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

Issued by the Department of Transportation
on the 2nd day of June, 2005

C&M Airways, Inc. **Violations of 49 U.S.C. §§ 41101 and 41712**	**Docket OST 2005-20077** **Served June 2, 2005**

CONSENT ORDER

This consent order concerns unauthorized service by C&M Airways, Inc., (C&M) which performed operations as a common carrier without the requisite economic authority from the Department. It directs C&M to cease and desist from such future unlawful conduct and assesses a compromise civil penalty of $60,000.

C&M is a citizen of the United States incorporated in Texas that operates a fleet of Convair and DC-9 aircraft pursuant to 14 CFR Part 125. [1] Authority under this Federal Aviation Administration (FAA) regulation, however, is limited to private carriage operations.[2] C&M has nonetheless performed significant common carriage service since at least 2003. C&M's unauthorized service as a common carrier violates the certificate requirements of Title 49 of the United States Code and constitutes an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712.[3]

In addition to applicable FAA requirements, in order to engage directly or indirectly in air transportation, a citizen of the United States is required to hold economic authority from the Department of Transportation pursuant to 49 U.S.C. § 41101, or an exemption from that provision, such as those applicable to direct air carriers operating as air taxis under

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[1] A "citizen of the United States" includes a corporation organized in the United States that 1) meets certain specified numerical standards regarding the citizenship of its president, officers and directors, and holders of its voting interest and 2) is under the actual control of citizens of the United States. 49 U.S.C. § 40102(a)(15).

[2] 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."

[3] Under Department enforcement case precedent, violations of 49 U.S.C. § 41101 and the Department's licensing requirements constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712. See, e.g., *Contract Air Cargo, Inc., Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2005-3-39 (March 30, 2005).

14 CFR Part 298 and indirect air carriers functioning as air freight forwarders under 14 CFR Part 296. "Air transportation" includes the transportation of passengers or property by aircraft as a common carrier for compensation between two places in the United States or between a place in the United States and a place outside of the United States.[4] Common carriage, in the context of air service, consists of the provision or holding out of air transportation to the public for compensation or hire.[5] From the standpoint of the requirements of section 41101, the holding out of service, as well as the actual operation of air service, constitutes "engaging" in air transportation.[6]

C&M operates a fleet of Convair and DC-9 aircraft. Since at least April 2003, C&M provided air cargo service to a significant number of different companies. Although C&M argues that it has not engaged in air transportation, the number of ultimate customers that it served far exceeded any reasonable interpretation of the boundaries of private carriage for hire, including that enunciated nearly 30 years ago by the Civil Aeronautics Board (CAB), which held jurisdiction over aviation licensing matters prior to the Department.[7]

Although C&M avers that it neither directly nor indirectly solicited business, a substantial number of C&M's operations were pursuant to contracts for it to perform sub-service for at least two duly licensed air carriers. Performing sub-service for common carriers is a text-book example of indirectly holding out to the public.[8] Moreover, even assuming that

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[4] 49 U.S.C. §§ 40102(a)(5), (a)(23), and (a)(25).

[5] See, e.g., *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993); *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2003-12-23 (Dec. 29, 2003).

[6] Prior to 1994, when Title 49 of the United States Code was recodified and simplified, 49 U.S.C. § 41101 stated that no carrier could "engage" in air transportation without appropriate authority. Although the wording of section 41101 now states that what is prohibited is "providing" air transportation without authority, Congress made clear when it recodified Title 49 that in doing so it did not intend any substantive change to the statute. Act of July 5, 1994, Pub. L. 103-272, § 6(a), 108 Stat. 745, 1378.

[7] In what it termed "a close one," the CAB held as private certain air service operations by Part 125 operators Zantop International Airlines and Air Traffic Service Corporation that involved transporting cargo pursuant to contracts with the three major American automobile manufacturers, plus a *de minimus* level of non-automotive related traffic. *Automotive Cargo Investigation*, 70 C.A.B. 1540, 1554 (1976). In addition, we note that the CAB's decision in this case appeared predicated substantially on the fact that, at the time, duly licensed common carriers had "no meaningful capability" to provide service equivalent to the Big Three. *Id.* at 1553. Today, by contrast, the Office of Aviation Enforcement and Proceedings has evidence that, in the market C&M serves, there are duly licensed common carriers with the capability to provide air transportation service equivalent to that which C&M provides. However, a major reason such lawful common carriers may not appear willing or able to provide such service is the difficulty that these carriers face in competing on price with unlicensed carriers that have lower regulatory compliance costs.

