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

Issued by the Department of Transportation
on the **29th day of December, 2003**

SportsJet, LLC	**Docket OST 2003-14194**
Violations of 49 U.S.C. §§ 41101 and 41712	**Served December 29, 2003**

CONSENT ORDER

This consent order concerns service by SportsJet, LLC, which the Office of Aviation Enforcement and Proceedings (Enforcement Office) alleges constituted operations in common carriage without the requisite economic authority from the Department. SportsJet is an operator of commercial services with 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 general 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] It is the Enforcement Office's position that SportsJet has nonetheless performed significant common carriage service since 1999. SportsJet's unauthorized service as a common carrier, in addition to violating the certificate requirements of Title 49, constituted an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712. This consent order assesses a compromise civil penalty of $250,000 and directs SportsJet to cease and desist from further violations of 49 U.S.C. §§ 41101 and 41712.

Pursuant to 49 U.S.C. §§ 41101 and 41102, citizens of the United States may not engage in air transportation unless they hold a certificate of public convenience and necessity authorizing them to provide air transportation as an air carrier.[3] An "air carrier" means a

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[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.

[3] A "citizen" includes a person, partnership, corporation, or association. 49 U.S.C. § 40102(a)(15).

citizen "undertaking by any means, directly or indirectly, to provide air transportation."[4] "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.[5] Common carriage, in the context of air service, consists of the provision or holding out of air transportation to the general public for compensation or hire.[6] 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.[7] Violations of section 41101 also constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.

In 1999, SportsJet began service with a Boeing 737-400, primarily to provide carriage to certain professional athletic teams also owned by the ultimate owners of SportsJet. Over time, however, the carrier began providing air transportation to various entities unrelated to it or its ultimate owners, including a significant number of collegiate and professional sports teams, public figures, and non-sports related businesses. In a number of these instances, SportsJet's service, which ranged from single flights to operations over an entire professional sports season, was performed pursuant to contracts with air charter brokers, who were holding out air transportation services to the public.[8] In 2001, as its business expanded, SportsJet added a Boeing 757-200 to its fleet.

In its defense, SportsJet characterizes the service that it provided as highly specialized and predominantly pursuant to long-term written contracts with only a limited number of entities wanting truly luxury transportation. The carrier maintains that it has neither advertised nor otherwise held itself out to the public directly, and that it has not employed brokers, sports personalities, or others to solicit business on its behalf.[9] As such,

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4 49 U.S.C. § 40102(a)(2).

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

6 *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 C.A.B. 583 (1965); *Sky King, Inc., Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2002-10-18 (2002); *Airmark Aviation, Inc., Violations of 49 U.S.C. § 1372*, Order 92-2-14 (1992); *Viscount Air Services, Inc., Violations of Sections 401 and 411 of the Federal Aviation Act and 14 CFR 201.6*, Order 92-8-26 (1992).

7 Prior to 1994, when Title 49 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 § 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.

8 A company may not hold out air transportation services, either directly or indirectly, without appropriate authority. Accordingly, the activities of several of the aforementioned charter brokers are under investigation by the Enforcement Office.

9 While, as it asserts, SportsJet may not have "employed" brokers, it repeatedly entered into contracts with them, either as agents of members of the public or in their own right, for the provision of air transportation.

SportsJet believes that it engaged in private carriage for hire in accordance with its interpretation of the case law on the subject and the guidelines enunciated in FAA Advisory Circular 120-12A. On the question of whether it has held out air transportation, SportsJet states that it neither advertised nor directly solicited business. Rather, SportsJet maintains that the demand for its ostensibly private carriage service was driven solely, if indirectly, by "word of mouth." SportsJet also points to the fact that it has ceased operations under its Part 125 certificate and that flights with its aircraft are now operated by a third party that holds the appropriate authority from the Department and the FAA.

It is the Enforcement Office's position that, even assuming that the carrier did not actively solicit business, its objective conduct involved the provision of air transportation to a significant number of diverse entities and, by doing so, it engaged in a course of conduct evincing a willingness to serve members of the general public indiscriminately.[10] In effect, SportsJet gained a reputation for a willingness to provide transportation by air to at least a class or segment of the public while operating without an effective certificate issued under 49 U.S.C. § 41101.[11] In fact, so well-established was SportsJet's reputation that the carrier was frequently approached by air charter brokers who specialize in arranging air transportation services for members of the public. The Enforcement Office, therefore, believes that SportsJet has engaged in common carriage without appropriate economic authority. Holding out air transportation without requisite authority is also an unfair and deceptive practice and unfair method of competition prohibited by 49 U.S.C. § 41712.

The Enforcement Office views seriously SportsJet's violations of the Department's licensing requirements. We have carefully considered the facts of this case, including the information provided by SportsJet, and continue to believe that enforcement action is necessary. SportsJet, 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 the assessment of $250,000 in compromise of potential civil penalties. Of this total penalty amount, $125,000 shall be paid under the terms described below. The remaining $125,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless SportsJet violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and SportsJet may be subject to further enforcement action. The Enforcement Office believes that this compromise is appropriate, serves the public

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[10] 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; *Sky King* at 2; *Viscount* at 3.

[11] The fact that a carrier "may limit its service to a class or segment of the general public… does not detract from [its] status as a common carrier so long as it indicates a willingness to serve all within the class." *Intercontinental*, 41 C.A.B. at 601. See also *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993) (carrier that held out its service only to rock and country music stars was nevertheless engaged in common carriage).

interest, and creates an incentive for all carriers to comply fully with the requirements of 49 U.S.C. §§ 41101 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 the order as being in the public interest;

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

4. SportsJet, LLC, and all other entities owned and controlled by, or under common ownership and control with SportsJet, LLC, and their successors and assignees, are ordered to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712;

5. SportsJet, LLC, is assessed $250,000 in compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3, above. Of this total penalty amount, $75,000 shall be due and payable within 30 days of the issuance of this order and $50,000 is due and payable on April 15, 2004. The remaining $125,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless SportsJet violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and SportsJet may be subject to further enforcement action. Failure to pay the penalty as ordered shall also subject SportsJet, LLC, to the assessment of interest, penalty, and collection charges under the Debt Collection Act; and

6. 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.

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 motion.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

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