



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

Issued by the Department of Transportation
on the 23rd day of October, 2002

**All Nippon Airways Co., Ltd.
Violations of 49 U.S.C. §§ 41302, 41703,
and 41712**

Served October 23, 2002

OST 2002-12273

CONSENT ORDER

This order concerns unauthorized passenger air service by All Nippon Airways Co., Ltd., (ANA) a foreign air carrier within the meaning of 49 U.S.C. § 40102(a)(21), between Guam, a U.S. territory, and cities in the United States, by way of Japan. 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 prohibits such transportation for compensation or hire except under very limited circumstances that do not apply here.¹ 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.

Between April 2002 and June 2002, the Enforcement Office has concluded that ANA unlawfully transported a number of passengers between Guam and cities in the United States. During this period, the Enforcement Office has also concluded that ANA unlawfully held out transportation between Guam and cities in the United States via the Internet and through its reservations agents. As recently as May 2002, it was possible to purchase tickets between cities in the United States and Guam on ANA's own Internet website and through the website

¹ 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..."

of Expedia.com, an Internet travel agent acting on ANA's behalf.¹ Moreover, it was also possible for members of the general public to purchase such tickets directly through ANA's own telephone reservations agents.

In mitigation, ANA states that it undertook measures during the summer of 2001 to ensure that ANA and its agents would not sell, and computer reservation systems and websites would not display, ANA connecting service between Guam and cities in the United States via Osaka, its then only existing service point from Guam. ANA asserts that instructions to this effect were given to the Official Airline Guide (OAG), the computer reservations systems with which it contracts, and to the administrators of ANA's own internal reservation system. ANA represents that these measures were largely effective, until it added service in April 2002 between Guam and Tokyo and inadvertently failed to instruct the OAG and the relevant computer reservation systems, as well as the administrators of its own internal reservation system, of the need to apply the same computer programming restrictions to its Tokyo hub that prevented ANA connecting service between Guam and cities in the United States via Osaka from being displayed and sold. Upon notification from the Department, ANA states that it immediately undertook corrective measures. At all times in this matter, ANA points out that it has exhibited a cooperative and compliant attitude and has sought advice from the Department to ensure that its future operations do not violate 49 U.S.C. §§ 41302, 41703, and 41712.

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 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 air 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.³ 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

¹ 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.

³ 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.

conduct cabotage operations.⁴ 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. Accordingly, we have carefully considered all of the available information, including that provided by ANA, but continue to believe that enforcement action is warranted. In this connection and in order to avoid litigation, the Enforcement Office and ANA have reached a settlement of this matter. Without admitting or denying that its above-referenced conduct constitutes a violation of 49 U.S.C. §§ 41302, 41703, and 41712, ANA consents to the issuance of this order to cease and desist from future violations of 49 U.S.C. §§ 41302, 41703, and 41712 and to the assessment of \$10,000 in compromise of potential civil penalties otherwise assessable. Of this total penalty amount, \$5,000 shall be due and payable within 30 days of the issuance of this order. The remaining \$5,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless, during this time period, ANA 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 ANA may be subject to further 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.

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 All Nippon Airways Co., Ltd., violated 49 U.S.C. §§ 41302 and 41703 by holding out and performing air transportation for compensation or hire between Guam and cities in the United States via Japan between April 2002 and June 2002;
3. We find that by holding out and performing air transportation for compensation or hire between Guam and cities in the United States via Japan between April 2002 and June 2002, All Nippon Airways Co., Ltd., engaged in an unfair and deceptive practice in violation of 49 U.S.C. § 41712;

⁴ 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.

4. All Nippon Airways Co., Ltd., and all other entities owned and controlled by, or under common ownership and control with All Nippon Airways Co., Ltd., and their successors and assignees, are ordered to cease and desist from future violations of 49 U.S.C. §§ 41703, 41302, and 41712 in connection with cabotage operations;

5. All Nippon Airways Co., Ltd., is assessed a civil penalty of \$10,000 in compromise of the civil penalties that might otherwise be assessed for the violations found in paragraphs 2 and 3. Of this amount, \$5,000 shall be paid within 30 days of the date of issuance of this order. The remaining \$5,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless, during this time period, All Nippon Airways Co., Ltd., 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 All Nippon Airways Co., Ltd., 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

6. 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)

*An electronic version of this document is available on the World Wide Web at
<http://dms.dot.gov>*