UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the **3rd day of May, 2004**

Traffic Management Corporation and Contract Cargo Airlines, Inc.	**Docket OST-2004-16943**
Violations of 49 U.S.C. §§ 41101 and 41712	**Served: May 3, 2004**

CONSENT ORDER

This consent order concerns unauthorized service by Traffic Management Corporation, d/b/a TMC Airlines (hereinafter TMC) and Contract Cargo Airlines, Inc. (hereinafter CCA), both of which performed operations as common carriers without the requisite economic authority from the Department. The order directs TMC and CCA to cease and desist from future unlawful conduct and assesses the companies $100,000 in compromise civil penalties.

TMC and CCA are commercial service operators who use large aircraft operated pursuant to 14 CFR Part 125. Authority under this Federal Aviation Administration (FAA) regulation, however, is strictly limited to private carriage operations.[1] In commercial operations with large aircraft that are offered to the public, by contrast, a carrier would be operating in common carriage, and must hold economic authority from the Department under 49 U.S.C. § 41101.[2] TMC and CCA have nonetheless performed significant common carriage service throughout their corporate existence. TMC's and CCA's unauthorized service as common carriers, in addition to violating the certificate requirements of Title 49, constitutes an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712.

TMC operates three Lockheed L-188 aircraft, which are leased from Zantop International Airlines (hereinafter Zantop), a certificated Part 121 operator, and CCA operates one

[1] 14 CFR 125.11(b) provides that "[n]o certificate holder may conduct any operation which results directly or indirectly from any person's holding out to the public to furnish transportation."

[2] Carriers engaged in common carriage with large aircraft must also be certificated by the FAA under 14 CFR Part 121. 14 CFR 119.1.

Lockheed L-188 aircraft also leased from Zantop.[3] The four Lockheed L-188 aircraft are operated under CCA's and TMC's respective Part 125 certificates. Both carriers have conducted flight operations for various companies, including several air charter brokers, some of which appear to hold out air transportation themselves indirectly to the general public. Both TMC and CCA have long-term written contracts with automotive manufacturing companies, through those companies' respective charter management companies. However, TMC and CCA have flown numerous flights for various entities that were not contracted for by these automotive companies. TMC and CCA obtained the "spot" contracts for these flights by actively bidding on charter flights offered by brokers and charter management companies, and, as a result, operated numerous flights for different shippers in a range of industries.[4]

Common carriage, in the context of air service, consists of the holding out or provision of air transportation to the public for compensation or hire.[5] On the question of whether the companies have held out air transportation, TMC and CCA state that they neither advertised nor directly solicited business. However, their use of chartering agents, evidenced by the numerous flights for various shippers flown by TMC and CCA, is an impermissible *indirect* holding out.[6] Moreover, even assuming that the carriers did not

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[3] The four owners of TMC and CCA are the children of the owner of Zantop International Airlines. The Enforcement Office understands that, at a minimum, TMC and CCA have been provided some administrative, maintenance, and operational support by Zantop.

[4] In *Zantop International Airlines, Enforcement Proceeding*, Order 76-6-182, June 29, 1976, the Civil Aeronautics Board (CAB), which held jurisdiction over aviation economic issues prior to the Department, ruled that Zantop, which at the time had no economic authority, had not engaged in common carriage because its operations were almost entirely devoted to serving the "Big Three" auto makers and it was not attempting to expand its service beyond those three companies. The CAB noted that, while Zantop operated certain limited additional non-automotive related flights, these additional flights were de minimus because they represented less than one percent of Zantop's total business, and the CAB found no unlawful holding out of air transportation in connection with these operations. Moreover, the CAB predicated its opinion substantially on the fact that, at the time, duly licensed common carriers had "no meaningful capability" to provide equivalent service for the Big Three. Today, by contrast, the Enforcement Office has evidence that, in the market TMC and CCA serve, there are duly licensed common carriers with the capability to provide air transportation services equivalent to that which TMC and CCA provide. Indeed, a major issue with duly licensed all-cargo common carriers involved in transporting parts destined for auto manufacturers is their inability to compete with carriers who operate under Part 125 and, therefore, have lower regulatory compliance expenses.

[5] Such activities on the part of Zantop raise questions as to whether its conduct constitutes unauthorized operations prohibited by 49 U.S.C. § 41101 or an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712.

[5] See, e.g., *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993); *Voyager 1000 v. Civil Aeronautics Bd.*, 298 F.2d 430 (9th Cir. 1973); *Las Vegas Hacienda, Inc., v. Civil Aeronautics Bd*., 298 F.2d 430 (9th Cir. 1962); *Intercontinental, U.S., Inc., Enforcement Proceeding*, 41 CAB 583 (1965). *Classic Limited Air, Inc., Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2004-1-23 (2004); *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2003-12-23 (2003).

[6] A non-common carrier may not perform common carriage operations that result from the marketing efforts of a third party, such as another air carrier or an air charter broker, agent, or affiliated company. See, e.g., *AGS Partnership, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2004-2-7 (2004); *Florida Air Transport, Inc., Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2002-9-15 (2002).

actively solicit business, their operations involved the provision of air transportation to a significant number of diverse entities and, by doing so, they engaged in a course of conduct that, when viewed objectively, evinced a willingness to serve members of the public indiscriminately. In effect, TMC and CCA gained a reputation for a willingness to provide transportation by air to the public, or a definable segment thereof, while operating without an effective certificate issued under 49 U.S.C. § 41101.[7] TMC and CCA have thereby held out and performed common carriage without appropriate economic authority. Holding out or performing air transportation without requisite authority is also an unfair and deceptive practice and unfair method of competition prohibited by 49 U.S.C. § 41712.

