



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

Issued by the Department of Transportation
on the 7th day of February, 2005

A-Liner-8 Aviation, Inc.

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

Docket OST 2005-20077

Served February 7, 2005

CONSENT ORDER

This consent order concerns unauthorized service by A-Liner-8 Aviation, Inc., (A-Liner-8) which, according to the Office of Aviation Enforcement and Proceedings (Enforcement Office), performed operations as a common carrier without the requisite economic authority from the Department. It directs A-Liner-8 to cease and desist from such future unlawful conduct and assesses the company a compromise civil penalty of \$50,000.

A-Liner-8 is a citizen of the United States incorporated in Michigan that operates a DC-9 aircraft pursuant to 14 CFR Part 125.¹ Authority under this Federal Aviation Administration (FAA) regulation, however, is limited to private carriage operations.² It is the Enforcement Office's position that A-Liner-8 has nonetheless performed common carriage service. Any such unauthorized service as a common carrier, in addition to violating the certificate requirements of Title 49 of the United States Code, constitutes an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712.³

¹ A "citizen of the United States" includes a corporation organized in the United States that 1) meets certain specified numerical standards regarding the citizenship of its president, officers and directors, and holders of its voting interest and 2) is under the actual control of citizens of the United States. 49 U.S.C. § 40102(a)(15).

² 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."

³ Under Department enforcement case precedent, violations of 49 U.S.C. § 41101 and the Department's licensing requirements constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712. See, e.g., *Traffic Management Corporation and Contract Cargo Airlines, Inc., Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-5-1 (May 3, 2004).

In addition to applicable FAA requirements, in order to engage directly or indirectly in air transportation, a citizen of the United States is required to hold economic authority from the Department of Transportation pursuant to 49 U.S.C. § 41101, or an exemption from that provision, such as those applicable to direct air carriers operating as air taxis under 14 CFR Part 298 and indirect air carriers functioning as freight forwarders under 14 CFR Part 296. "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.⁴ 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.⁵ 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.⁶

On the question of whether the company has held out air transportation, A-Liner-8 states that it neither advertised for nor directly solicited business. However, between February 2002 and October 2003, A-Liner-8 used its DC-9 on a number of occasions to provide air cargo transportation to a number of different customers, including several air charter brokers that hold out air transportation indirectly to the public.⁸ The Enforcement Office has concluded that A-Liner-8's use of these air charter brokers was an impermissible *indirect* holding out.⁹ Moreover, in procuring many of these customers, A-Liner-8 actively bid on charter flights using web-based bidding systems that, while not *per se* unlawful, afforded A-Liner-8 a conduit to hold out indirectly to the public. Even assuming that the carrier did not actively solicit business, its operations involved the provision of air transportation to a significant 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, according to the Enforcement

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

⁵ See, e.g., *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993); *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2003-12-23 (Dec. 29, 2003).

⁶ Prior to 1994, when Title 49 of the United States Code 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 section 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., *Ameristar Airways, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-8-9 (Aug. 12, 2004); *AGS Partnership, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-2-7 (Feb. 9, 2004).

Office, A-Liner-8 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. § 41101.¹⁰ Therefore, the Enforcement Office has concluded that A-Liner-8 has clearly held out and performed air transportation without appropriate economic authority in violation of section 41101 and 49 U.S.C. § 41712.

In mitigation, A-Liner-8 states that, at all times since its Part 125 certification¹¹ by the FAA, the company reasonably believed that its operations under Part 125 were fully compliant with applicable governmental regulations. According to A-Liner-8, its belief was based on what it describes as extensive discussions with and guidance from its certificate holding FAA Flight Standards District Office and a general understanding in the aviation industry that Part 125 operators are permitted to operate on behalf of auto manufacturers under certain circumstances.¹² Based on this advice and understanding, A-Liner-8 states that it commenced operations with its single DC-9 in order to almost exclusively serve the automobile industry.¹³ Since its inception, A-Liner-8 asserts that it has operated the overwhelming majority of its flights on behalf of the General Motors, Ford, and Chrysler, their sub-assemblers, and suppliers.

We view seriously A-Liner-8's violations of the Department's licensing requirements. We have carefully reviewed the facts of this case, including those set forth by A-Liner-8, and continue to believe enforcement action is necessary. A-Liner-8, 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 \$50,000 in compromise of potential civil penalties. Of this total penalty amount, \$25,000 shall be

¹⁰ 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. See, e.g., *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 A-Liner-8 received its Part 125 certificate on January 25, 2002.

¹² A-Liner-8 attributes this "understanding" to the Civil Aeronautics Board's holding in *Automotive Cargo Investigation*, 70 C.A.B. 1540 (1976). The Enforcement Office points out, however, that A-Liner-8's operations far exceeded anything that might reasonably have been permissible under this holding. Furthermore, we note that 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 automobile manufacturers. *Automotive Cargo Investigation* at 1553. Today, by contrast, in the market A-Liner-8 seeks to serve, the Enforcement Office has evidence that there are duly licensed common carriers with the capability to provide air transportation service equivalent to that which A-Liner-8 provides. However, a major reason such lawful common carriers may not appear willing or able to provide such service is the difficulty that these carriers face in competing on price with unlicensed carriers that have lower regulatory compliance costs.

¹³ 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* 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).

paid under the terms described below. The remaining \$25,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless A-Liner-8 violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and A-Liner-8 may be subject to further enforcement action. 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 A-Liner-8 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.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that A-Liner-8 Aviation, 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, A-Liner-8 Aviation, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. We order A-Liner-8 Aviation, Inc., and all other entities owned and controlled by, or under common ownership and control with A-Liner-8 Aviation, Inc., and their successors and assignees, to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712;
5. We assess A-Liner-8 Aviation, Inc., a compromise civil penalty of \$50,000 in lieu of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2 and 3, above. Of this total penalty amount, \$8,334 shall be due and payable within 30 days of the date of issuance of this order, \$8,333 shall be due and payable on May 20, 2005, and \$8,333 shall be due and payable on August 20, 2005. The remaining \$25,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless A-Liner-8 Aviation, 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 A-Liner-8 Aviation, Inc., may be subject to further enforcement action;
6. A-Liner-8 Aviation, Inc., shall make the payment set forth in ordering paragraph 5, above, by wire transfer through the Federal Reserve Communications System, otherwise 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; and

7. Failure to pay the compromise civil penalty as ordered shall subject A-Liner-8 Aviation, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and to possible additional 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)

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<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. Jamie Cottrell, Office of Financial and Budget, General Accounting Branch, AMZ-300, P.O. Box 25780, Oklahoma City, Oklahoma 73125, phone: (405) 954-8894, fax: (405) 954-1620. To ensure proper credit, notify Ms. Cottrell when each payment is made.