



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

Issued by the Department of Transportation
on the 12th day of August 2004

Ameristar Airways, Inc.

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

Docket OST 2004-16943

Served August 12, 2004

CONSENT ORDER

This consent order concerns unauthorized service by Ameristar Airways, Inc., which performed operations as a common carrier without the requisite economic authority from the Department. It directs Ameristar Airways to cease and desist from such future unlawful conduct and assesses a compromise civil penalty of \$70,000.

Ameristar Airways 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 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 Ameristar Airways nonetheless performed common carriage service since 2002. Ameristar Airways' 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.

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

Since it began operations in late 2002 with three DC-9 aircraft under its Part 125 certificate, Ameristar Airways has entered into contracts with various companies, including air charter brokers who appear to hold out air transportation indirectly to the general public.⁸ Moreover, Ameristar Airways has actively bid on charter flights offered by these brokers, and, as a result, operated flights for shippers in different industries. In many cases, employees of Ameristar Jet Charter, an affiliated company and certificated Part 135 operator, placed these bids on behalf of Ameristar Airways. Additionally, Ameristar Jet Charter provided Ameristar Airways with a significant portion of its administrative, maintenance, and operational support, a situation that the Office of Aviation Enforcement and Proceedings (Enforcement Office) contends resulted in the two entities, in effect, operating as one.

On the question of whether it has held out air transportation, Ameristar Airways states that it neither advertised nor directly solicited business. However, Ameristar Airways’ use of its sister company’s employees to place bids on its behalf is an impermissible *indirect* holding out.⁹ Furthermore, even assuming that the carrier did not actively solicit business, its objective conduct involved the provision of air transportation to a number of

⁴ 49 U.S.C. § 40102(a)(2).

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

⁶ See, e.g., *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993); *MSG Flight Operations, LLC, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-7-3 (Jul. 6, 2004); *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2003-12-23 (Dec. 29, 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 themselves are under investigation by the Enforcement Office.

⁹ 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 (Feb. 9, 2004); *Florida Air Transport, Inc., Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2002-9-15 (Sep. 13, 2002).

diverse entities and, by doing so, it engaged in a course of conduct evincing a willingness to serve members of the public indiscriminately.¹⁰ In effect, Ameristar Airways 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 Ameristar Airways' 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 Ameristar Airways has held out and engaged in common carriage without appropriate economic authority.

In mitigation, Ameristar Airways points out that, when contacted by the Enforcement Office, it had been conducting its Part 125 cargo operations for only a few months and that it immediately undertook efforts to change the nature and degree of its operations such that they would no longer violate the Department's licensing requirement. In addition, Ameristar Airways explains that, as a newcomer to Part 125 cargo operations, it modeled its operations on existing Part 125 cargo operators involved in transporting automotive parts and supplies to support the automotive manufacturing industries. Ameristar Airways states that it did not advertise its services and that it believed that its operations were consistent with the guidance for permissible private carriage set forth in FAA Advisory Circular 120-12A. The carrier further explains that it provided cargo air services for basically the same limited group of shippers and brokers with whom a number of other Part 125 cargo operators had been providing cargo services for many years. Ameristar Airways states that it used the same computerized bidding process as these other Part 125 operators to place bids via internet websites used by brokers and third-parties with whom the carrier had entered into long-term written contracts. Accordingly, the carrier contends that it reasonably believed that the cargo services it provided involved permissible private carriage and not common carriage.

The Enforcement Office's investigation confirmed that Ameristar obtained much of its business through "charter managers" or so-called "logistics companies" that manage the transportation of cargo for the major auto manufacturers, as well as scores of other customers,¹² who may be the actual shippers of goods or air freight forwarders. These charter managers conduct business through an Internet bid-quote solicitation system that

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; *Premier Aircraft Management Violations of 49 U.S.C. §§ 41301, 41703, and 41712 and 14 CFR Part 375*, Order 2004-5-11 (May 13, 2004); *Intercontinental, U.S., Inc., Enforcement Proceeding*, 41 C.A.B. 583, 601 (1965).

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).

¹² We understand that some charter managers may manage air services for up to 200 separate customers.

allows subscribing air carriers and Part 125 operators to see and bid on the transportation needed.