[8] 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., *Ameristar Airways, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2004-8-9 (Aug. 12, 2004); *AGS Partnership, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2004-2-7 (Feb. 9, 2004).

Seventeen years ago, C&M apparently obtained business through a related certificated air carrier, Century Airlines (Century), a situation that a National Transportation Safety Board (NTSB) administrative law judge found not to constitute common carriage because he determined that Century, notwithstanding its

the carrier did not actively solicit business, its operations involved the provision of air transportation to a large number of diverse entities and, by doing so, it engaged in a course of conduct that evinced a willingness to provide air transportation to the public, thereby constituting an unlawful holding out of common carriage via its reputation.[9]

In mitigation, C&M states that it did not intend to violate the Department's licensing requirements and that at all times in this matter it has cooperated fully with the Enforcement Office. C&M further states that it has worked with the Department to ensure that its future operations do not violate the Department's licensing requirements.

The Office of Aviation Enforcement and Proceedings views seriously C&M's violations of the Department's licensing requirements. We have carefully considered the facts of this case and continue to believe enforcement action is necessary. C&M, in order to avoid litigation and without admitting or denying the alleged violations, agrees 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, and to an assessment of $60,000 in compromise of potential civil penalties. Of this amount, $30,000 shall be paid under the terms described below. The remaining $30,000 shall be suspended for one year after the issuance of the order and then forgiven unless C&M violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and C&M may be subject to additional enforcement action. This compromise assessment is appropriate in view of the nature and extent of the violations in question and serves the public interest. This settlement, moreover, represents a deterrent to future air transportation operations without appropriate economic authority by C&M, 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;

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status as a lawful common carrier, was, as a factual matter, engaging only in private carriage since it had limited its operations to serving only a small number of automotive customers. *Administrator v. C & M Airways, Inc., d/b/a Armadillo Air Associates*, N.T.S.B. Order No. EA-2742 (June 1988). We note that this decision is not binding on the Department here. However, even if it were binding, the *Armadillo* decision is inapposite here, since in the instant case neither of the common carriers for whom C&M performed sub-service limits its traffic to a very small number of customers. In addition, we note that the NTSB law judge in *Armadillo* looked exclusively to the CAB's holding in *Automotive Cargo Investigation* for guidance on the proper demarcation between private and common carriage and that this holding was narrowly circumscribed based largely on the inability thirty years ago of the then-existing common carriers to perform equivalent service. This condition has long since changed. See *supra* note 7.

[9] A holding out of common carriage occurs when a carrier engages in a course of conduct such that it gains a reputation for having a willingness to serve the public. See, e.g., *Woolsey*, 993 F.2d at 524 n.24; *Premier Aircraft Management Violations of 49 U.S.C. §§ 41301, 41703, and 41712 and 14 CFR Part 375*, Order 2004-5-11 (May 13, 2004); *Intercontinental, U.S., Inc., Enforcement Proceeding*, 41 C.A.B. 583, 601 (1965).

2. We find that C&M Airways, 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, C&M Airways, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;

4. We order C&M Airways, Inc., and all other entities owned and controlled by or under common ownership and control with C&M Airways, Inc., and their successors and assignees to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712;

5. We assess C&M Airways, Inc., a compromise civil penalty of $60,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3 above. Of this total amount, $30,000 shall be due and payable within 30 days of the issuance of this order. The remaining $30,000 shall be suspended for one year after the issuance of this order and then forgiven unless C&M Airways, Inc., violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and C&M Airways, Inc., may be subject to additional enforcement action. Failure to pay the penalty as ordered shall also subject C&M Airways, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act; and

6. C&M Airways, Inc., shall make the payment set forth in ordering paragraph 5, above, 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.

This order will become a final order of the Department ten 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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