(1) Where the application concerns the performance of off-route charter trips (other than for another direct air carrier or direct foreign air carrier as provided in § 212.8(a)(4–a)):

(i) Whether the foreign air carrier has previously conducted similar flights on a regular and frequent basis in relation to the regularity and frequency of its on-route charter, scheduled, and nonscheduled operations.

(ii) Whether the off-route charter was generated as a result of solicitation of individual members of the traveling public.

(iii) Whether the foreign air carrier or its agent or the charterer or its agent has previously violated any of the provisions of this part.

(2) Where the application concerns the performance of a charter trip or trips for the transportation of commercial traffic for another direct air carrier or direct foreign air carrier (as provided in § 212.8(a)(4–a)):

(i) Whether the foreign air carrier or its agent or the charterer or its agent has previously violated any of the provisions of this part or of Part 218 of this subchapter.

(ii) Whether operations under the charter will have a significant adverse competitive impact on any U.S. air carrier. In making this determination, the Board will consider such factors as: the relative size and financial strength of the U.S. air carriers and the foreign air carriers operating on the route; and whether the proposed operation will render uneconomic any U.S. carrier operations over the route.

(iii) Whether the nature of the arrangement and the benefits to be realized are such that the authority sought should be the subject of a bilateral agreement with the applicant's government.

(iv) Whether the authority sought is covered by and consistent with pertinent bilateral air transport agreements to which the United States is party.

(v) Whether, and to what extent, the applicant owns and controls the charterer.

* * * * *

5. Amend § 212.8(a) to read as follows:

§ 212.8 Charter flight limitations.

* * * * *

(a) Where the entire * * *

* * * * *

(4) By a direct air carrier, direct foreign air carrier, or surface carrier when such aircraft is engaged solely for the transportation of company personnel and their personal baggage or company property; or

(4–a) By a direct air carrier or direct foreign air carrier when such aircraft is engaged solely for the transportation of commercial traffic: *Provided, however,* That such flights may also carry the chartering carrier's own personnel and property;

* * * * *

6. Add a new § 212.14 to read as follows:

§ 212.14 Reports of emergency charters for other direct carriers.

(a) It shall be an express condition upon authority conferred in § 212.8(a)(4–a) that each foreign air carrier which performs an emergency charter transporting commercial passenger traffic for another direct carrier shall file a report with the Bureau of Operating Rights, within 30 days following each charter flight, containing the following information:

(1) Name of direct carrier performing the charter and the name of the direct carrier for which the charter was performed;

(2) Date of flight or flights;

(3) Points of origin and destination, and intermediate points, if any;

(4) Number of passengers transported;

(5) Description of circumstances creating the emergency;

(6) Date of initial contact by the chartering carrier regarding the charter;

(7) Reasons why the traffic in question was not or could not be carried by other carriers certificated to serve the particular market.

(Secs. 204(a) and 402 of the Federal Aviation Act of 1958, as amended, 72 Stat. 743, 757; 49 U.S.C. 1324, 1372)

By the Civil Aeronautics Board.

Effective: January 19, 1972.

[SEAL] HARRY J. ZINK, *Secretary.*

NOTE: The reporting requirements herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

[FR Doc.71-17752 Filed 12-3-71;8:50 am]

[Reg. ER-714; Amdt. 3]

PART 214—TERMS, CONDITIONS, AND LIMITATIONS OF FOREIGN AIR CARRIER PERMITS AUTHORIZING CHARTER TRANSPORTATION ONLY

Procedures for Authorizations of Wet Lease Charters

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 14th day of October 1971.

By EDR–193,[1] the Board proposed, inter alia, certain amendments to Part 214. For the reasons set forth in ER–713 (Part 212), published simultaneously herewith, the Board hereby amends Part 214 of the Economic Regulations (14 CFR Part 214), effective January 19, 1972, as follows:

1. Amend the Table of Contents by adding new §§ 214.9a and 214.9b. As amended, the Table of Contents will read in pertinent part:

[1] Nov. 9, 1970, 35 F.R. 17556 (Docket 22730).

2. Amend § 214.7(a) to read as follows:

§ 214.7 Charter flight limitations.

