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

Issued by the Department of Transportation
on the 18th day of June, 2004

Universal Airlines, Inc. Docket OST 2004-16943 Violations of 49 U.S.C. §§ 41101 and 41712 Served June 18, 2004

CONSENT ORDER

This consent order concerns unauthorized service by Universal Airlines, Inc., (hereinafter Universal), which performed operations as a common carrier without the requisite economic authority from the Department. This order directs Universal to cease and desist from such future unlawful conduct and assesses the company $10,000 in compromise civil penalties.

Universal 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 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] Universal has nonetheless performed significant common carriage service throughout its corporate existence. Universal's unauthorized service as a common 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.

Since Universal began operations under Part 125, the carrier has entered into multiple contracts with various companies and their agents, including several air charter brokers, some of which appear to hold out air transportation themselves indirectly to the public. In looking at Universal's recent history, the carrier has entered into long term written contracts with automotive manufacturing companies, through those companies' charter

managers. However, Universal has flown flights for various entities that were not contracted for by these automotive companies. Universal obtained the "spot" contracts for these flights by actively bidding on charter flights offered by brokers and charter management companies, and, as a result, operated numerous flights for different shippers in a range of industries.[3]

[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.

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.[4] On the question of whether it has held out air transportation, Universal states that it neither advertised nor directly solicited business. However, its use of chartering agents, evidenced by the numerous flights for various shippers flown by Universal, is an impermissible *indirect* holding out.[5] Moreover, even assuming that the carrier did not actively solicit business, its operations involved the provision of air transportation to an impermissible number of entities and, by doing so, it engaged in a course of conduct that, when viewed objectively, evinced a willingness to serve members of the public indiscriminately. In effect, Universal gained a reputation for a willingness to provide transportation by air to the public, or a definable segment thereof, while operating without an effective certificate issued under 49 U.S.C. § 41101.[6] Universal has thereby held out and performed common carriage without appropriate economic authority. Holding out or performing air transportation without requisite authority is also an unfair and deceptive practice and unfair method of competition prohibited by 49 U.S.C. § 41712.

[3] In *Zantop International Airlines, Enforcement Proceeding*, Order 76-6-182, June 29, 1976, the Civil Aeronautics Board (CAB), which held jurisdiction over aviation economic issues prior to the Department, ruled that Zantop, which at the time had no economic authority, had not engaged in common carriage because its operations were almost entirely devoted to serving the "Big Three" auto makers and it was not attempting to expand its service beyond those three companies. The CAB noted that, while Zantop operated certain limited additional non-automotive related flights, these additional flights were de minimus because they represented less than one percent of Zantop's total business, and the CAB found no unlawful holding out of air transportation in connection with these operations. Moreover, the CAB predicated its opinion substantially on the fact that, at the time, duly licensed common carriers had "no meaningful capability" to provide equivalent service for the Big Three. Today, by contrast, the Enforcement Office has evidence that, in the market that Universal serves, there are duly licensed common carriers with the capability to provide air transportation services equivalent to that which Universal provides. Indeed, a major issue with duly licensed all-cargo common carriers involved in transporting parts destined for auto manufacturers is their inability to compete with carriers who operate under Part 125 and, therefore, have lower regulatory compliance expenses.

[4] 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). *Classic Limited Air, Inc., Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2004-1-23 (2004); *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2003-12-23 (2003).

[5] 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., *AGS Partnership, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2004-2-7 (2004); *Florida Air Transport, Inc., Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2002-9-15 (2002).

In mitigation, Universal states that it has maintained a positive compliance disposition. The company states that it always believed that its operations were in full compliance with all applicable laws and regulations. The company states it has conducted its operations openly, frequently requesting oversight and review by responsible government officials. Universal states it has been forthcoming with information about its operations when the Department notified the company that it was under investigation. Furthermore, Universal states that it promptly, and at significant commercial cost, brought its operations into compliance with current DOT policies as soon as the company became aware of those requirements.

Universal states it sought to comply with the prohibition against "holding out" by refraining from advertising and marketing its services. Further, the company states that it did serve customers in addition to its contracts with four automotive customers, but that the bulk of the transportation that it has performed has been transportation in support of the auto industry, which Universal understood to be specifically authorized. The company states it never believed, or had any reason to believe, that accepting work tendered by others in support of the major manufacturers in the auto industry could constitute "holding out" by Universal.

We view seriously Universal'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. Universal, in order to avoid litigation and without admitting or denying the alleged violations, agrees to the issuance of this order and 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 an assessment of $10,000 in compromise of potential civil penalties of which half will be forgiven if Universal refrains from further violations 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 transportation operations without appropriate economic authority by Universal as well as other similarly situated companies.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

[6] 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; *Classic Limited Air* at 2; *SportsJet* at 3.

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 Universal Airlines, Inc. 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, Universal Airlines, Inc. engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;

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

5. Universal Airlines, Inc. is assessed $10,000 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, $2,500 shall be due and payable within 60 days of the date of the issuance of this order. Another $2,500 shall be due and payable within 180 days of the date of the issuance of this order. The remaining $5,000 shall be suspended for one year following the date of issuance of this order, and then forgiven, unless, during this time period, Universal 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; 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. Failure to pay the penalty as ordered shall also subject Universal Airlines, Inc., 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 motion.

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