



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

Issued by the Department of Transportation
on the 30th day of March, 2005

Contract Air Cargo, Inc.

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

Docket OST 2005-20077

Served March 30, 2005

CONSENT ORDER

This consent order concerns unauthorized air transportation by Contract Air Cargo, Inc., (CAC) which performed operations as a common carrier without the requisite economic authority from the Department. It directs CAC to cease and desist from such future unlawful conduct and assesses a compromise civil penalty of \$350,000.

CAC is a citizen of the United States incorporated in Michigan that operates a fleet of Convair and Boeing 727 aircraft pursuant to 14 CFR Part 125.¹ Authority under this Federal Aviation Administration (FAA) regulation is limited to private carriage operations.² Nonetheless, the Office of Aviation Enforcement and Proceedings (Enforcement Office) asserts that CAC has performed extensive common carriage service since at least 2003. CAC's 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 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 air 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, CAC avers that it neither directly nor indirectly solicited business. However, in at least one instance, CAC transported cargo pursuant to a contract between it and The Logistics Company, Inc., (TLC), a self-styled “logistics facilitator,” that arranges air transportation operated by various direct air carriers and is under common control with CAC. (In signing contracts in its own right with a carrier, TLC’s activities are consistent with those of an air freight forwarder, which may lawfully hold out indirect air transportation to the public.) In addition, in a number of other instances, CAC’s aircraft appeared to have conducted what amounted to sub-service for at least three certificated common carriers. Performing sub-service for common carriers and carrying the cargo of air freight forwarders, such as TLC, are textbook examples of *indirectly* holding out to the public.⁷ There are, however, other aspects of CAC’s operations that support a finding that it has been engaged unlawfully in common carriage operations.

As of the date of issuance of this order, based on information supplied by the carrier, CAC was part of a group of aviation-related companies effectively controlled by Mr. Alan Ross, and ultimately owned by him, his wife, and their children. In addition to

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.

⁷ 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).

CAC, its corporate family includes IFL Group, Inc., (IFL)⁸ a registered Part 298 air taxi; Gulf & Caribbean Cargo, Inc., (G&C)⁹ a certificated all-cargo air carrier; and TLC, the aforementioned logistics facilitator. Until recently, CAC operated a fleet of eight Convair 580's and 5800's, which it leased from IFL, and two Boeing 727's, which it leased from an unrelated third party. Also, until recently, G&C's fleet consisted of two Convair 580's, also leased from IFL.¹⁰

In terms of the day to day business of CAC's corporate family, there appears to have been little, if any, practical separation between it and the other companies, with CAC relying for its own operations on at least 85 employees who are deployed to it from the common carrier operations of G&C and IFL, as well as from TLC, and with CAC sharing office space with IFL. In the Enforcement Office's view, CAC appears to have been so heavily dependent on its related companies for all manner of support services, including marketing, that little, if any, of its business could plausibly be characterized as its own. This scenario is particularly troublesome because it creates a situation in which cargo transported using the aircraft listed on CAC's FAA operations specifications was in all likelihood derivative of the otherwise lawful holding out of common carriage by the commonly controlled companies to which CAC was related.¹¹

Even if CAC's operations were entirely separate and none of its traffic was siphoned from the common carriage businesses of its related companies, as CAC contends, the magnitude of its actual operations, in terms of ultimate customers, exceeded any reasonable interpretation of the boundaries of private carriage for hire, including that enunciated nearly thirty years ago by the Civil Aeronautics Board (CAB), which held jurisdiction over aviation licensing matters prior to the Department.¹² Indeed, during the period from March 1, 2003, to July 31, 2004, the extent of CAC's operations in these terms was so great that, even assuming it did not affirmatively solicit business or hold out

⁸ IFL also holds a Part 135 operating certificate issued by the FAA.

⁹ G&C also holds a Part 121 operating certificate issued by the FAA.

¹⁰ As further described in the body of this order, CAC has transferred all of its Convair 580 aircraft to G&C's operations specifications and is in the final stages of transferring its Convair 5800 and Boeing 727 aircraft to the G&C operations specifications, so that it will no longer conduct operations under Part 125 once the aircraft transfers are completed.