* * * * *

(a) The entire capacity * * *

(1) By a person for his own use (including a direct air carrier or direct foreign air carrier when such aircraft is engaged solely for the transportation of company personnel and their personal baggage, or of commercial passenger traffic);

* * * * *

3. Add a new § 214.9a to read as follows:

§ 214.9a Statement of Authorization; application.

(a) A foreign air carrier shall not perform any charter for the transportation of commercial passenger traffic for another direct air carrier or direct foreign air carrier (as provided in § 214.7(a)(1)) unless specific authority in the form of a Statement of Authorization to conduct such charter flights has been granted by the Board; *Provided, however,* That no Statement of Authorization shall be required for the performance of such charter flights in cases of emergency; *Provided, also,* That emergency charters shall be reported in accordance with § 214.5. An emergency charter within the meaning of this section shall not include such circumstances as cancellation of flights due to periodic overhaul of aircraft or delay in the delivery of newly acquired aircraft, and a foreign air carrier may not provide emergency charter trips on any day in each of three or more successive calendar weeks for any single direct carrier without a Statement of Authorization.

(b) Application for a Statement of Authorization shall be submitted on CAB Form 433 to the Civil Aeronautics Board, addressed to the attention of the Director, Bureau of Operating Rights. Upon a showing of good cause, such application may be transmitted by cablegram or telegram or may be made by telephone; *Provided, however,* That an application for the performance of a charter transporting commercial passenger traffic for another direct air carrier or direct foreign air carrier, as provided in § 214.7(a)(1), must be submitted on CAB Form 433 and a copy thereof shall be served upon the Federal Aviation Administration, marked for the attention of Director, Flight Standards Service, and each U.S. certificated air carrier which is authorized to serve the same general area in which the proposed charter trips are to be performed. Each applicant shall keep on file with the Director, Bureau of Operating Rights, a copy of its current standard form of charter agreement. Each application shall contain an abstract of the charter agreement setting forth the names and addresses of the operator, the charterer, and their agents, if any; a description of the proposed operations; type aircraft to be flown; and, if reciprocity has not previously been established or if any changes have occurred since the previous Board finding thereon, documentation to establish the extent to which the nation which is the domicile of the applicant grants a similar privilege with respect to U.S. air carriers. A true copy of the charter agreement actually consummated shall be transmitted to the Director, Bureau of Operating Rights, as soon as practicable, but in no event later than 15 days after consummation.

(c) Applications shall be filed with the Board at least 45 days in advance of the date of the commencement of the proposed flights. Upon showing that good cause exists for failure to adhere to the above requirements and that waiver of these requirements is in the public interest, applications later submitted may be considered by the Board.

(d) Any party in interest may file a memorandum in support of or in opposition to the grant of an application within 7 days after service of the application. Such a memorandum shall set forth in detail the reasons why the party believes the application should be granted or denied and shall be accompanied by such data, including affidavits, which it is desired that the Board shall officially notice. Copies of the memorandum shall be served upon the foreign air carrier to whose application such memorandum is directed. Nothing in this subparagraph shall be deemed to preclude the Board from granting or denying an application when the circumstances so warrant without awaiting the filing of memoranda in support of or in opposition to the application.

(e) Except to the extent that the Board shall direct that such information be withheld from public disclosure as hereinafter specified, every application and its supporting documents filed pursuant to this section shall be open to public inspection, and notice thereof shall be published in the Board's Weekly List of Applications Filed. Any person may make written objection to the Board to the public disclosure of such information or any part thereof, stating the grounds for such objection. If the Board finds that disclosure of such information or part thereof would adversely affect the interests of such person and is not required in the interest of the public, it will order that such information or part be so withheld.

4. Add a new § 214.9b to read as follows:

§ 214.9b Issuance of Statement of Authorization.

(a) If the Board finds that the proposed charter trip or trips meet the requirements of this part, that the foreign nation which is the domicile of the applicant grants a similar privilege with respect to U.S. air carriers, and that such charter trip or trips are otherwise in the public interest, it will issue a Statement of Authorization for the conduct of the trip or trips set forth in the application. Such Statement of Authorization may be withheld, conditioned, or limited by the Board as the public interest may require.

(b) In passing upon the requirements of the public interest, the Board will consider the following factors, among others:

(i) Whether the foreign air carrier or its agent or the charterer or its agent has previously violated any of the provisions of this part or of Part 218 of this subchapter.