In mitigation, TMC and CCA state that since obtaining their Part 125 certifications, they have attempted to comply with the regulations defining and governing private carriage operations. TMC and CCA state that they have always, in good faith, attempted to refrain from "holding out" as a common carrier, or otherwise operating in violation of any applicable law. TMC and CCA assert that they have always attempted to operate as separate and distinct entities from Zantop by having separate customer contracts, accounting, office facilities, and administrative and operational personnel. They maintain that their association with Zantop has always consisted of separately negotiated, arms length aircraft leases, maintenance agreements and ancillary agreements for flight following and aircraft-dispatch services.

In recognition of the Enforcement Office's concerns, TMC and CCA state that they are also willing take a number of steps to resolve any future question about the private carriage nature of their operations. In this regard, CCA will immediately terminate its Part 125 operations and return its aircraft to Zantop. In addition, TMC states that it will implement new procedures to further ensure separation from Zantop of its customer contract and bidding procedures and modify its present operations to eliminate any appearance of dependence upon Zantop for ancillary services.

We view seriously TMC's and CCA's violations of the Department's licensing requirements. We have carefully considered all the facts before us, including the information provided by TMC and CCA and continue to believe enforcement action is necessary. TMC and CCA, in order to avoid litigation and without admitting or denying the alleged violations, agree to the issuance of this order to cease and desist from future violations of 49 U.S.C. §§ 41101 and 41712 by engaging in common carriage directly or indirectly, to an assessment of $100,000 in compromise of potential civil penalties, payable in accordance with the provisions set forth below, and to maintain certain records of their operations. This compromise assessment is appropriate in view of the nature and extent of the violations in question and, in particular, in view of the steps that the TMC and CCA have taken and promise to take to resolve any issues about their future

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[7] A holding out of common carriage may occur when a carrier engages in a course of conduct such that it gains a reputation for having a willingness to serve the public. *Woolsey,* 993 F.2d at 524 n.24; *Arrow Aviation, Inc., v. Moore*, 266 F.2d 488, 490 (8th Cir. 1959); *Alaska Air Transport, Inc. v. Alaska Airplane Charter Co.,* 72 F.Supp. 609, 610-11 (D. Alaska 1947); *Intercontinental*, 41 C.A.B. at 601; *Classic Limited Air* at 2; *SportsJet* at 3.

operations, and it serves the public interest.[8] This settlement, moreover, represents a deterrent to future air transportation operations without appropriate economic authority by TMC and CCA as well as other similarly situated companies.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of the order as being in the public interest;

2. We find that Traffic Management Corporation, d/b/a TMC Airlines and Contract Cargo Airlines, Inc., violated 49 U.S.C. § 41101, as described above, by engaging in air transportation without appropriate economic authority;

3. We find that by engaging in the conduct described in paragraph 2, above, Traffic Management Corporation, d/b/a TMC Airlines and Contract Cargo Airlines, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of
49 U.S.C. § 41712;

4. Traffic Management Corporation, d/b/a TMC Airlines and Contract Cargo Airlines, Inc., and all other entities owned and controlled by, or under common ownership and control with Traffic Management Corporation, d/b/a TMC Airlines and Contract Cargo Airlines, Inc., and their successors and assignees, are ordered to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712;

5. Traffic Management Corporation, d/b/a TMC Airlines and Contract Cargo Airlines, Inc., and all other entities owned and controlled by, or under common ownership and control with Traffic Management Corporation, d/b/a TMC Airlines and Contract Cargo Airlines, Inc., and their successors and assignees, are ordered to keep records of each future operation for a period of at least two years after performance of the operation. These records are to include, at a minimum, the date, origin and destination of the flight, the contracting entity for whom the flight was performed and contact information for that entity (and, if different, the shipper and consignee involved), what goods were transported, and the amount of revenue earned from the operation or pursuant to the contract governing the operation;

6. Traffic Management Corporation, d/b/a TMC Airlines and Contract Cargo Airlines, Inc., are jointly and severally assessed $100,000 in compromise of civil penalties that

[8] The companies are on notice that, should they fail to take the steps promised herein designed to ensure they do not engage unlawfully in common carriage, they will be subject to immediate enforcement action regarding such violations, as well as any resultant violation of this order. We are particularly concerned about the possibility of unlawful holding out and operations as a common carrier by TMC, the surviving Part 125 operator, that may be facilitated through its relationship with Zantop, a licensed common carrier. Such activities on the part of Zantop would also raise questions as to whether its own conduct constituted an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712, which could affect its fitness to operate as an air carrier.

might otherwise be assessed for the violations described in ordering paragraphs 2 and 3 above. Of the assessed penalty, $25,000 is due and payable within 30 days of the date of the issuance of this order. Another $25,000 is due and payable within 180 days of the date of the issuance of this order. The remaining $50,000 shall be suspended for one year following the date of issuance of this order, and then forgiven, unless, during this time period, Traffic Management Corporation, d/b/a TMC Airlines and/or Contract Cargo Airlines, Inc., violate this order's cease and desist or payment provisions, in which case the entire unpaid portion of this civil penalty shall become due and payable immediately; and

7. Payments shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall also subject Traffic Management Corporation, d/b/a TMC Airlines and Contract Cargo Airlines, Inc., jointly and severally, to an assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own initiative.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

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