



**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 February, 2004

DB Air, Ltd.

**Violations of 49 U.S.C. §§ 41101
and 41712**

Docket OST-2004-16943

Served: February 23, 2004

CONSENT ORDER

This consent order concerns unauthorized air carrier operations by DB Air, Ltd. (DB Air), in which it engaged in air transportation as an air carrier without the requisite economic authority from the Department.

Companies engaged in air transportation are required to hold economic authority from the Department under 49 U.S.C. § 41101.¹ DB Air leases two Boeing 727-200 aircraft, each of which is in an all first class executive configuration, but the company has no economic authority itself to hold out or to provide, directly or indirectly, air transportation using these or any other aircraft. DB Air has nonetheless engaged in significant indirect air carrier service since its inception in June 1997. DB Air's unlawful conduct as an air carrier, 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.

Pursuant to 49 U.S.C. §§ 41101 and 41102, citizens of the United States² 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. An "air carrier" means a citizen "undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a)(2). "Air transportation" includes the transportation of passengers

¹ A carrier may also operate small aircraft as an air taxi under the exemption authority of 14 CFR Part 298. Carriers engaged in air transportation must also be certificated by the Federal Aviation Administration under 14 CFR Parts 135 or 121. 14 CFR 119.1.

² A "citizen" includes a person, partnership, corporation, or association. 49 U.S.C. § 40102(a)(15).

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. 49 U.S.C. §§ 40102(a)(5), (a)(23), and (a)(25).³

From the standpoint of the requirements of § 41101, the holding out of service, as well as the actual operation of air service, constitutes “engaging” in air transportation.⁴ Violations of § 41101 also constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712. Pursuant to 49 U.S.C. § 46301, at the time of DB Air’s conduct at issue, such violations of the statutory provisions subject DB Air to the assessment of civil penalties of up to \$2,500 for each violation and \$2,500 for each day each such violation continues.

As of August 1, 2003, DB Air possessed two aircraft that it leased from Seven Two Capital Partners, LLC, the sole owner of which, David Bernstein, is also one of the two owners of DB Air. These two aircraft were in turn, sub-leased to Miami Air International, Inc. (Miami Air), an air carrier that holds economic authority from the Department pursuant to 49 U.S.C. § 41101 and safety certification from the Federal Aviation Administration under 14 CFR Part 121. Miami Air in turn serviced the corporate charters that were arranged exclusively by DB Air on its aircraft. Under the companies’ arrangement, DB Air paid all of the expenses incurred by Miami Air in placing the aircraft on Miami Air’s Part 121 Operations Specifications. Furthermore, DB Air paid all of the expenses incurred by Miami Air in operating the aircraft, such as the loading and unloading fees, power carts, air startups, pushback fees, ramp charges, landing fees, all baggage fees, all taxes relating to operation of the aircraft, passenger facility charges, and all security fees. Under the arrangement, the aircraft were maintained for the exclusive use of DB Air and Miami Air was forbidden from using DB Air’s aircraft without DB Air’s permission.

DB Air marketed aircraft charters with its aircraft to potential clients directly, as well as indirectly to other members of the public through various independent brokers, mass mailings, and public distribution of brochures. DB Air also maintains its own website, <http://www.dbairltd.com>, through which it marketed its aircraft and charter services. In

³ 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. 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); *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); and *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).

⁴ Order 2001-9-6. 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.

addition to its mass mailings and internet web site, DB Air 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. As a result of this unlawful holding out, DB Air entered into charter contracts to provide air transportation using its aircraft with numerous entities, including several professional sports teams, various entertainment groups and promoters, and corporate clients. The coverage of these contracts for air transportation ranged from single flights to operations over an entire professional sports season of several months. It is DB Air that contracted directly with the customers for air transportation and DB Air that collected and held all of the monies paid by the entities that ultimately were provided air transportation using DB Air's aircraft that DB Air paid Miami Air to operate. DB Air did not act as an agent for Miami Air or for the ultimate charter customers that Miami Air transported. Therefore, DB Air was the principal in such transactions and, at a minimum, engaged in air transportation as an indirect air carrier,⁵ doing so without required Departmental economic authority in violation of 49 U.S.C. § 41101. DB Air's conduct also constitutes an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712.