(ii) Whether operations under the charter will have a significant adverse competitive impact on any U.S. air carrier. In making this determination, the Board will consider such factors as: the relative size of and financial strength of the U.S. air carriers and the foreign air carriers operating on the route; and whether the proposed operation will render uneconomic any U.S. carrier's operations over the route.

(iii) Whether the nature of the arrangement and the benefits to be realized are such that the authority sought should be the subject of a bilateral agreement with the applicant's government.

(iv) Whether the authority sought is covered by and consistent with pertinent bilateral air transport agreements to which the United States is party.

(v) Whether, and to what extent, the applicant owns and controls the charterer.

(Secs. 204(a) and 402 of the Federal Aviation Act of 1958, as amended, 72 Stat. 743, 757; 49 U.S.C. 1324, 1372)

By the Civil Aeronautics Board.

[SEAL] HARRY J. ZINK, *Secretary*.

JANUARY 19, 1972.

[FR Doc.71-17753 Filed 12-3-71;8:50 am]

[Reg. ER-715; Amdt. 2]

PART 217—REPORTING DATA PERTAINING TO CIVIL AIRCRAFT CHARTERS PERFORMED BY FOREIGN AIR CARRIERS

Reports of Wet Lease Charters

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 14th day of October 1971.

By EDR-193,[1] the Board proposed certain amendments to Parts 212 and 214, and an implementing amendment to Part 217. Since the proposed amendments to Parts 212 and 214 are (with certain modifications) being adopted simultaneously herewith,[2] the amendment to Part 217 is being adopted substantially as proposed.

Accordingly, the Board hereby amends Part 217 of the Economic Regulations (14 CFR Part 217), effective January 19, 1972, as follows:

Amend § 217.6(b) by adding a new subparagraph (6), to read as follows:

§ 217.6 Reporting instructions.

(a) * * *

(b) Separate reports shall be filed for each of the below-named types of charters and the type shall be inserted opposite the caption "Type of Charter."

* * * * *

(6) Charter performed for another direct foreign air carrier, as provided in §§ 212.8(a)(4-a) and 214.7(a)(1), whichever is applicable, except emergency charters reported under § 212.14 or § 214.5.

(Secs. 204(a) and 402 of the Federal Aviation Act of 1958, as amended, 72 Stat. 743, 757; 49 U.S.C. 1324, 1372)

By the Civil Aeronautics Board.

[SEAL] HARRY J. ZINK, *Secretary*.

NOTE: The reporting requirements herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

[FR Doc.71-17754 Filed 12-3-71;8:51 am]

[1] Nov. 9, 1970, 35 F.R. 17556 (Docket No. 22730).

[2] ER-713 and ER-714, respectively.

[Reg. ER-716]

PART 218—LEASE OF AIRCRAFT WITH CREW BY FOREIGN AIR CARRIER OR OTHER FOREIGN PERSON

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 14th day of October 1971.

By notice of proposed rule making EDR-166,[1] the Board announced that it had under consideration adoption of a new Part 218 applicable to foreign air carriers and other persons not citizens of the United States who as lessors enter into so-called "wet leases" providing for the performance of foreign air transportation services of another foreign air carrier. Therein, the Board noted that where an aircraft is leased with crew, the operational control and ultimate safety responsibility for the flight will normally remain in the hands of the lessor. Accordingly, the Board has generally considered that a lease with crew is not a true lease of equipment but rather constitutes a charter or series of charters of the aircraft, and that to the extent the "wet lease" provides for the performance of services in foreign air transportation, the lessor will be engaged in foreign air transportation. In such cases, the Board has required that a foreign air carrier (or any other foreign person) which furnishes an aircraft with crew for the performance of air transportation services on behalf of another foreign air carrier, pursuant to a so-called "wet lease," must obtain a foreign air carrier permit pursuant to section 402 of the Act, specifically authorizing the lessor to engage in such foreign air transportation.

