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.