We are particularly concerned about DB Air's operations because its scheme bypassed the protections put in place by the Department to afford the public a measure of financial protection where charter flights are involved. With respect to single-entity charters using large aircraft, Department rules require a direct air carrier that engages in charter air transportation to maintain a bond, in an unlimited amount, to guarantee performance of all charter flights for which it has contracted, or to maintain an escrow account into which it must deposit immediately all payments received for charter flights until after the flight has been operated.⁶ DB Air, however, entered into contracts for charter air transportation worth millions of dollars and as a principal it received payments for charter trips, none of which money was escrowed by DB Air or protected by a bond under Department rules while in DB Air's possession. Not only were DB Air's operations unlawful, but its conduct posed an unacceptable risk to the public's funds that 49 U.S.C. § 41101 and Department regulations, where followed, are designed to minimize.

In mitigation, DB Air states that it has conducted its single-entity charter brokerage activities in a good faith belief that its activities were in full compliance with all applicable aviation laws and regulations, and it always arranged for charter flights for its customers to be performed by direct air carriers that were fully certificated under 49 U.S.C. § 41102 and 14 CFR Part 121. DB Air further states that its Internet website content and other promotional materials fully disclosed that DB Air is not itself an air carrier and that it never attempted to mislead the public into believing that it is an air

⁵ To the extent DB Air failed to advise charter customers that Miami Air actually operated the flights, it may have held itself out unlawfully as a direct carrier.

⁶ This rule is specified in 14 CFR 212.8. Similar protections exist for public charter flights, with the authorized indirect air carrier required to have a bond or other security arrangement and to escrow payments from charter participants until payment is made to the airline's own escrow account. 14 CFR 380.34.

carrier. In addition, DB Air states that it has not encountered any instances in which a member of the public was in fact misled or harmed in any way by its activities. DB Air states it has cooperated fully with the Department's investigation into its charter brokerage activities, and DB Air has taken prompt and effective action to modify its single-entity charter contracting and promotional practices to address the Department's concerns shortly after becoming aware of and fully understanding those concerns.

We view seriously DB Air'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. DB Air, 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 air transportation, directly or indirectly, without appropriate authority and to an assessment of \$100,000 in compromise of potential civil penalties, half of which will be forgiven if the company remains in compliance over the next year. 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 carrier operations without appropriate economic authority by DB Air as well as other 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 DB Air, Ltd., violated 49 U.S.C. § 41101, as described above, by engaging in air transportation as an air carrier without appropriate economic authority;
3. We find that by engaging in the conduct described in paragraph 2, above, DB Air, Ltd., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. DB Air, Ltd., and all other entities owned and controlled by, or under common ownership and control with DB Air, Ltd., and their successors and assignees, as well as the owners and officers of all such companies, are ordered to cease and desist from further violations of 49 U.S.C. §§ 41101 and 41712;
5. DB Air, Ltd., is assessed \$100,000 in compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2, 3, and 4, above. Of the assessed penalty, \$50,000 is due and payable within 30 days of the date of the issuance of this order. The remaining \$50,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless, during this time period, DB Air, 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 DB Air, 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 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 DB Air, Ltd., 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

(SEAL)

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

Attachment

(1) To 021030004	(2) Type		
(3) From		(4) Ref.	(5) Amount
(6) Ordering Bank and Related Data			
(7/8) TREAS NYC/CTR/OST			
(9) BNF=/AC-69010005 OBI=			
(10) Payor			
(11)			

1. **Treasury Department Code—Provided**
2. **Type Code—To be provided by sending bank.**
3. **Sending Bank's Code—(ABA#)**
4. **Reference No.—Optional number, entered if sending bank desires to number transaction.**
5. **Amount—Include dollar sign and punctuation including cents digits.**
6. **Sending Bank Name—Telegraphic abbreviation corresponding to Item 4.**
- 7/8. **Entire line provided precisely as shown.**
9. **Entire line provided precisely as shown.**
10. **Enter name of air carrier or other payor (as shown on order).**
11. **Identify payment (maximum 80 digits). Enter order number (if any), issue date, and state "installment" or "full payment."**

NOTE: Questions about these instructions should be directed to Ms. Betty Barber, Office of Financial and Budget, General Accounting Branch, AMZ-120, P.O. Box 25082, Oklahoma City, Oklahoma 73125, phone: (405) 954-1194, fax: (405) 954-3930. To ensure proper credit, notify Ms. Barber when each payment is made.