Although the Board took note of the fact that whether a particular arrangement constitutes a charter or a true lease turns upon the facts, there is a strong presumption that a lease of aircraft with crew constitutes a charter. The Board tentatively concluded that the public interest requires that, to the extent there exists a question whether a particular

[1] June 13, 1969, 34 F.R. 9621 (Docket 21080).

lease with a crew constitutes a charter under which the lessor will be engaged in foreign air transportation, the matter should be passed upon by the Board prior to commencement of operations. Accordingly, the Board proposed to prohibit the furnishing of an aircraft with crew for the performance of air transportation operations of another foreign air carrier, unless the Board has issued the "lessor" a section 402 permit authorizing such operation, or, upon application by the parties to the transaction, the Board has issued an order disclaiming jurisdiction. The Board explained that implementation of the proposed rule would avoid confusion as to the necessity for additional section 402 permit authority under so-called "wet lease" transactions; would minimize the performance of unauthorized operations by "wet lease" lessors and thereby simplify the Board's enforcement responsibilities; and should, as a result, avoid intergovernmental friction and misunderstandings that might otherwise arise from reliance upon the Board's enforcement procedures to ensure compliance with the requirements of the Act.

Pursuant to the notice, a number of comments have been received.[2] The foreign governmental authorities and the foreign air carriers[3] filing comments oppose the rule proposed, while it has the support of the U.S. air carriers.

Upon consideration, the Board has decided to adopt Part 218 as proposed, with modification. Except as indicated herein, the tentative findings and conclusions set forth in EDR-166 are adopted and incorporated by reference.

EDR-166 provoked considerable objection from the foreign air carriers upon the ground that it would put them at a severe disadvantage vis-a-vis the U.S. air carriers with regard to wet leasing. That is, a U.S. carrier could obtain authority to wet lease by means of a section 416 exemption proceeding without hearing, while a foreign carrier would be compelled to go through the far more burdensome and time-consuming procedure of seeking an amendment to its section 402 permit. In light of these comments, the Board issued an additional notice of proposed rule making[4] in which the Board proposed to amend Parts 212 and 214 so as to authorize foreign air carrier wet lessors to conduct wet lease operations through application for and issuance of a Statement of Authorization, obviating in such cases a section 402 proceeding for permit amendment. By ER-713 and ER-714, issued contemporaneously, the Board is adopting the proposed amendments, with minor modifications. In implementation of this determination the rules proposed in EDR-166 are being revised to permit operations of leased aircraft with crew pursuant to an Operating Authorization under Parts 212 and 214.

In view of this revision, certain comment directed to alleged discriminatory treatment of foreign air carriers and the proposal to require permit amendment in all cases is no longer relevant. We shall pass therefore to discussion of comments concerning specific proposals.

Section 218.2, governing applicability of the part, provides, inter alia, that the part does not apply to charter operations for the transportation of company personnel or property, or, in cases of emergency, of commercial traffic, pursuant to the provisions of Part 212 or 214. Lufthansa and Swissair state that the provision in effect says that an off-route wet lease to another foreign carrier is permissible in cases of emergency, but if the operation is on-route, the exception does not apply. Surely, they add, if cases of emergency are to be exempted, the exemption should apply on-route as well as off. However, Part 212 has been reissued subsequent to the issuance of EDR-166, and, as amended, that part now governs both off-route and on-route charters.[5] Accordingly, the exclusion will apply to both on-route and off-route charters in cases of emergency.

As revised, the rules provide that foreign air carriers and other non-U.S. citizens may not "lease an aircraft with crew" to a foreign air carrier unless the Board has issued the lessor an appropriate permit or Operating Authorization or has issued an order disclaiming jurisdiction. Section 218.3 provides that, for purposes of this part, an aircraft is considered to be leased with crew, if the pilot in command of the aircraft: (1) Is to be furnished by the lessor; (2) is employed by the lessor; (3) continues in the employ of the lessor in the operation of services other than those provided for in the agreement between the parties; or (4) has been employed by the lessor prior to the lease, and his employment by the lessee is coextensive with the period or periods for which the aircraft is available to the lessee under the lease agreement.

Lufthansa and Swissair state that the provisions appear to create an irrebuttable presumption, and, while the various instances may be indicative of usual experience, they are not always so, and should be rebuttable. Some explanation on this point is warranted. If, under a wet lease arrangement, the status of the pilot in command meets any of the prescribed conditions, the prohibitions of the section become operative. However, the parties to the lease in seeking a disclaimer under § 218.5 would be free to show that, notwithstanding that the status of the pilot in command met the prescribed tests, the lessor was not in fact in control of the operation.

