



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

Issued by the Department of Transportation  
on the 17th day of October, 2002

**Asiana Airlines, Inc.  
Violations of 49 U.S.C. §§ 41302, 41703,  
and 41712, and Order 98-7-22**

**Served October 17, 2002**

**OST 2002-12273**

**CONSENT ORDER**

This order concerns unauthorized passenger air service by Asiana Airlines, Inc., (Asiana) a foreign air carrier within the meaning of 49 U.S.C. § 40102(a)(21), between Guam (a U.S. territory), Saipan in the Northern Mariana Islands (a U.S. commonwealth), and various cities in the United States, by way of Seoul, Republic of Korea. Service by a foreign air carrier between two points in the United States, a practice commonly referred to as cabotage, is a violation of 49 U.S.C. § 41703, which explicitly prohibits such transportation for compensation or hire except under very limited circumstances that do not apply here.<sup>1</sup> In addition, holding out to the public, expressly or by course of conduct, that a foreign air carrier provides any such service, without the appropriate exemption authority, violates the carrier's permit authority issued under 49 U.S.C. § 41302 and constitutes an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712. Furthermore, Asiana is subject to Order 98-7-22 in which it agreed to cease and desist from conducting cabotage operations between the United States and Guam via Seoul. This consent order directs Asiana to cease and desist from further violations of Order 98-7-22 and 49 U.S.C. §§ 41302, 41703, and 41712 and to pay a compromise civil penalty.<sup>2</sup>

Between July 1998, when Order 98-7-22 was issued, and May 2002, Asiana unlawfully transported a substantial number of passengers between Guam, Saipan, and various cities in the United States, notwithstanding the Department's order that it cease and desist from further

<sup>1</sup> The pertinent language of 49 U.S.C. § 41703 states that foreign civil aircraft may "take on for compensation, at a place in the United States, passengers or cargo destined for another place in the United States only if - (1) specifically authorized under section 40109(g) of this title..."

<sup>2</sup> The civil penalty that was the subject of Order 98-7-22 was paid in 1998.

violations of 49 U.S.C. §§ 41302, 41703, and 41712. During this period, Asiana also unlawfully held out transportation in these markets via a broad spectrum of media, both direct and indirect, including the Internet and newspaper advertisements, and through travel agents. As recently as May 2002, it was possible to construct cabotage schedules on Asiana's own Internet website and to purchase tickets between several cities in the United States and Guam or Saipan that violated cabotage restrictions through the website of Orbitz LLC, an Internet travel agent acting on Asiana's behalf.<sup>3</sup> In May 2001, Asiana ran newspaper advertisements in Guam offering double frequent flyer mileage, as well as an opportunity to "enjoy shopping during short stopovers in Seoul," on flights between Guam and the United States. Moreover, for several years, Asiana regularly distributed memoranda to travel agents in Guam and Saipan listing Asiana's sale prices on various routes to cities in the United States via Seoul, thereby further encouraging the sale of cabotage air service.<sup>4</sup> Through its sales offices in the United States, Guam, and Saipan that violated the cabotage prohibition. One of these agents subsequently offered a Departmental staff member, calling as a member of the general public, transportation between Guam and Seattle at a fare competitive with the lowest fare offered by a U.S. carrier in the same market.

In mitigation, Asiana states that, at a corporate level, it did not intend to violate Order 98-7-22 and 49 U.S.C. §§ 41302, 41703, and 41712. Asiana states that a small number of employees erroneously interpreted Order 98-7-22 as applying only to its cargo operations. Accordingly, these employees failed to advise Asiana's passenger operations division of the existence of the order. While Asiana realizes that it is accountable for errors made by its employees within the scope of their work, Asiana contends that the lack of knowledge permeating all levels of its management about what constitutes cabotage shows a significantly lesser degree of culpability than had Asiana's cabotage operations been a deliberate effort to flout the order.

In remediation, upon receiving notice from the Department, Asiana states that it immediately notified its various corporate sales and marketing offices, including those in the United States, and all travel agents in Guam and Saipan, of the discontinuance of the holding out and sale of transportation on its U.S. mainland-Guam/Saipan routes. Furthermore, Asiana asserts that it informed the global distribution systems with which it contracts to block or delete all its on-line availabilities of service between cities in the United States, Guam, and Saipan, thus making it impossible for consumers using Internet travel agents to construct independently a connection between Asiana's Guam/Saipan-Seoul service and its Seoul-U.S. mainland service.

During the investigation of this matter, an issue arose concerning what actions might constitute a break in the continuity of travel so that a foreign air carrier could legally transport a passenger between two points in the United States via an intermediate point or points in the

<sup>3</sup> Regarding the use of Internet websites to hold out air transportation, the Department's position, as set forth in Order 98-7-22, is that the Internet sites of foreign air carriers that are accessible to members of the general public may not display itineraries in which the origin and destination are both points in the United States.