¹¹ See footnote 7, *supra*.

¹² The CAB held as private certain air service operations by Zantop International Airlines and Air Traffic Service Corporation that involved transporting cargo pursuant to contracts with the three major American automobile manufacturers, plus a *de minimus* level of non-automotive-related traffic. *Automotive Cargo Investigation*, 70 C.A.B. 1540, 1554 (1976). The CAB's decision in this case appeared predicated substantially on the fact that, at the time, duly licensed common carriers had "no meaningful capability" to provide service equivalent to the Big Three. *Id.* at 1553. Today, by contrast, the Enforcement Office has evidence that, in the market CAC serves, there are duly licensed common carriers with the capability to provide air transportation service equivalent to that which CAC provides. We point out, however, that 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.

indirectly through related companies or other entities, CAC engaged in a course of conduct that, when viewed objectively, indicated a willingness to provide air transportation to the public, thereby constituting, in the view of the Enforcement Office, an unlawful holding out of common carriage via its reputation.¹³

In mitigation, CAC presented a number of arguments relating to the legal underpinning of its Part 125 operations, including a claim that the CAB's decision in the *Automotive Cargo Investigation* case fully authorized its activities.¹⁴ To wit, CAC argues that the level of flight activity by the investigated carriers, Zantop International Airlines (Zantop) and Air Traffic Service Corporation (Air Traffic), was several times greater than its own and that CAC's non-automotive operations were *de minimus* as a percentage of its automotive-related activity. Further, in accordance with its interpretation of the CAB decision, CAC describes itself as providing highly specialized services to the automotive industry by being "on-call" with aircraft configured to address the unique needs of shippers of bulky and odd-sized automotive parts and accessories. CAC contends that although the number of individual shippers that it accommodated may have been numerous, the ultimate number of beneficiaries of the cargo transported by CAC were few in number and, in the overwhelming majority of cases, were automobile manufacturers, thereby bringing its operations within the ambit of the decision in the *Automotive Cargo Investigation* case.¹⁵ Moreover, CAC asserts that it went to great lengths to avoid any indirect holding out through the certificated and exempted operations of related companies. In any event, CAC has advised the Department that, pending DOT and FAA approval, it will transfer all of its aircraft to G&C's certificate and operations specifications. Once the aircraft transfer has been completed, CAC will return its Part 125 certificate to the FAA. Indeed, the aircraft transfer and approval process is well underway at this time: all of its Convair 580's have already been transferred along with one Convair 5800. CAC represents that its Boeing 727's and remaining Convair 5800's will be transferred upon receipt of all necessary DOT and FAA approvals. CAC states that this conversion to Part 121 operations has been costly, involving outlays of more than \$4,300,000.

¹³ 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).

¹⁴ See footnote 12, *supra*.

¹⁵ CAC noted that the U.S. automobile industry, for which Zantop operated, was highly integrated at the time of the CAB's decision in the *Automotive Cargo Investigation*. Today, many automobile manufacturers have spun off their parts manufacturing capabilities and rely on what are now third party suppliers for parts and components that were once manufactured by the automakers themselves. CAC has taken the position with the Department that the shipment of parts by third parties for the benefit of a relatively small group of automobile manufacturers does not render the legal analysis in the *Automotive Cargo Investigation* any less applicable today. That is, whether or not a Part 125 operator has more than a few customers should be, in CAC's view, determined by the number of automobile manufacturers (end users) and not the number of suppliers of parts and components to such manufacturers. Of course, the needs of such end users must be specialized, in CAC's view, in order for the ruling in the *Automotive Cargo Investigation* to be applicable to a Part 125 operator.