Some foreign route carriers contend that it is difficult to see why the employment of the captain should be the determinative factor; that the aircraft and crew are really both "equipment," and ownership and control of the equipment should be immaterial unless there is a question as to safety, misleading of passengers, or unless a carrier is using so much equipment not its own that its fitness and ability to mount its own service within the requirements of the bilateral air transport agreements is called into question.

It seems clear to us that the relationship of the pilot in command of the aircraft to the lessor is a critical factor in determining whether an aircraft is furnished "with crew."[6] That control of the equipment is vital to determine the legal nature of an arrangement such as a wet lease has been long well-established in British and American law. In maritime law, what we have referred to as a "true lease," over which we have no jurisdiction under section 402 of the Act, is equivalent to a "demise" or "bare boat" charter; and the equivalent of a "charter," over which we do have jurisdiction, is a "contract of affreightment." In "Leary v. United States," 14 Wall. 607, 610 (1871), it was said:

> If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel.[7]

Accordingly, "the duties and responsibilities" of the owner or wet lessor are unchanged in the latter type of arrangement; the owner is engaged in foreign

[2] From the Government of Colombia, the Department of Transport and Power, Ireland, the Board of Civil Aviation of Sweden (concurred in by the Danish and Norwegian Civil Aviation Authorities); Aerovias Nacionales de Colombia, S.A. (AVIANCA), Compania Mexicana de Aviacion (CMA), Lineas Aereas Costarricenses, S.A. (LACSA) and Venezolana Internacional de Aviacion, S.A. (VIASA) (jointly); Air France; All Nippon Airways; Sabena Belgian World Airlines (SABENA); El Al Israel Airlines, Iberia, Lineas Aereas de Espana, S.A., Linea Aerea Nacional-Chile, Empresa de Viacao Aerea Rio-Grandense (VARIG), and Scandinavian Airlines System (jointly); Ethiopian Airlines; Irish International Airlines; KLM Royal Dutch Airlines; Lufthansa German Airlines; Swiss Air Transport (Swissair); TACA International Airlines; Pan American World Airways; and World Airways.

[3] Irish International Airlines is under the misapprehension that under the proposed Part 218 it was intended that a wet lease between two foreign air carriers both of whom hold permits authorizing them to provide air transportation between the points involved requires no further authorization from the Board. As all other parties filing comments recognize, the contrary is the case.

[4] EDR-193, Nov. 9, 1970; 35 F.R. 17556.

[5] ER-686, May 8, 1971.

[6] Under the Federal Aviation Regulations the pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft. In an emergency situation requiring immediate action he may even deviate from prescribed rules to the extent required to meet the emergency. (14 CFR 91.3(a).)

[7] See also United States v. Hvoslef, 237 U.S. 1, 16 (1914); Bramble v. Culmer, 78 Fed. 497, 501 (4th Cir., 1897).

air transportation as a carrier [8] to the same extent as he would be in the absence of a wet lease arrangement; and the role of the wet lessee is that of a charterer. As the court stated in "Overseas National Airways v. Civil Aeronautics Board" [9] concerning a wet lease from an air carrier to a foreign air carrier: "* * * the foreign air carrier became the charterer rather than the 'Watch Tower Bible and Tract Society' or the 'American Rocket Society.' The holding that a carrier is to be viewed in the same light as any other charterer was correct."

Moreover, the terms of greater significance in the determination as to whether a charter amounts to a demise or a contract of affreightment are those which relate to the master and crew. "If they are appointed and paid by the owner, and are subject to his orders, the charter will ordinarily be construed as an affreightment contract, on the theory that through his master and crew the owner retains possession and control of the ship, even though the directions on which the ship shall proceed are given by the charterer." [10] This principle has not been confined to maritime law. In cases decided under the Motor Carrier Act in which the question of the status created by a lease of equipment with driver by a carrier to a shipper is presented, the Interstate Commerce Commission has held that, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation, and as such is subject to regulation.[11] In a different context the Commission has indicated what we would call an unauthorized off-route charter to be an unauthorized lease of operating rights.[12]

