



## Pilot Counsel

# Commercial pilot privileges

BY JOHN S. YODICE (From *AOPA Pilot*, February 1995.)

We have spent a good deal of space in this column explaining the privileges and limitations of a private pilot certificate as set out in the Federal Aviation Regulations. Essentially, these come down to commanding an aircraft without the supervision of a flight instructor and, most importantly, the legal ability to carry passengers. With limited exceptions, a private pilot may not carry paying passengers, nor may a private pilot get paid to pilot an aircraft. We have explained that a private pilot may share the expenses of a flight with his or her passengers in previous columns ("[Pilot Counsel](#)," July 1992 *Pilot*). But, the limited exceptions aside, at least a commercial pilot certificate is needed to conduct the paying operations. An airline transport pilot certificate is needed to command an airline aircraft.

Many of us go on to obtain commercial pilot and airline transport pilot certificates to improve our skills and demonstrate a higher level of competency, never really intending to fly commercially. It doesn't pose a problem to our intended operations. A commercial pilot and an ATP may exercise private pilot privileges. But, if we have a commercial pilot certificate, what are the privileges and limitations of this higher certificate? An inadequate understanding of these privileges and limitations could lead to trouble.

Because of the way the regulations are set out, some commercial pilots don't understand what they may or may not do in carrying paying passengers or cargo. Some few who do understand try to stretch the letter of the law to conduct what is essentially a commercial operation requiring a Part 135 certificate. A recent legal case is helpful in understanding the outer limits of the commercial pilot privileges.

Part of the confusion is caused by FAR 61.139 itself, which spells out the privileges and limitations of a commercial pilot. It says:

"The holder of a commercial pilot certificate may:

"(a) Act as pilot in command of an aircraft carrying persons or property for compensation or hire;

"(b) Act as pilot in command of an aircraft for compensation or hire...."

In other words, a commercial pilot may be paid to pilot an aircraft and, whether the pilot gets paid or not, a commercial pilot is needed to carry paying passengers or cargo. Nowhere in Part 61, or for that matter in the General Operating and Flight Rules of Part 91 (with which general aviation pilots are most familiar), does it say that Part 135 also applies. In fact, FAR 61.139(b) seems to suggest that all it takes to carry paying passengers or cargo is a commercial pilot's license. That's not so.

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Part 135, which governs commercial operations in smaller aircraft, requires (with exceptions not important to this discussion) that a person must obtain an air taxi/commercial operator (ATCO) certificate in order to carry persons or property for compensation or hire. And it imposes many other operational and paperwork requirements, including crewmember qualifications, training, and checks — and maintenance, airworthiness, and record keeping requirements — far beyond those required by Part 91. FAR 61.139, properly interpreted with Part 135, merely entitles a commercial pilot to get paid for being a pilot in command of aircraft engaged in a commercial operation. It does not entitle the commercial pilot himself or herself to be a commercial operator. Whoever is to be the operator must obtain an ATCO certificate and must comply with the other requirements of Part 135.

The case that brings up this issue involved a commercial pilot who in the past had been employed by a properly certificated charter operator. This pilot developed an idea to service the transportation needs of one of the former clients at very favorable rates (probably because he wouldn't have the costs of complying with Part 135). He wrote to the former client:

"I have the Cessna 421 that you used when I was with [the charter operator]. I am offering it on a rental basis to a few of my old customers at a greatly reduced rate. The way this works is you rent the plane from [the owner] and pay the pilots separately. [He specified the costs for the three usual destinations to which the customer's employees traveled.] Mike, I hope we can accommodate some of your travel needs. If you have any questions, you can contact me at the above address or call me at...." The deal was apparently favorable enough that "Mike" did take advantage of the opportunity.

The FAA got wind of the operation, investigated it, and ultimately suspended the commercial pilot's certificate for 90 days for essentially operating in violation of Part 135.

The commercial pilot appealed the suspension to the National Transportation Safety Board. He argued that the flights were private, non-commercial flights properly conducted under Part 91 because the customer entered into two separate transactions, one with the aircraft owner for the rental of the aircraft, and one with the pilot for piloting services — and he had a commercial pilot license. There is certainly nothing wrong under the FARs with the customer renting an aircraft for its own transportation needs, and nothing wrong with the customer hiring and paying its own commercial pilot to fly the rented aircraft, so long as the customer retains operational control and complies with the operating rules of Part 91. It is not a commercial operation.

The Board didn't buy the argument. The Board found that the aircraft rental and the piloting services were offered together by the pilot, and that they were treated by the customer as a unified transportation package. "Our case law makes clear that obtaining both a flight crew and an airplane from the same source (known as a 'wet lease') is usually considered conclusive evidence of carriage for compensation or hire."

The Board did recognize, however, that a pilot could be confused by the regulations. It reduced the period of suspension from 90 days to 45 days largely because the Board believed that the pilot believed that he was in compliance with the regulations. The pilot "believed that he was doing what he needed to do to be operating under [Part] 91."

The lesson to be learned from this case for commercial pilots is not to take FAR 61.139(a) too literally. Remember that FAR Part 135 may also apply.

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