

# Federal Aviation Agency



AC NO : AC 120-12

AIR CARRIER AND  
COMMERCIAL OPERATIONS

EFFECTIVE :

6/24/64

**SUBJECT :** PRIVATE CARRIAGE VERSUS COMMON CARRIAGE BY COMMERCIAL OPERATORS USING LARGE AIRCRAFT

1. **PURPOSE.** This Circular furnishes FAA personnel and interested segments of the 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 also determines whether the operator needs economic authority as an "air carrier" from the CAB or whether he may operate with only a commercial operator certificate from FAA.
2. **BACKGROUND.** "Common carriage" and "private carriage" are common law terms. The Act uses the term "common carrier" 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.
3. **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 issued, transportation only pursuant to separately negotiated contracts, or occasional refusals to transport, are not conclusive proof that the carrier is not a common carrier.

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 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

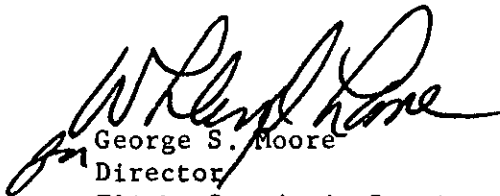
not only through the "group" approach but also by individual ticketing on known common carriers.

- 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 this physical holding out takes 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 this "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. But the number of contracts must not be too great, for otherwise it implies a willingness to make a contract with anybody. A carrier operating pursuant to 18-24 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 one and 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.
- 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 plane-loads of passengers or cargo on a charter basis is a common carrier, if it so holds itself out, and this is, in fact, the basic business of the supplemental air carriers licensed as common carriers by the CAB.
- 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 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. The CAB has said that only in rare instances could carriage engaged in by a common carrier be legitimately classified as private.

4. ACTION. Applicants for commercial operators certificates are encouraged to discuss their proposed operation with the Regional Counsel of the region in which it intends to establish its principal business office. Such early interviews will materially assist the applicant in avoiding, subsequent to the issuance of a commercial operators certificate, many of the "pitfalls" which could result in illegal common carriage operations.

  
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