However, it is not our intention to suggest that determination of the question of whether an aircraft is leased with crew requires the application of a rigid test revolving solely around the status of the pilot. For this reason, we have determined to modify § 218.3 so as to provide that an aircraft will be considered to be leased with crew if, regardless of the status of the pilot, a majority of the crew, other than cabin attendants, meets the same tests as are prescribed for the pilot. Moreover, since operating specifications are normally issued by the Federal Aviation Administration [13] to the carrier whose crew is operating the aircraft, a provision is being incorporated into § 218.3 to the effect that an aircraft is considered to be leased with crew, for purposes of the requirement that a disclaimer of jurisdiction be obtained, if it is operated under operating specifications issued to the lessor.

A number of carriers also refer to the provision that: "Until the Board has acted upon the application no operations in foreign air transportation shall be performed pursuant to the agreement." They contend that the provision appears to be without authority, since if there is no jurisdiction in fact, there is no need to file an application for disclaimer of nonexistent jurisdiction.

The flaw in this argument is, as will be shown, that there is presumed jurisdiction in the Board, and foreign permits by specific provision are subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board. We consider it to be both reasonable and in the public interest for foreign air carriers which wet lease to other foreign carriers and which have no authority to engage in presumptively illegal operations to seek a disclaimer before performing the charter and we are further of the opinion that the requirement is fully within our rule making powers.[14] Moreover, under § 218.4 of the rule as revised herein, compliance with this part shall be a condition upon the authority of the lessee foreign air carrier to perform the foreign air transportation in question. Clearly, the Board has jurisdiction to condition the operating authority of the lessee foreign air carrier in order to determine the status of presumptively illegal operations.

Certain carriers take issue with the presumption set forth in § 218.7 which appears in the margin.[15] Lufthansa and Swissair state that the presumption of operational control appears reasonable, provided the carrier is permitted to rebut the presumption. However, they state that the burden must always rest upon the government to establish "that a violation occurred and that the respondent committed it." They add that "this is not satisfied by purportedly placing the burden on the respondent in a preparatory case and then holding that commencement of operations without satisfying the preparatory burden is in itself a violation." [16]

The argument of the two carriers lacks merit. Assuming, arguendo, that the Board has the burden of showing that a particular arrangement does not constitute a true lease, the use of this presumption toward that end is nevertheless appropriate. Presumptions are rules of law requiring the assumption of one fact upon proof of another in the absence of satisfactory evidence. They place upon the adverse party the burden of offering further evidence, but do not affect the ultimate burden of proof.[17] "Presumptions of fact which the law recognizes must be immediate inferences from the facts proved and must be such as sensible men influenced by observation, experience, and reason, would draw from clearly established facts." [18] In the situation at hand, the presumption is in accord with Board experience; moreover, Lufthansa and Swissair concede that the presumption of operational control appears reasonable.

Furthermore, a disclaimer proceeding is not for the purpose of establishing "that a violation occurred and that the respondent committed it." The proceeding is to enable the parties to show that the wet lease arrangement, despite the contrary presumption, is a true lease that will not involve the lessor in foreign air transportation.

In light of the foregoing, the Board finds that Part 218 should be adopted as proposed, except as modified herein.

Accordingly, the Civil Aeronautics Board hereby adopts Part 218 of its Economic Regulations (14 CFR Part 218), effective January 19, 1972, as follows:

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[8] Cf. United States v. Hvoslef, supra.

[9] 307 F. 2d 634, 636 (D.C. Cir., 1962).

[10] See The Steel Inventor, 35 F. Supp. 986, 994 (D.C. Md., 1940).

[11] H. B. Church Truck Service Co. Com. Car. Application, 27 M.C.C. 191 (1940); Oklahoma Furniture Mfg. Co.—Investigation, Operations, 79 M.C.C. 403, 410 (1959), aff'd, United States v. Drum, 368 U.S. 370 (1962); Silver Line, Inc., Investigation and Revocation, 96 M.C.C. 173, 176 (1964); Motor Haulage Co., Inc., Contract Carrier Application, 46 M.C.C. 107, 118 (1946), sust. Motor Haulage Co. v. United States, 70 F. Supp. 17 (E.D.N.Y. 1947); aff'd, 331 U.S. 784 (1946).

