



U.S. Department
of Transportation
**Federal Aviation
Administration**

Advisory Circular

Subject: PRIVATE CARRIAGE VERSUS COMMON
CARRIAGE OF PERSONS OR PROPERTY

Date: 4/24/86
Initiated by: AFS-820

AC No: 120-12A
Change:

1. PURPOSE. This advisory circular furnishes Federal Aviation Administration (FAA) personnel and interested segments of industry with general guidelines for determining whether current or proposed transportation operations by air constitute private or common carriage. If the operations are in interstate or foreign commerce, this distinction determines whether or not the operator needs economic authority as an "air carrier" from the Department of Transportation. Operations that constitute common carriage are required to be conducted under Federal Aviation Regulations (FAR) Parts 121 or 135. Private carriage may be conducted under FAR Parts 125 or 91, Subpart D. Operations conducted under FAR Section 91.181, which permits certain charges to be made, may also be subject to these guidelines, particularly the "time sharing" provisions of FAR Section 91.181(c)(1). It should also be noted that lease agreements entered into under FAR Section 91.181 are subject to FAR Section 91.54, "Truth in leasing clause requirement in leases and conditional sales contracts."

2. CANCELLATION. Advisory Circular 120-12, Private Carriage Versus Common Carriage By Commercial Operators Using Large Aircraft, dated June 24, 1964, is canceled.

3. BACKGROUND. "Common carriage" and "private carriage" are common law terms. The Federal Aviation Act of 1958 uses the term "common carriage" but does not define it. It has therefore been determined that guidelines giving general explanations of the term "common carriage" and its opposite, "private carriage," would be helpful,

4. GUIDELINES. A carrier becomes a common carrier when it "holds itself out" to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it. Absence of tariffs or rate schedules, transportation only pursuant to separately negotiated contracts, or occasional refusals to transport, are not conclusive proof that the carrier is not a common carrier. There are four elements in defining a common carrier; (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation. This "holding out" which makes a person a common carrier can be done in many ways and it does not matter how it is done.

a. Signs and advertising are the most direct means of "holding out" but are not the only ones.

b. A "holding out" may be accomplished through the actions of agents, agencies, or salesmen who may, themselves, procure passenger traffic from the general public and collect them into groups to be carried by the operator. It is particularly important to determine if such agents or salesmen are in the business of selling transportation to the traveling public not only through the "group" approach but also by individual ticketing on known common carriers.

c. Physically holding out without advertising where a reputation to serve all is gained is sufficient to constitute an offer to carry all customers. There are many means by which physical holding out may take place. For example, the expression of willingness to all customers with whom contact is made that the operator can and will perform the requested service is sufficient. The fact that the holding out generates little success is of no consequence. The nature and character of the operation are the important issue.

d. Carriage for hire which does not involve "holding out" is private carriage. Private carriers for hire are sometimes called "contract carriers," but the term is borrowed from the Interstate Commerce Act and legally inaccurate when used in connection with the Federal Aviation Act. Private carriage for hire is carriage for one or several selected customers, generally on a long-term basis. The number of contracts must not be too great, otherwise it implies a willingness to make a contract with anybody. A carrier operating pursuant to 18 to 24 contracts has been held to be a common carrier because it held itself out to serve the public generally to the extent of its facilities. Private carriage has been found in cases where three contracts have been the sole basis of the operator's business. Special adaptation of the transportation service to the individual needs of shippers is a factor tending to establish private carriage but is not necessarily conclusive.

e. A carrier holding itself out as generally willing to carry only certain kinds of traffic is, nevertheless, a common carrier. For instance, a carrier authorized or willing only to carry planeloads of passengers, cargo, or mail on a charter basis is a common carrier, if it so holds itself out. This is, in fact, the basic business of supplemental air carriers.

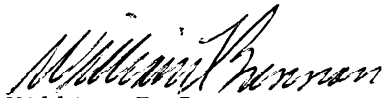
f. A carrier flying charters for only one organization may be a common carrier if membership in the organization and participation in the flights are, in effect, open to a significant segment of the public. Similarly, a carrier which flies planeload charters for a common carrier, carrying the latter's traffic, engages in common carriage itself.

g. Occasionally, offers of free transportation have been made to the general public by hotels, casinos, etc. In such cases, nominal charges have been made which, according to the operators, bear the expense of gifts and gratuities. However, the operators maintain that the transportation is free. The courts have held that such operations are common carriage based on the fact that the passengers are drawn from the general public and the nominal charge constituted compensation.

h. Persons admittedly operating as common carriers in a certain field (for instance, in intrastate commerce) sometimes claim that transportation for hire which they perform in other fields (for instance, interstate or foreign commerce) is private carriage. To sustain such a claim, the carrier must show that the private carriage is clearly distinguishable from its common carriage business and outside the scope of its holding out. The claimed private carriage must be viewed in relation to and against the background of the entire carrying activity. Historically, Civil Aeronautics Board decisions have concluded that only in rare instances could carriage engaged in by a common carrier be legitimately classified as private.

i. In summary, persons intending to conduct only private operations in support of other business should look cautiously at any proposal for **revenue-**generating flights which most likely would require certification as an air carrier.

j. Persons **who** have questions concerning intended operation of their aircraft are encouraged to discuss their proposed operation with the Regional Counsel of the FAA region in which it intends to establish its principal business office. Such early interviews will materially assist the applicant in avoiding many of the "pitfalls" which could result in illegal common carriage operations.



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