



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

Issued by the Department of Transportation
on the **9th day of February, 2004**

AGS Partnership

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

Docket OST-2004-16943

Served February 9, 2004

CONSENT ORDER

This consent order concerns unauthorized service by AGS Partnership (AGS), which performed operations as a common carrier without the requisite economic authority from the Department. AGS 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 AGS has nonetheless performed significant common carriage service since November 2001. AGS' 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 order assesses a compromise civil penalty of \$65,000 and directs AGS 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

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 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.

Between November 2001 and March 2003, on a substantial number of occasions, AGS provided charter air transportation for compensation or hire to numerous college and professional sports teams using two DC-9-15 aircraft. During this time, AGS obtained its business largely through the use of several air charter brokers, including Scott Aviation, an affiliated air taxi⁸ with which AGS also shares common ownership and substantial managerial and other operational resources. Starting with AGS’s inception in 2001, Scott Aviation served as a conduit for marketing AGS’s aircraft to the general public and for receiving offers for their operation in air transportation. Specifically, AGS, through Scott Aviation, sent written material to air charter brokers and other members of the general public holding out the availability of AGS’s aircraft for charter flights.⁹ These and other efforts, in turn, yielded numerous requests for charter air transportation that AGS, through Scott Aviation, ultimately provided.

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); *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2003-12-23 (2003); *Sky King, Inc., Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2002-10-18 (2002).

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 Scott Aviation is licensed by the Federal Aviation Administration under Part 135 and holds exemption authority from the Department’s Office of the Secretary under 14 CFR Part 298. Accordingly, Scott’s authority to engage in air transportation is conditioned on it holding out and operating only aircraft that are designed to have a maximum passenger capacity of sixty seats or less or a maximum payload capacity of 18,000 pounds or less. 14 CFR 298.31. The DC-9-15 aircraft exceeds these limitations, and Scott Aviation may not operate them under Part 298.

⁹ 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.

On the question of whether it has held out air transportation, AGS states that it neither advertised nor directly solicited business. However, AGS's use of its sister company, Scott Aviation, to market its aircraft constitutes an impermissible *indirect* holding out.¹⁰ Moreover, 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.¹¹ In effect, AGS 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. § 41101.¹² Therefore, the Office of Aviation Enforcement and Proceedings (Enforcement Office) believes that AGS has engaged in common carriage without appropriate economic authority in violation of 49 U.S.C. §§ 41101 and 41712.

The Enforcement Office views seriously AGS's violations of the Department's licensing requirements. We have carefully considered the facts of this case, including the information provided by AGS, and continue to believe that enforcement action is necessary. AGS, 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 \$65,000 in compromise of potential civil penalties otherwise due and payable. Of this total penalty amount, \$32,500 shall be paid under the terms described below. The remaining \$32,500 shall be suspended for two years following the issuance of this order, and then forgiven, unless AGS violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and AGS may be subject to further enforcement action. The Enforcement Office believes that this compromise is appropriate, serves the public 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.

¹⁰ 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., *Florida Air Transport, Inc., Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2002-9-15 (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).

¹¹ 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; *SportsJet at 3*; *Sky King at 2*.

¹² 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).

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 AGS Partnership 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 AGS Partnership engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. AGS Partnership and all other entities owned and controlled by, or under common ownership and control with AGS Partnership and their successors and assignees, are ordered to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712;
5. AGS Partnership is assessed \$65,000 in compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3, above. Of the assessed penalty, \$32,500 is due and payable within 30 days of the date of issuance of this order. The remaining \$32,500 shall be suspended for two years following the issuance of this order, and then forgiven, unless AGS Partnership violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and AGS Partnership may be subject to further enforcement action. Failure to pay the penalty as ordered shall also subject AGS Partnership 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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