[12] Campbell Sixty-Six Exp., Inc. v. Frisco Transp. Co., 81 M.C.C. 53 (1959). The Frisco and M-A motor common carriers were authorized to operate between two points but over different routes. Frisco purportedly leased a trailer, with tractor and driver, to M-A, whose route was 98 miles shorter than Frisco's and equipment was operated over M-A's route. The ICC ruled that there was not a mere lease of equipment nor a valid interchange of equipment, but that M-A was improperly and without authority leasing its operating rights to Frisco.

[13] See 14 CFR Part 129.

[14] See American Trucking Assn's v. U.S., 344 U.S. 298 (1953).

[15] Section 218.7 *Presumption*. Whether under a particular lease agreement the lessor of the aircraft is engaged in foreign air transportation is a question of fact to be determined in the light of all the facts and circumstances. However, in circumstances where the lessor furnishes both the aircraft and the crew, there shall be established a presumption that true operational control and safety responsibility are exercised by the lessor, and that the agreement constitutes a charter arrangement under which the lessor is engaged in foreign air transportation. The burden shall rest upon the applicants for disclaimer of jurisdiction in each instance to demonstrate by an appropriate actual showing that the operation contemplated will not constitute foreign air transportation by the lessor.

[16] It is contended that the rule on presumption is in derogation of the Administrative Procedure Act, section 556(d) providing that, except as otherwise provided by statute, "the proponent of a rule or order has the burden of proof." Section 556 does not apply unless rules are required by statute to be made on the record after opportunity for an agency hearing. Section 553(c). That is not the case here.

[17] Sowizral v. Hughes, 333 F. 2d 829, 833 (3d Cir., 1964).

[18] Socony-Vacuum Oil Co. v. Oil City Refiners, 136 F. 2d 470, 474 (6th Cir., 1943), cert. den., 320 U.S. 798, 64 S. Ct. 368.

AUTHORITY: The provisions of this Part 218 issued under sections 204(a) and 402 of the Federal Aviation Act of 1958, as amended, 72 stat. 743, 757; 49 U.S.C. 1324, 1372.

§ 218.1 Definitions.

For the purpose of this part the term "lease" shall mean an agreement under which an aircraft is furnished by one party to the agreement to the other party, irrespective of whether the agreement constitutes a true lease, charter arrangement, or some other arrangement.

§ 218.2 Applicability.

This part applies to foreign air carriers and other persons not citizens of the United States which, as lessors or lessees, enter into agreements providing for the lease of aircraft with crew to a foreign air carrier for use in foreign air transportation. For purposes of section 402 of the Act, the person who has operational control and safety responsibility is deemed to be the carrier, and is required to have appropriate operating authority. This part therefore provides, inter alia, that where aircraft leases involve the use of the lessor's crew, it is presumed that direction, control and responsibility are in the lessor, and operations under such leases may not be conducted in the absence of the issuance to the lessor of a foreign air carrier permit under section 402, a Statement of Authorization under Part 212 or 214 of this chapter, or a disclaimer of jurisdiction. This part does not apply to charters conducted in accordance with Part 212 or Part 214 of this chapter, (a) for the transportation of company personnel or company property, (b) in cases of emergency, of commercial traffic, or (c) to authorized foreign air freight forwarders or foreign tour operators.

§ 218.3 Prohibition against unauthorized operations employing aircraft leased with crew.

(a) No foreign air carrier, or other person not a citizen of the United States, shall lease an aircraft with crew to a foreign air carrier for use by the latter in performing foreign air transportation in the absence of the issuance to the lessor of a foreign air carrier permit pursuant to section 402 of the Act, or a Statement of Authorization pursuant to Part 212 or Part 214 of this chapter specifically authorizing the holder to engage in the foreign air transportation which will be conducted pursuant to the lease, unless, upon application by both parties to the lease, the Board has issued an order under § 218.6 disclaiming jurisdiction over the matter.

(b) For purposes of this part, an aircraft shall be considered to be leased with crew, if:

(1) The pilot in command or a majority of the crew of the aircraft, other than cabin attendants:

(i) Is to be furnished by the lessor;

(ii) Is employed by the lessor;

(iii) Continues in the employ of the lessor in the operation of services other than those provided for in the agreement between the parties; or

(iv) Has been employed by the lessor prior to the lease, and the employment of whom by the lessee is coextensive with the period or periods for which the aircraft is available to the lessee under the lease; or

(2) The aircraft is operated under operations specifications issued to the lessor by the Federal Aviation Administration.

