



April 19, 2021

Mr. Ali Bahrami, Associate Administrator for Aviation Safety
Federal Aviation Administration
800 Independence Avenue SW
Washington, DC 20591

Dear Mr. Bahrami:

The judgment issued by the D.C. Circuit Court of Appeals on April 2, 2021 in *Warbird Adventures, Inc. et al. v. Federal Aviation Administration* has created significant confusion and concern in the aviation community regarding the impact of the decision on compensated flight training, in limited category aircraft and other categories of aircraft. When pilots look for guidance on what they can and cannot do, they look to the Federal Aviation Regulations and FAA formal policy announcements, not court decisions. We therefore urge the FAA to expedite a direct and final statement of its position on the impact of the Court's decision on the specific issues discussed below.

As you know, the Court's decision states that a flight instructor who receives compensation for flight instruction is carrying persons for compensation or hire. Our organizations filed a joint amicus brief in this case because we were concerned about this very issue: language in the ruling that could restrict access to flight training and negatively affect air safety in the United States. The Court's decision is unpublished, meaning that the Court did not see precedential value, and the characterization of flight training was discussed in dicta, not the holding (which was simply to deny Warbird's Petition). The impacts of the Court's characterization, if the FAA adopts the same broad position, would create significant domino effects across the aviation regulatory landscape and spur additional confusion. The aviation community needs clarification on the FAA's characterization of compensation for flight instruction, flight tests, and line checks.

1. Characterization of flight instruction. The Court's characterization of instructor compensation as payment for carriage of persons is contrary to the FAA's longstanding position. The FAA has distinguished

between compensation for instruction and compensation for carriage of persons or property in regulations, guidance, and multiple FAA Chief Counsel legal interpretations. Compensation received by a flight instructor for instruction is compensation for the instruction rather than for carriage of persons or property for hire. It is for this reason that flight instructors are not required to hold first or second-class medical certificates, which are required for pilots flying passengers or cargo for compensation. This important distinction is not only recognition of the fact that flight instructors are being compensated for their professional knowledge and skill as instructors, but also importance of access to training to maintain aviation safety. The situation is further complicated by the fact that FAA legal interpretations state that compensation can be the receipt of anything of value, including accumulation of flight time or goodwill, not just payment of money or reimbursement of expenses.

2. Flight instruction in limited category aircraft. The Limited Category was created by the Civil Aviation Administration (prior to the creation of the FAA) after World War II (WW-II) to allow civil operation of aircraft that had proven records as military aircraft. 14 C.F.R. § 91.315 provides that “No person may operate a limited category civil aircraft carrying persons or property for compensation or hire.” Currently, there are more than 350 limited category aircraft in the FAA registry, but roughly two dozen current exemptions from 14 C.F.R. § 91.315 allowing organizations to offer flight training in the organization’s aircraft. In such cases, payment is for instruction and use of the aircraft. Historically, the FAA has *not* prohibited *owners* of limited category aircraft from paying instructors to receive training in the owners’ aircraft in the absence of an exemption. We are not aware of any exemptions granted for such training nor any enforcement cases against owners for receiving training in their aircraft. In the interest of safety, it is vital to avoid any roadblocks for owners who wish to pay for flight training in their own aircraft.

Limited Category aircraft are historic aircraft. Only former US military aircraft produced for use during World War II were eligible for Limited certification. The pilot skills required for the safe operation of these unique aircraft require training beyond that required for the current general aviation aircraft, and therefore additional training, both initial and recurrent is essential. On November 21, 1946 Civil Air Regulation 09 became effective. The Civil Aeronautics Board (predecessor to the Federal Aviation Administration) enacted this regulation:

Effective November 21, 1946

"Explanatory Statement of Part 09"

"This part is for the purpose of making available to the public certain military surplus aircraft which were originally designed for the military services of the United States for combat and other specialized purposes and which experience in military service has shown to be safe for operation so long as the operation is confined to flights in which neither passengers nor cargo are carried for hire."

The civil certification of these aircraft provided the US with a supply of aircraft to serve the needs of private and corporate non-air carrier operators until the advent of turbine powered aircraft in the 1960s.

In the wake of the Court's judgment, the aviation community needs clarification regarding how flight training can be provided in limited category aircraft in compliance with the regulations, including any distinctions based on compensation for the aircraft.

3. Flight instruction in other categories of aircraft. Multiple regulations prohibit the use of aircraft for carriage of persons or property for hire, and aircraft are used for flight training in a variety of contexts including individual ownership, shared ownership, flying clubs, flight schools and air carriers.

Several other regulations use the same or very similar wording to § 91.315 in Part 91. One example is § 91.325 Primary category aircraft: Operating limitations. Section 91.325(a) uses the same wording as § 91.315 with the substitution of limited in place of primary. In the preamble of the final rule that created § 91.325 (FR Vol, 59, No. 175, page 41360, dated September 9, 1992) under the section titled Rental and Flight Instruction, the FAA discussed the subject and determined that flight instruction would be permitted in Primary category aircraft. Later in the preamble, under the title Primary Category Aircraft Operating limitations, the FAA again agrees that primary category aircraft may be used for flight instruction. It then, under Pilot Certification clearly states that primary aircraft may be used for pilot certification.

The FAA also amended § 91.319 by adding § 91.319(h) specifically to permit flight training for hire in experimental aircraft based on the safety enhancement provided by flight training through the use of a letter of deviation authority (LODA). Prior to amending § 91.319 to permit the FAA to issue authorizations to provide for flight training in experimental aircraft for compensation or hire, the FAA had issued exemptions to the Experimental Aircraft Association and others (examples: exemptions 7162, 6658, 6778). When the FAA amended § 91.319 to permit training without the need for an exemption, they did not provide for similar relief for training under § 91.315.

However, although 91.319(h) enables instructors to hold out specialized training to the flying public for hire, the guidance is clear that LODAs are *not* necessary for training to occur in experimental aircraft when the use of the *aircraft itself* is not compensated (Order 8900.1, Paragraph 3-292(A-C)).

We note that the language regarding flight for compensation or hire in §91.319(a)(2) is identical to § 91.315. Consistency is essential in application of FAA regulations, and it is unlikely that the intent of § 91.315 was different than the intent of § 91.319 since the wording is the same. In the interest of safety, the aviation community needs clarification regarding how flight training can be provided in various categories aircraft in compliance with the regulations, including any distinctions based on compensation for the aircraft.

Industry agrees with the FAA that flight training is the cornerstone for safe flight operations, including make/model specific training. The FAA promotes training as evidenced by the requirements for the flight review, the FAA-sponsored pilot proficiency award program, and the many FAA-sponsored safety seminars provided by the safety program managers found in all FSDOs located throughout the United States. EAA, AOPA, and GAMA respectfully request that the FAA clarify its policy to ensure continuity for

continuation of flight training. Flight training and checking/testing in thousands of aircraft, including those in the limited category, continue to occur every day in privately owned hulls and we do not want to have an interruption in these safety enhancing activities.

Your personal attention to help expedite a direct and final statement is very much appreciated.

Sincerely,



Jack J. Pelton
CEO & Chairman of the Board
EAA



Mark Baker
President & CEO
AOPA



Peter J. Bunce
President & CEO
GAMA

cc: Rick Domingo, Executive Director, Flight Standards Service