



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

Office of the Chief Counsel
Enforcement Division

800 Independence Ave., SW.
Washington, DC 20591

December 17, 2019

Via Electronic Mail

Roy Goldberg, Esq.
Stinson LLP
1775 Pennsylvania Avenue N.W.
Suite 800
Washington, D.C. 20006

Re: Your client, BlackBird Air

Dear Mr. Goldberg:

We have considered the June 10, 2019 letter from BlackBird Air, Inc. (BlackBird), that set out many aspects of its business model and operating assumptions. The information that BlackBird has presented leads us to conclude that the pilots participating in BlackBird's platform and using its app are holding out and thus are engaged in common carriage. This conclusion does not apply to individual commercial pilots who are legally operating the flights for operators authorized to conduct operations under 14 C.F.R. part 135, or pilots who are legally operating under 14 C.F.R. §91.501.¹

In arriving at this conclusion, we considered BlackBird's position articulated in its June 10th letter. BlackBird stated that, "[u]nlike air carriers, BlackBird is not building an operation based on crews, aircraft, or routes. BlackBird is building an infrastructure that supports all of general aviation, which includes air carriers and operators."² BlackBird manages two databases: one for aircraft available for lease and a second one for commercial pilots (described as "independent person[s] with a specific skill set (pilot)"). BlackBird uses the databases as part of a marketplace service that serves as an aggregator of information and connects third-party service providers (the pilots) with users seeking to charter an aircraft or purchase a ticket on a direct air carrier. BlackBird asserts, "the ultimate business goal is to create an online platform that surfaces the many options available to users; [and] NOT to provide air transportation."

¹ The exceptions from certification provided under 14 C.F.R. §91.501 only apply to large airplanes of U.S. registry, turbojet-powered multiengine civil airplanes of U.S. registry, and fractional ownership program aircraft of U.S. registry that are operating under subpart K of part 91 in operations not involving common carriage. Most of the aircraft offered on BlackBird's app appear to be outside of those requirements.

² The FAA notes that, although not defined in regulation, the term "general aviation" is commonly understood not to include air carriers or commercial operators engaged in scheduled air services or non-scheduled air transport operations for hire.

BlackBird states it is a facilitator, in that it supports users with the process of (1) leasing an aircraft and (2) separately hiring a commercial pilot to fly the aircraft the user has leased. BlackBird states that it does not own, manage, or maintain the aircraft and does not employ pilots. BlackBird also states that, through the application, the user, not BlackBird, (1) selects and leases the aircraft and (2) chooses and hires the pilot. BlackBird asserts that operational control of the aircraft remains with the user at all times. BlackBird represents that it only facilitates the agreements, processes payments, and provides customer support to all three parties (user, i.e., person leasing the aircraft and hiring the pilot; pilot; and aircraft lessee).

As a general rule, a party must obtain a part 119 certificate to engage in the transportation of passengers or property for compensation or hire.³ This applies to operations involving both noncommon/private carriage and common carriage. As BlackBird noted in its letter, to determine whether common carriage is present, the FAA assesses whether there is: (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation.⁴ The courts have determined that these criteria are consistent with common law precepts and are appropriate within the aviation context.⁵

We have little trouble concluding that the pilots listed on BlackBird's pilot database selected by the user are transporting persons or property, from place to place, for compensation. Despite BlackBird's assertion that the pilots are not transporting persons or property, it is clear that they are being hired for that very purpose. In addition, as BlackBird concedes, the pilots are being compensated for the flight service (whether the money comes directly from the lessee or through the BlackBird platform). That leaves only the issue of holding out.

With respect to whether the pilots are holding out, we believe the BlackBird database establishes that element. "Holding out" is a common law concept that the FAA has applied to aviation in a functionalist, pragmatic manner. Holding out can be accomplished by any means that communicates to the public that a transportation service is indiscriminately available to the members of the segment of the public it is designed to attract. There is no specific rule or criteria as to how holding out is achieved. Holding out is determined on a case-by-case basis by assessing the specific facts of the situation. Advertising in any form raises the question of holding out.⁶

"Holding out" can be done in many ways, including signs and advertising; the actions of agents, agencies, or sales people who may procure passenger traffic; and individual ticketing on known common carriers. In addition the expression to all customers with whom contact is made that the operator can and will perform the requested service is sufficient to conclude that a person is holding out.

To date, the FAA has issued two legal interpretations in which the agency concluded that pilots using companies with a web-based presence, similar to BlackBird, were common carriers. See Legal Interpretation to MacPherson, dated August 13, 2014, and Legal Interpretation to Winton

³ 14 C.F.R. 119.1(e) identifies certain operations not subject to certification.

⁴ FAA AC 120-12A.

⁵ See Woolsey v. National Transportation Safety Board, 993 F.2d 516 (5th Cir. 1993).

⁶ Legal Interpretation to Yodice (April 7, 1978); AC 120-12A.

