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Flytenow, Inc. v. FAA Decision: Flight-Sharing Requires FAA Part 119 Certification

On December 18, 2015, the District of Columbia Circuit Court of Appeals decided the case *Flytenow, Inc. v. F.A.A.* Flytenow, Inc. is a web-based service that allows private pilots to offer their planned itineraries to all website members. Members can accompany the pilot if they are willing to share the pilots' expenses as alleged to be authorized pursuant to the private pilot cost sharing exemption found in the Federal Aviation Regulations (FARs), 14 C.F.R. § 61.113(c). Shortly after it began operating in 2014, Flytenow requested a legal interpretation from the FAA regarding compliance with the Federal Aviation Act of 1958 (now codified as the Transportation Code ("Code") and the FARs. In a Letter Interpretation, the FAA responded to Flytenow's request and determined that participating pilots would be considered common carriers and thus subject to certification as commercial operators under FAR Part 119. Flytenow then appealed the Letter Interpretation. The court upheld the FAA's Letter Interpretation.

Flight-Sharing Constitutes Common Carriage

Shortly after launching its flight-sharing services website, Flytenow requested a legal interpretation from the FAA regarding its business model's compliance. Contemporaneously, another flight-sharing services website, AirPooler, Inc., requested a similar interpretation. The FAA Letter Interpretations stated that under Flytenow's and AirPooler's current models, its pilots were operating as common carriers and needed to obtain Part 119 certification. Flytenow filed an appeal in the United States Court of Appeals, District of Columbia Circuit asking the court to overrule the FAA's interpretation. The court declined to overrule the FAA's interpretation for the following reasons.

The FAA is empowered to regulate nearly every aspect of private and commercial flight. One way the FAA regulates flight safety is by requiring different certification levels for private and commercial operations. Private pilots must comply with FAR Part 91 while commercial pilots and operators must comply with FAR Part 91 and FAR Part 119 (among other things). Commercial pilots may transport passengers or property in exchange for compensation. Generally, private pilots are not allowed to receive any compensation. However, there are seven narrow exceptions to this general rule. In *Flytenow* the relevant exception is that private pilots may share expenses with passengers, provided that (1) the pilot does not pay less than the pro-rata share of the operating expense and (2) that the expenses involve only fuel, oil, airport expenditures or rental fees. 14 C.F.R. § 61.113(c). In addition, this pro-rata sharing of expenses is further limited by the FAA's "common-purpose" test, which requires the private pilot and all expense sharing passengers share a bona fide common purpose for their travel.

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The FAA's Letter Interpretation addresses whether Flytenow's business plan falls under the narrow exception listed in 14 C.F.R. 61.113(c), or if its actions go beyond that exception and require regulation under the commercial rules found in Part 119. The FAA's analysis focuses on whether posting of pilots' itineraries on the Flytenow website in order to facilitate the sharing of expenses between passengers and pilots constitutes providing transportation as a common carrier.

The Code and the FARs do not define the term "common carrier." Instead, the FAA has historically relied on common law interpretations. The FAA released Advisory Circular 120-12A (April 26, 1986) ("Advisory Circular") enumerating the four elements of a common carriage: (1) holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation. In *Flytenow*, the first and fourth elements were critical to the court's upholding the FAA interpretation.

The Advisory Circular defined "holding out" as making representations to the public, or to a segment of the public, that a carrier is willing to furnish transportation within the limits of its facilities to any person who wants it. Furthermore, the FAA has stated that occasionally refusing service to would-be customers, or the absence of rate schedules is not necessarily conclusive proof that the carrier is private. The FAA also cautioned private pilots against making too many contracts for private carriage, because it implies a willingness to make contracts with anyone, which gives the impression that the pilot is operating as a public carrier.

The FARs also do not specifically define "compensation" but the FAA has interpreted what is compensation for the purposes of common carriage quite broadly. The court stated that since the 1980s it has been the FAA's position that any payment for a flight is compensation, even a partial payment or a pro rata share of operating expenses. The court held that the FAA correctly concluded in accordance with its prior interpretations that expense sharing is always compensation. Instead, the expense-sharing permitted in 14 C.F.R. § 61.113(c) is merely an exception to the general rule that private pilots may not accept any compensation.

In deference to an agency's interpretation of its own regulations the court in *Flytenow* agreed with the Letter Interpretation that treated flight-sharing services as common carries. Flytenow met the "holding out" element because its pilots use the website to post their itineraries. Although Flytenow limits the service only to members, anyone may become a member merely by signing up. Furthermore, even though Flytenow pilots reserve the right to refuse passengers for any reason, or no reason, and do not post rate schedules, this is not conclusive proof that these pilots are operating as private pilots. Flytenow's business model also meets the compensation element because expense sharing is compensation.

Conclusion

The court in *Flytenow* upheld the FAA's longstanding definition of common carriage and concluded that flight-sharing services are effectively pilots operating in common carriers and thus subject to FAR Part 119 certification requirements. The FAA will continue to interpret what is holding out and what is compensation quite broadly and strictly limit the exceptions to cost sharing.

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