§ 218.4 Condition upon authority of lessee.

In any case where a foreign air carrier leases from another foreign air carrier or other person not a citizen of the United States an aircraft with crew for use in performing foreign air transportation, it shall be a condition upon the authority of the lessee to perform such foreign air transportation that compliance be achieved with the requirements of this part.

§ 218.5 Application for disclaimer of jurisdiction.

The parties to a lease with crew as described in § 218.3(b) may apply to the Board for an order disclaiming jurisdiction over the matter. The application shall be filed jointly by both parties to the lease, and shall generally conform to the procedural requirements of Part 302, Subpart A, of this chapter. It shall be served upon any air carrier providing services over all or any part of the route upon which air transportation services will be provided pursuant to the agreement. The application should set forth in detail all evidence and other factors relied upon to demonstrate that true operational control and safety responsibility for the air transportation services to be provided are in the hands of the lessee rather than the lessor. A copy of the agreement and all amendments thereof, as well as a summary interpretation of its pertinent provisions, shall be included with the applications. Any interested person may file an answer to the application within 7 days after service hereof. Until the Board has acted upon the application, no operations in foreign transportation shall be performed pursuant to the agreement.

§ 218.6 Issuance of order disclaiming jurisdiction.

If the Board finds that true operational control and safety responsibility will be vested in the lessee and not in the lessor (i.e., that the lease transaction is in substance a true lease of aircraft rather than a charter or series of charters), and that the performance of the operations provided for in such lease will not result in the lessor's being engaged in foreign air transportation, it will issue an order disclaiming jurisdiction over the matter. Otherwise the application for disclaimer of jurisdiction will be denied.

§ 218.7 Presumption.

Whether under a particular lease agreement the lessor of the aircraft is engaged in foreign air transportation is a question of fact to be determined in the light of all the facts and circumstances. However, in circumstances where the lessor furnishes both the aircraft and the crew, there is a presumption that true operational control and safety responsibility are exercised by the lessor, and that the agreement constitutes a charter arrangement under which the lessor is engaged in foreign air transportation. The burden shall rest upon the applicants for disclaimer of jurisdiction in each instance to demonstrate by an appropriate factual showing that the operation contemplated will not constitute foreign air transportation by the lessor.

By the Civil Aeronautics Board.

[SEAL] HARRY J. ZINK,
Secretary.

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Title 19—CUSTOMS DUTIES

Chapter I—Bureau of Customs, Department of the Treasury

[T.D. 71-287]

PART 19—CUSTOMS WAREHOUSE AND CONTROL OF MERCHANDISE THEREIN

Reimbursable Compensation

On August 5, 1971, there was published in the FEDERAL REGISTER (36 F.R. 14388) a notice of proposed rule making to amend § 19.5(b) of the Customs regulations (19 CFR 19.5(b)) to provide for obtaining reimbursement from bonded warehouse proprietors of the Government's contribution under the Federal Insurance Contributions Act and for employee uniform allowance made for intermittent when actually employed employees when services by such employees are performed on a reimbursable basis. Interested persons were given 30 days in which to submit in writing any data, views, or arguments pertaining to the proposed amendment.

No objections have been filed to the proposed amendment. Since the Government contributions under the Federal Insurance Contributions Act and for employee uniform allowances constitute part of the compensation of such officers reimbursable under section 555 of the Tariff Act of 1930, as amended (19 U.S.C. 1555), by the warehouse proprietor, the proposed amendment, therefore, is hereby adopted. Section 19.5(b) is amended to include the following sentence after the second full sentence of the paragraph.

§ 19.5 Customs warehouse officer; compensation of.

* * * * *

(b) * * * When services of a Customs warehouse officer or a Customs employee temporarily assigned to act as a Customs warehouse officer at a bonded warehouse are performed by an intermittent when-actually-employed employee, the charge for such services shall be computed at a rate per hour equal to 107 percent of the hourly rate of the regular pay of such employee to provide for reimbursement of the Government contribution under