Aviation Law Firm, dated August 14, 2014. The legal interpretations discussed the expense sharing provision of 14 C.F.R. § 61.113(c) and addressed whether specific circumstances cause a pilot to become a common carrier.

In the Legal Interpretation to MacPherson, the FAA concluded that the use of a website by pilots constituted common carriage because by posting specific flights to the AirPooler website, a pilot participating in the AirPooler service held out as willing to transport persons or property from place to place for compensation or hire. The FAA stated that, although the pilots chose the destinations, the pilots were holding out because they were willing to transport passengers for compensation. In the Legal Interpretation to Winton Aviation Law Firm, the FAA assessed a scenario in which a website called FlyteNow connected pilots and “general aviation enthusiasts” who paid a share of the flight expenses in exchange for travel on a route predetermined by the pilot. Only FlyteNow members could search for flights on the website, but anyone could become a member by filling out an online form. If a pilot carried one or more passengers, FlyteNow facilitated the sharing of expenses on a pro rata basis between the passenger(s) and the pilot. The FAA issued a legal interpretation to FlyteNow referring Mr. Winton to the Legal Interpretation to Ms. MacPherson for answers to the questions presented in his request, as it involved a similar web-based expense-sharing scheme.

FlyteNow petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the FAA’s interpretation that the *pilots* would be considered common carriers, which meant that the pilots would be required to hold at least commercial pilot licenses and hold certificates issued under 14 C.F.R. part 119. In 2015, the court decided the case FlyteNow, Inc. v. Federal Aviation Administration,⁷ and the court upheld the FAA’s conclusion that the pilots’ participation on Flytenow.com would amount to holding out an offer of transportation to the public. The court stated that the FAA uses “holding out” as that concept is defined through common law and applies it in a functionalist and pragmatic manner. The court explained that, while Flytenow.com is a flight-sharing website limited to its members, membership requires nothing more than signing up to the website and any prospective passenger searching for flights could readily arrange for travel via the website. Furthermore, the court stated that there is no conclusive proof that a pilot is not a common carrier based on the absence of rate schedules or pilots occasionally refusing service. The court distinguished FlyteNow’s facts from other internet-based communications, such as emails among friends, which the court stated would not likely be deemed as holding out.⁸ The court upheld the FAA’s determination that the pilots were holding out via the website, expense-sharing was a form of compensation, and all four elements of common carriage were met. Because these were common carriage operations, the pilots were required to hold a part 119 certificate to engage in them.

The BlackBird platform is similar to the websites considered by the court in the FlyteNow case.⁹ BlackBird stated in its June 10, 2019 letter that its pilots are commercial pilots operating under part 91 or part 135. However, as previously stated, unless a specific exception applies that allows

⁷ 808 F.3d 882 (Dec. 18, 2015), rehearing en banc denied Feb. 24, 2016.

⁸ Id.

⁹ Part of the FlyteNow and Airpooler issues focused on the pilot databases involving private pilots and compliance with § 61.113. BlackBird’s pilot database only includes pilots holding commercial or airline transport pilot certificates.

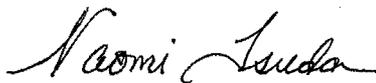
an operation for compensation or hire to occur in the absence of an operating certificate, certification under part 119 is required. Thus, if a pilot conducts an operation under only part 91 that is subject to the requirements of part 119, the pilot would be in violation of 14 C.F.R. § 61.133 in that the person acting as pilot in command of an aircraft carrying persons or property for compensation or hire must be qualified in accordance with part 61 and must comply with the applicable parts of 14 C.F.R. that apply to the operation.

The BlackBird platform, like the FlyteNow website, is available to everyone. Anyone can readily search the BlackBird platform and book a flight, and the pilots on BlackBird's website are available and willing to transport passengers who solicit pilot services through the platform. Much like the pilots participating on FlyteNow.com, commercial pilots utilizing the BlackBird application express their willingness to transport people by posting their availability to conduct flights to the BlackBird platform. Although some exceptions from the part 119 certification requirement exist for certain, discrete types of operations, no exception applies in this case. A pilot's participation in the BlackBird platform amounts to holding out a willingness to transport persons from place to place for compensation and requires certification under part 119 prior to conducting the operation.

In sum, the FAA has concluded that pilots' use of the BlackBird platform constitutes "holding out" and participating pilots are engaged in common carriage. Because these operations are subject to part 119 certification, a pilot who holds an airline transport pilot or commercial pilot certificate must obtain and hold a certificate issued under part 135 or the pilot must be employed by a company operating the flight that is certificated under part 119.

Accordingly, please expect further investigative activity into BlackBird's operations, particularly regarding its pilot database. In addition, we would be interested in learning of any action you intend to take in view of the jeopardy facing pilots who participate in BlackBird's service. Please let me know if you would like to present any additional information in response to this correspondence.

Sincerely,



Naomi Tsuda
Assistant Chief Counsel for Enforcement
Federal Aviation Administration