



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

Issued by the Department of Transportation
on the 6th day of July, 2004

MSG Flight Operations, LLC

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

Docket OST 2004-16943

Served July 6, 2004

CONSENT ORDER

This consent order concerns service by MSG Flight Operations, LLC, (MSGFO) which, according to the Office of Aviation Enforcement and Proceedings (Enforcement Office), constituted operations in common carriage without the requisite economic authority from the Department. MSGFO is an operator of commercial services with a 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 MSGFO has performed certain common carriage service since 2002. The Enforcement Office asserts that MSGFO's operations, 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 and directs MSGFO to cease and desist from further violations of 49 U.S.C. §§ 41101 and 41712.

Pursuant to 49 U.S.C. §§ 41101 and 41102, a citizen of the United States may not engage in air transportation unless it holds a certificate of public convenience and necessity authorizing it 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.

In August 2002, MSGFO began service using a Boeing 737-400 to carry the New York Knicks and New York Rangers, which are divisions of MSGFO’s parent company, Madison Square Garden, L.P. MSGFO states that it neither advertised nor directly solicited business. Since August 2002, however, a portion of MSGFO’s service has been pursuant to contracts with other sports and entertainment entities. On certain occasions, MSGFO’s operations were in response to requests by air charter brokers and agents representing members of the public.⁸ In other instances, MSGFO responded directly to requests for air transportation services from the ultimate customer.

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.⁹ In effect, MSGFO gained a reputation for a willingness to provide transportation by air to

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); *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).

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 A holding out of common carriage occurs 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.

at least a class or segment of the public while operating without an effective certificate issued under 49 U.S.C. § 41101.¹⁰ So well-established was MSGFO's reputation that the carrier was on several occasions approached by brokers who specialize in arranging air transportation services for members of the public. Therefore, the Enforcement Office believes that MSGFO has held out and 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.

In its defense, MSGFO states that, at all times since its Part 125 certification¹¹ by the FAA, MSGFO reasonably believed that the ensuing operations with its specially configured B737-400,¹² a substantial portion of which were performed for its affiliates, the Knicks and Rangers, constituted private carriage for hire subject only to the FAA jurisdiction under Part 125, despite the fact that, as noted above, MSGFO performed a limited number of flights for other sports and entertainment companies. MSGFO asserts that its understanding of the lawfulness of its operations was supported by several factors, including that (a) the special configuration of its B737-400 and the resulting specialized service offered by this aircraft was consistent with its concept of private carriage for hire, (b) the scope of MSGFO's historical operations, concentrated as they were on serving the Knicks and Rangers, but including a limited number of other customers, appeared to it to be consistent with FAA guidance in this area,¹³ (c) the FAA was aware of the nature and scope of MSGFO's operations and never questioned whether they constituted common carriage, and (d) MSGFO did not advertise or actively solicit customers; rather it responded to requests for service and accommodated a number of companies in the same industry (sports and entertainment) as MSGFO's parent company, Madison Square Garden. MSGFO also states that, immediately upon becoming aware of the Enforcement Office's concerns, it took steps to comply with Departmental regulations and it cooperated fully with the Enforcement Office's investigation.

The Enforcement Office believes that MSGFO's understanding of the permissible scope of its authorized Part 125 operations is misguided. For example, although the "specialized" configuration of an aircraft may be a factor to be considered in determining whether air service operations could be considered private because properly licensed common carriers may be unable to perform the specialized air transportation services that

¹⁰ 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).

¹¹ MSGFO received its Part 125 certificate (i.e., an Operating Certificate issued under 14 CFR Part 119 with Part 125 operations specifications) on August 20, 2002.

¹² MSGFO's fleet consists of a single, executive style B737-400 configured for 50 seats with no overhead bins and equipped with specially designed rest rooms and entertainment centers primarily to accommodate the Knicks and Rangers.

¹³ FAA Advisory Circular 120-12A (April 24, 1986).

such aircraft are designed to perform, MSGFO has not established this to be the case with respect to its service.¹⁴ Moreover, the Enforcement Office notes that the portion of operations that MSGFO flew for unrelated entities vis-à-vis those it flew for its affiliates is not necessarily a relevant consideration when determining whether a carrier has performed common carriage operations, since a single flight pursuant to a single contract, if obtained through a holding out of air transportation, would subject an operator to Departmental licensing jurisdiction.¹⁵

We disagree with MSGFO's characterization of its operations as consistent with FAA guidance. While the number of customers transported by MSGFO may have seemed relatively small to MSGFO, the fact remains that a private carrier cannot hold out to the public, directly or indirectly through third parties or by garnering business by reputation as a company willing to accept offers. Lastly, even if MSGFO had limited its activity to contracts for air transportation with those in a particular industry this does not render the conduct lawful.¹⁶

We view seriously MSGFO'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. MSGFO, 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 an assessment of \$30,000 in compromise of potential civil penalties. Of this amount, \$15,000 shall be due and payable within 15 days of the issuance of this order. The remaining \$15,000 shall be suspended for one year after the issuance of this order and then forgiven unless MSGFO violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and MSGFO may be subject to additional enforcement action. The Enforcement Office believes that this compromise is appropriate, serves the public

¹⁴ In holding as private certain air transport operations that existed to serve the highly specialized needs of the three major American automobile manufacturers in the 1970s, the Civil Aeronautics Board, which held jurisdiction over aviation economic issues prior to the Department, 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. *Automotive Cargo Investigation*, 70 C.A.B. 1540, 1553 (1976). Today, by contrast, in the market MSGFO seeks to serve, there appears to be an ample number of duly licensed common carriers with the capability to provide air transportation service equivalent to that which MSGFO provides with its "executive style" B737-400. We note, however, that a primary reason such duly licensed carriers may not appear willing or able to contract for services, such as those performed by MSGFO, is the difficulty that these carriers face in competing on price with unlicensed carriers whose costs are lower by virtue of their failure to obtain proper authority.

¹⁵ Even accepting MSGFO's representation of the level of its "unaffiliated" business, the percentage of that business in MSGFO's case far exceeds the "*de minimus*" level cited by the Civil Aeronautics Board in that body's review of Zantop International Airlines, which, though existing to serve the specialized needs of the American auto industry as it existed in the 1970s, also derived about 1% of its business from carrying non-automotive cargo. *Automotive Cargo Investigation* at 1552.

¹⁶ See *supra* note 10. It goes without saying that "sports" teams and "entertainment" individuals or entities are not in the same industry.

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 MSG Flight Operations, 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, MSG Flight Operations, LLC, engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. MSG Flight Operations, LLC, and all other entities owned and controlled by, or under common ownership and control with MSG Flight Operations, 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. MSG Flight Operations, LLC, is assessed \$30,000 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, \$15,000 shall be due and payable within 15 days of the issuance of this order. The remaining \$15,000 shall be suspended for one year after the issuance of this order and then forgiven unless MSG Flight Operations, LLC, violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and MSG Flight Operations, LLC, may be subject to additional enforcement action. Failure to pay the penalty as ordered shall also subject MSG Flight Operations, 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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