<sup>4</sup> Asiana states that these prices were the sum of the sector fares in the Guam-Seoul, Saipan-Seoul, and Seoul-United States markets, rather than through fares.

carrier's homeland or a third country. In response, the Enforcement Office emphasizes that the sale or holding out, either explicitly or by course of conduct, of transportation between two points in the United States via an intermediate point or points in a foreign country may be illegal regardless of the duration of the stopover, the passenger's immigration status at the intermediate point or points, the number of tickets under which the transportation is conducted, and the number of foreign air carriers under which the transportation is conducted if they are working in concert.<sup>5</sup> However, we are not likely to pursue enforcement action except in straightforward cases, such as those in which the transportation was continuous (including short stopovers that were incidental to or otherwise did not break the continuity of the trip), the transportation was conducted pursuant to a single ticket, the carrier or its agents knowingly sold two tickets covering cabotage service, the carrier or its agents held out cabotage service via the Internet or other advertising media, or the carrier explicitly or tacitly accepted, benefited from, or participated in a substantial arrangement with a third party to conduct cabotage operations.<sup>6</sup> In reaching conclusions regarding any future cabotage violations and any related enforcement action, the Enforcement Office will continue to consider the reasonable good faith efforts of the carrier involved to avoid engaging in conduct that the Department considers to constitute prohibited cabotage.

The Enforcement Office views seriously the obligation of all foreign air carriers to observe the statutory prohibitions on cabotage operations and we are particularly concerned here where Asiana's conduct is in direct violation of an existing order to cease and desist from such unlawful operations. Accordingly, we have carefully considered all of the available information, including that provided by Asiana, but continue to believe that enforcement action is warranted. In this connection and in order to avoid litigation, the Enforcement Office and Asiana have reached a settlement of this matter. Without admitting or denying the violations described above, Asiana consents to the issuance of this order to cease and desist from future violations of Order 98-7-22 and 49 U.S.C. §§ 41302, 41703, and 41712 and to the assessment of \$750,000 in compromise of potential civil penalties otherwise assessable. Of this total penalty amount, \$375,000 shall be paid under the terms described below. The remaining \$375,000 shall be suspended for three years following the issuance of this order, and then forgiven, unless, during this time period, Asiana violates 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 Asiana may be subject to further and more stringent enforcement action. The Enforcement Office believes this compromise is appropriate, serves the public interest, and creates an incentive for all foreign air carriers to comply fully with the requirements of 49 U.S.C. §§ 41302, 41703, and 41712.

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<sup>5</sup> While these and other circumstances not listed here may be an indication of a break in the continuity of travel, they are not definitive of such, either alone or in any particular combination.

<sup>6</sup> The Enforcement Office does not intend to preclude air carriers from continuing standard interline agreements that are common in the industry and are not used to circumvent the cabotage prohibition. We also do not intend to preclude travel agents from issuing separate tickets on separate carriers as long as the issuance of such tickets is not pursuant to an explicit or tacit arrangement with one or both air carriers to facilitate cabotage service.

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 this order as being in the public interest;
2. We find that Asiana Airlines, Inc., violated 49 U.S.C. §§ 41302 and 41703 by holding out and performing air transportation for compensation or hire between cities in the United States and Guam and the Northern Mariana Islands via Seoul between July 1998 and May 2002;
3. We find that by violating 49 U.S.C. §§ 41703, 41302, and 41712, Asiana Airlines, Inc., violated the cease and desist provision of Order 98-7-22;
4. We find that, by engaging in the conduct described in ordering paragraphs 2 and 3 above, Asiana Airlines, Inc., engaged in an unfair and deceptive practice in violation of 49 U.S.C. § 41712 in connection with cabotage operations;
5. Asiana Airlines, Inc., and all other entities owned and controlled by, or under common ownership and control with Asiana Airlines, Inc., and their successors and assignees, are ordered to cease and desist from future violations of Order 98-7-22 and 49 U.S.C. §§ 41703, 41302, and 41712;
6. Asiana Airlines, Inc., is assessed a civil penalty of \$750,000 in compromise of the civil penalties that might otherwise be assessed for the violations found in paragraphs 2, 3, and 4 above. Of the assessed penalty, \$75,000 is due and payable within 30 days of the date of issuance of this order, \$75,000 is due and payable on April 15, 2003, \$75,000 is due and payable on October 15, 2003, \$75,000 is due and payable on April 15, 2004, and \$75,000 is due and payable on October 15, 2004. The remaining \$375,000 shall be suspended for three years following the issuance of this order, and then forgiven, unless, during this time period, Asiana Airlines, Inc., violates 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. Failure to pay the penalty as ordered will subject Asiana Airlines, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and to possible enforcement action for failure to comply with this order; and
7. Payment of the civil penalty described above 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 attached instructions.

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

**By:**

ROSALIND A. KNAPP  
Deputy General Counsel

(SEAL)

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