As shown in the preceding paragraph, CAC is relying heavily, albeit incorrectly, on an attenuated interpretation of the reference in the CAB's *Automotive Cargo Investigation* case to the number of Zantop and Air Traffic's non-automotive-related flight operations as being "*de minimus*"¹⁶ in proportion to the number of flight operations that they conducted pursuant to their contracts with the Big Three automobile manufacturers, the totality of which the CAB deemed as private. CAC reasons that, despite the fact that it performed a certain number of flights for a variety of non-automotive-related customers, since it performed a much larger number of flights for automotive-related customers, as Zantop and Air Traffic did, its activities similarly fell within the lawful bounds of private carriage for hire. As an initial matter, even if all of CAC's flights during this period involved the transportation of auto parts, the number of customers served by CAC in the auto parts industry alone far exceeded that which could reasonably be permitted under the rubric of private carriage for hire.¹⁷ Nevertheless, were we to apply CAC's interpretation of the "*de minimus*" language in the *Automotive Cargo Investigation* decision regardless of the circumstances of a particular case, as CAC would have us do, we would reach a perverse result in which the greater the absolute number of ostensibly "private" carriage operations (i.e., automotive-related flights) that a carrier performed, even if only for a small number of customers, the greater the relative number of otherwise "non-private" operations (i.e., non-automotive-related flights) it could perform for any number of customers. Such an interpretation would permit carriers, especially those with large fleets of aircraft and extensive operations, such as CAC, to circumvent easily the Department's licensing requirements, which exist to protect the public interest. Rather, we view the CAB's tolerance of Zantop and Air Traffic's non-automotive-related operations as reflective of the CAB's exercise of discretion in weighing the unique circumstances of a case that it termed "a close one."¹⁸

In addition, CAC's argument lacks factual grounding in the instant case. The Enforcement Office notes that CAC carried cargo from March 2003 to July 2004 that included shrimp larvae, candy, clothing, pharmaceuticals, computers, plastic bags for a major national newspaper, lettuce and other fresh food, military use equipment, equipment for a rock star, aviation-related equipment, household appliances, dolphins, sea lions, and unspecified items for a "marine life oceanarium." We do not, therefore, agree with CAC's view that these operations can be characterized as *de minimus* for purposes of determining whether it engaged in unauthorized common carriage.

CAC also asserted that its operations did not constitute common carriage based in part on its belief that the ultimate number of "beneficiaries" of most of the cargo it transported, i.e., several major automobile manufacturers, was small. CAC argues this despite the fact

¹⁶ *Automotive Cargo Investigation* at 1552.

¹⁷ 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*, 993 F.2d 516 (carrier that held out its service only to rock and country music stars was nevertheless engaged in common carriage).

¹⁸ *Automotive Cargo Investigation* at 1554.

that the number of shippers, i.e., mostly automotive parts manufacturers and distributors, with whom it contracted to transport cargo destined for these ultimate beneficiaries, was numerous. As with CAC's interpretation of the *de minimus* language in the *Automotive Cargo Investigation* case, accepting this reasoning would create a perverse result, but this time one even more harmful to the public interest. It would allow carriers to serve a limitless number of actual customers, so long as the goods that these customers paid them to transport ultimately found their way into the finished products of a small number of companies/beneficiaries.¹⁹ Accepting it, therefore, would expand the scope of private carriage for hire operations so far beyond what the current law and common sense allow that it would render meaningless any distinction between those operations and common carriage operations.

While taking into account the views and arguments of CAC, we view seriously CAC'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. CAC, 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 \$350,000 in compromise of potential civil penalties. Of this amount, \$175,000 shall be due and payable within 30 days of the issuance of this order. The remaining \$175,000 shall be suspended for two years after the issuance of this order and then forgiven unless CAC violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and CAC may be subject to additional 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 CAC 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 the order as being in the public interest;
2. We find that Contract Air Cargo, 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, Contract Air Cargo, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;

¹⁹ This reasoning could also be extended from the automotive industry to cover without limit all manufacturing industries and perhaps even beyond.

4. We order Contract Air Cargo, Inc., and all other entities owned and controlled by or under common ownership and control with Contract Air Cargo, 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 Contract Air Cargo, Inc., a compromise civil penalty of \$350,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3 above. Of this total amount, \$175,000 shall be due and payable within 30 days of the issuance of this order. The remaining \$175,000 shall be suspended for two years after the issuance of this order and then forgiven unless Contract Air Cargo, 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 Contract Air Cargo, Inc., may be subject to additional enforcement action. Failure to pay the penalty as ordered shall also subject Contract Air Cargo, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act; and

6. Contract Air Cargo, Inc., shall make the payment set forth in ordering paragraph 5, above, 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 initiative.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

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