civil aircraft outside the territory of the United States or any other country must be in compliance with Annex 2 (Rules of the Air) to the Convention on International Civil Aviation (the Chicago Convention) and with most provisions of 14 C.F.R. part 91 to the extent that those provisions are not inconsistent with Annex 2 standards. 14 C.F.R. §91.703(a). Public aircraft may not be able to comply with all international standards and U.S. requirements applicable to U.S. civil aircraft operating outside the United States.

The other option is to operate as a state aircraft. The definition of state aircraft in the Chicago Convention at Article 3 includes aircraft "used in military, customs and police services. . . ." In general, an aircraft operated by the U.S. government (or a contractor thereto) may be eligible for state aircraft status. Determinations of whether to grant state aircraft status will normally involve the agency of the U.S. government conducting the operation and the U.S. Department of State when a diplomatic clearance is needed for the operation. If the operation of a U.S. state aircraft is confined to a U.S.-controlled Flight Information Region, a diplomatic clearance for the operation is not needed.

There are no exceptions that allow a public aircraft operation to retain that status outside U.S. territory, whether while transiting through international airspace to get from one part of the territory of the United States to another, such as CONUS to Alaska, Hawaii, or Puerto Rico, or proceeding to a U.S.-controlled military warning area beyond the 12-mile territorial limit of the

United States. In other words, there are no "corridors" through international airspace that public aircraft can access.

[redacted]

Mark W. Bury
AGC-7, Deputy Assistant Chief Counsel

2

2007 WL 1647824 (D.O.T.)

Department of Transportation (D.O.T.)
Federal Aviation Administration

*1 Legal Interpretation

April 10, 2007

Mr. David E. Shacknai

216 Robin Redbreast Road

Newark, DE 19711

Dear Mr. Schacknai:

This letter responds to your request for reconsideration of our October 12, 2005 interpretation of 14 CFR § 91.117(a). This interpretation was issued to Mr. Michael De Marco and addressed whether a U.S. registered aircraft, operating within U.S. Class B, or any other type of designated airspace, is required to comply with 14 CFR § 91.117(a) when more than **12 miles** offshore.

A copy of the relevant portions of the October 12, 2005, interpretation is provided below:

> Title 14 of the Code of Federal Regulations (14 CFR) § 91.117(a) provides that unless otherwise authorized by the Administrator, no person may operate an aircraft below 10,000 feet MSL at an indicated airspeed of more than 250 knots (288 mph). Paragraph (c) of this section states that no person may operate an aircraft in the airspace underlying a Class B airspace area designed for an airport or in a VFR corridor designate through such a Class B airspace area at an indicated airspeed of more than 200 knots (230 mph).
>
> Under § 91.701(a) of Title 14, the regulations of subpart H, including § 91.703, are applicable to U.S. registered civil aircraft operating outside of the United States and foreign civil aircraft operating within the United States. Specifically, § 91.703(a)(1) requires that "Each person operating a civil aircraft of U.S. registry outside of the United States shall when over the high seas, comply with annex 2 (Rules of the Air) to the Convention on International Civil Aviation and with §§ 91.117(c), 91.127, 91.129, and 91.131." Section 91.703(a)(3) further provides that "Except for §§ 91.307(b), 91.309, 91.323, and 91.711, comply with this part [91] so far as it is not inconsistent with applicable regulations of the foreign country where the aircraft is operated *or annex 2 of the Convention on International Civil Aviation*." (Emphasis added.)
>
> Our review of Annex 2 reveals no inconsistency with § 91.117. Therefore, when conducting an operation outside of the U.S., which would be beyond 12 NM from the coastline, operators of U.S. registered aircraft must comply with § 91.117. Consequently, a pilot operating a U.S. registered aircraft in international airspace below 10,000 feet MSL must not exceed an indicated airspeed of more than 250 knots (288 mph). When operating a U.S.-registered aircraft in airspace underlying a Class B Airspace area, or in a VFR corridor through Class B airspace, the pilot may not exceed an indicated airspeed of more than 200 knots (230 mph).

You raise three points concerning the interpretation of § 91.703. First, you maintain that the requirements of paragraph (a)(3) can only be read in conjunction with paragraph (a)(2) [operations conducted in a foreign country] and not at all to paragraph (a)(1) [operations over the high seas]. Second, you cite to FAA Order 7110.65, paragraph 5-7-

2, which states that "speed restrictions of 250 knots do not apply to aircraft operating beyond 12 NM from the coastline within the U.S. FIR in offshore Class E airspace below 10,000 knots." You also cite to FAA Order 7110.65 and the Instrument Procedures Handbook, which state that speed restrictions of 250 knots do not apply to aircraft operating beyond 12 NM from the coastline within the U.S. Flight Information Region in offshore class E airspace below 10,000 feet. Thirdly, you point out that air traffic control in numerous foreign countries may authorize speeds in excess of 250 knots below 10,000 feet to assist in flow control.

*2 We find that our position articulated in the October 12, 2005, letter remains the correct legal interpretation of the applicability of §§ 91.117(a) and 91.703. We do agree with you that § 91.703(a)(1) applies to U.S. aircraft when operating outside the U.S. and over the high seas and that paragraph (a)(2) applies to U.S. aircraft operating within a foreign country. Paragraph (a)(3), however is a stand alone provision that is not linked or conditioned upon paragraph (a)(1) or (a)(2). The provisions of 91.703(a) in summary are:

Section 91.703(a)(1) applies to U.S. aircraft when operating over the high seas
Section 91.703(a)(2) applies to U.S. aircraft operating within a foreign country
Section 91.703(a)(3) requires U.S. aircraft to comply with all the requirements of part 91, except for §§ 91.307(b), 91.309, 91.323 and 91.711, if consistent with the regulations of the foreign country [if operating in a foreign country] or with Annex 2.

We understand that there are several agency orders that incorrectly apply the speed restrictions requirements of §§ 91.117(a) and 91.703(a). The FAA currently is reviewing the statements in those Orders and the underlying basis for the regulatory requirement. If the conclusion is that the Orders or the rule should be amended, the FAA will do so following the appropriate procedures.

Thirdly, we do direct your attention to fact that § 91.117(a) does contain a provision for the FAA to permit a person to operate an aircraft below 10,000 feet MSL and exceed the 250 knot restriction.

Lastly, we must clarify the interpretation in that while it is true that Annex 2, (Rules of the Air) does not contain a speed restriction, Annex 11 (Air Traffic Services) does include a speed restriction for certain classes of designated airspace. Annex 11, Chapter 2, paragraph 2.6.3. includes the requirements for flight within each class of airspace as shown in the table in Appendix 4. In this Appendix, the speed limitation of 250 knows indicated airspeed below 10,000 feet AMSL applies to VFR operations in Class C airspace and to IFR and VFR flights in classes D, E, F, and G airspace. Consequently, the FAA requirement to not exceed 250 knots when operating in international airspace below 10,000 feet is entirely consistent with Annex 2 and Annex 11.

I apologize for the delay in this response. Should you have any additional questions, please contact Lorelei Peter, of my staff at [redacted] of the Federal Aviation Administration, Office of the Chief Counsel, Regulations Division, 800 Independence Avenue, SW, Washington DC 20591.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations

2007 WL 1647824 (D.O.T.)

END OF DOCUMENT