The Enforcement Office does not contend that the multiple customer computerized bidding process through which Ameristar Airways obtained much of its business is *per se* unlawful. Rather, the Enforcement Office views seriously the fact that Ameristar used this process as a conduit to hold out indirectly to the public. Its repeated bids on contracts for numerous different customers and the large number of contracts and customers that resulted from those bids far exceeded any reasonable interpretation of the limits of private carriage for hire.

In this connection, even a single flight pursuant to a single contract, if obtained through a direct or indirect holding out of air transportation, subjects an operator to the Department's economic licensing jurisdiction. While each situation must be evaluated based on its own specific facts, the Enforcement Office has consistently advised companies that, even in the absence of any direct holding out or indirect holding out through a third party, when, as occurred here with Ameristar, a company has entered into contracts with more than three different customers for transportation by air in any twelve month period, the office would likely consider that conduct to warrant investigation to determine whether the company is engaging in an impermissible holding out due to the company's reputation and pursue enforcement action, if appropriate.

With respect to the computerized bidding processes noted above involving a charter manager with multiple customers whose air service needs it manages, a Part 125 carrier could contract with customers through the charter manager, with the charter manager being an agent for the customers, so long as either (1) the charter manager/agent with whom a Part 125 carrier signed a long-term contract represented only a few customers, or (2) the contracts between the Part 125 carrier and the charter manager/agent are specific as to only a small number of delineated customers with whom the Part 125 carrier is dedicated to contracting.¹³ The Enforcement Office would likely investigate for unlawful common carriage any situation where the number of different customers whose trips the Part 125 carrier bid on, or with whom the Part 125 carrier contracted, through the customers' charter manager/agent exceeded three.¹⁴

¹³ A Part 125 carrier can only contract to transport goods through a charter manager if the charter manager is acting legally as the agent of the customer. This is the case because, if the charter manager is not acting as the lawful agent of the customer in its contract with an air carrier, i.e., the charter manager signs one contract in its own name as principal with the charter manager promising to provide the customer air transportation and another contract with the Part 125 carrier in which the Part 125 carrier's obligation is to the charter manager to perform the transportation, the charter manager is acting either as a direct air carrier, thus in effect sub-servicing the operation (we understand some charter managers do, in fact, hold authority as direct air carriers), or as an indirect air carrier, i.e., freight forwarder, pursuant to 14 CFR Part 296. A Part 125 carrier can never lawfully carry the traffic of a Part 121 air carrier or a freight forwarder since such transportation clearly would be in common carriage. Indeed, we would view seriously the actions of any charter manager acting as a direct or indirect air carrier that contracted in such a manner with a Part 125 carrier. Such actions could, at a minimum, constitute an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712.

¹⁴ Presuming the Part 125 carrier signs a contract with a charter manager/agent representing three customers, the carrier should not participate in any other bid quote solicitation system operated by another

The Enforcement Office views seriously Ameristar Airways' violations of the Department's licensing requirements. We have carefully considered the facts of this case, including the information provided by Ameristar Airways, and continue to believe that enforcement action is necessary. Ameristar Airways does not admit any wrongdoing or violation, but, solely in order to avoid litigation, 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 \$70,000 in compromise of potential civil penalties. Of this total penalty amount, \$35,000 shall be paid under the terms described below. The remaining \$35,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless Ameristar Airways violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Ameristar Airways 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 Ameristar Airways and all companies 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 Ameristar Airways, 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, Ameristar Airways, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. Ameristar Airways, Inc., and all other entities owned and controlled by, or under common ownership and control with Ameristar Airways, 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. Ameristar Airways, Inc., is assessed \$70,000 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, \$35,000 is due and payable within 30 days of the date of issuance of this order. The remaining \$35,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless Ameristar Airways, Inc., violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Ameristar Airways, Inc., may be subject

charter manager/agent unless doing so involved only bidding on and operating trips for the same three customers. To do so would likely trigger an investigation by the Enforcement Office to determine whether the carrier is engaging in common carriage.

to further enforcement action. Failure to pay the penalty as ordered shall also subject Ameristar Airways, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act; 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.

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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