



**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 March, 2005

Tradewind Aviation, LLC.

**Violations of 49 U.S.C. §§ 41101, 41712, and
41738 and 14 CFR Part 298.21**

Docket OST 2005-20077

Served March 9, 2005

CONSENT ORDER

This consent order concerns unauthorized scheduled passenger service as a commuter air carrier by Tradewind Aviation, LLC, (Tradewind) that constitutes violations of 49 U.S.C. §§ 41101, 41712, and 41738 and 14 CFR Part 298. This consent order directs Tradewind to cease and desist from further violations of these statutory provisions and federal regulation and to pay a compromise civil penalty of \$40,000.

Tradewind is a Connecticut-based air taxi operator registered under 14 CFR Part 298, which exempts direct air carriers that do not operate large aircraft¹ and that otherwise comply with its provisions from, among other things, the certificate requirement found in 49 U.S.C. § 41101. An air taxi operator that carries passengers on at least five round-trips per week on at least one route between two or more points according to a flight schedule that specifies the times, days of the week, and places between which those flights are performed is a "commuter air carrier" as defined in 14 CFR 298.2. Although air taxi operators hold economic authority from the Department in the form of an exemption, 49 U.S.C. § 41738 nonetheless authorizes the Department to subject air taxis that seek to operate as commuter air carriers to a formal fitness proceeding. Accordingly, 14 CFR 298.21(d) provides that an air taxi operator shall not provide scheduled passenger service as a commuter air carrier without holding economic authority from the Department after being found "fit, willing, and able" to provide such service. Tradewind has nonetheless engaged in extensive commuter air service operations without having been so found. Operating, advertising, or otherwise holding out commuter air service

¹ Large aircraft are those aircraft that have a maximum passenger capacity of more than 60 seats or a maximum payload capacity of more than 18,000 pounds.

without having the requisite economic authority is a violation of 14 CFR 298.21(d) and 49 U.S.C. §§ 41101 and 41738. Moreover, Tradewind's unauthorized commuter air service constitutes an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712.²

Tradewind has a fleet of three Cessna Grand Caravans, one Pilatus PC-12, and two Beech King Air 200's, all of which seat between six and nine passengers. The carrier has been engaging in unauthorized commuter air service using these aircraft since at least April 2004, when it launched its seasonal "Nantucket Shuttle" on routes between Nantucket, Massachusetts, and Teterboro, New Jersey, as well as between Nantucket and White Plains, New York. The Nantucket Shuttle operated pursuant to a schedule posted on Tradewind's Internet website, which listed 62 weekly "proposed" times for "shared charter" flights on its Nantucket-Teterboro and Nantucket-White Plains routes. The website included a disclaimer that a particular flight would take place only if there were at least five passenger bookings. Ultimately, on both routes, the carrier conducted a significant number of the 62 weekly flights shown on its schedule—a number well in excess of the four-flight-per-route weekly maximum allowed for air taxis that have not been found fit by the Department to provide scheduled passenger service as a commuter air carrier.

Tradewind has argued that it did not, in fact, "publish" a flight schedule. In the alternative, it states that it merely advised its prospective passengers that its aircraft would be available for a shared charter at particular times provided that five of them wished to fly at those times, which it asserts did not amount to a "schedule." This argument is unconvincing. A scheduled flight is one in which the departure time and route are offered publicly by a carrier in advance and not specifically negotiated by a customer, which is precisely the manner in which Tradewind held out and operated its services. Tradewind cannot render permissible as "on demand" its otherwise scheduled operations simply by conditioning them as "proposed" pending a certain number of passenger bookings. Were this practice deemed permissible, it would render meaningless the Department's requirement that air taxis undergo a fitness proceeding before undertaking commuter air service. Additionally, it would allow carriers to engage in unrealistic scheduling practices that would otherwise constitute violations of 14 CFR 399.81 and 49 U.S.C. § 41712 since they could advertise any number of flights without necessarily having the intention or the resources available to operate those flights.

In mitigation, Tradewind asserts that its customers initially asked it to perform shared charter service and that it only began proposing times when the number of customers for its shared charter flights exceeded the customers' ability to schedule the flights themselves. At that point, according to Tradewind, its customers asked it to handle

² 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., *Aviation Ventures, Inc. d/b/a Violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR Parts 201 and 298*, Order 2002-7-30 (Jul. 24, 2002); *Arizona Express Airlines, Inc., Violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR Parts 201 and 298*, Order 2002-5-9 (May 9, 2002).

scheduling functions and it acquiesced. Tradewind states that it had a good-faith belief that it was operating only on-demand charter flights in full compliance with all applicable aviation laws and regulations. Tradewind further states that any non-compliance by it was inadvertent and that it immediately revised its business practices in order to come into full compliance with Departmental regulations when the Office of Aviation Enforcement and Proceedings (Enforcement Office) brought its concerns to Tradewind's attention. Moreover, Tradewind is currently taking steps required to apply to the Department for appropriate economic authority to conduct commuter operations. Tradewind points out that it has fully cooperated with the Enforcement Office's investigation into its marketing and operation of its charter flights and states that it has otherwise exhibited a good compliance disposition.

The Enforcement Office has carefully considered the facts in this case, including the information provided by Tradewind, but continues to believe that enforcement action is warranted. Tradewind, 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, 41712, and 41738 and 14 CFR 298.21 and to the assessment of \$40,000 in compromise of potential civil penalties. Of this amount, \$20,000 shall be due and payable within 30 days of the issuance of this order. The remaining \$20,000 shall be suspended for one year after the issuance of this order and then forgiven, unless Tradewind violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Tradewind may be subject to additional enforcement action. This compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest as a deterrent to future unauthorized commuter air service operations by Tradewind, as well as by 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 Tradewind Aviation, LLC, violated 49 U.S.C. §§ 41101 and 41738 and 14 CFR 298.21 by engaging in scheduled air transportation as a commuter air carrier without having been found fit willing and able by the Department to provide scheduled passenger service as a commuter air carrier;
3. We find that by engaging in the conduct and violations described in ordering paragraph 2, above, Tradewind Aviation, LLC, engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712;

4. We order Tradewind Aviation, LLC, and all other entities owned or controlled by or under common ownership and control with Tradewind Aviation, LLC, and their successors and assignees, to cease and desist from further similar violations of 49 U.S.C. §§ 41101, 41712, and 41738 and 14 CFR 298.21;
5. We assess Tradewind Aviation, LLC, a compromise civil penalty of \$40,000 in lieu of civil penalties that might otherwise be assessed for the violations found in paragraphs 2 and 3, above. Of this total amount, \$20,000 shall be due and payable within 30 days of the issuance of this order. The remaining \$20,000 shall be suspended for one year after the issuance of this order and then forgiven unless Tradewind Aviation, 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 Tradewind Aviation, LLC, may be subject to additional enforcement action. Failure to pay the penalty as ordered shall also subject Tradewind Aviation, LLC, to the assessment of interest, penalty, and collection charges under the Debt Collection Act; and
6. Tradewind Aviation, LLC, 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

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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