



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

Issued by the Department of Transportation
on the 21st day of March, 2006

Simmons Air, Inc.

**Violations of 49 U.S.C. §§ 41101 and
41712 and 14 CFR 399.84**

Docket OST 2006-23528

Served March 21, 2006

CONSENT ORDER

This consent order concerns unauthorized air service provided by Simmons Air, Inc. (Simmons), a company without economic operating authority from the Department under 49 U.S.C. § 41101. Section 41101 requires that an air carrier may only offer and provide service once it has received certificate authority from the Department or operates under an exemption from that provision.¹ The holding-out or operating of air service without economic authority, in addition to violating the requirements of 49 U.S.C. § 41101, constitutes an unfair and deceptive trade practice as defined in 49 U.S.C. § 41712. This order directs Simmons to cease and desist from further similar violations and assesses a compromise civil penalty of \$15,000.

For a period of several weeks, Simmons advertised, sold and operated small aircraft service between Ocean City, Maryland, and Baltimore-Washington International Airport (BWI) which was performed by Hinson Air Services, a Federal Aviation Administration (FAA) certificated Part 135 carrier. Hinson, under its agreement with Simmons, flew its own aircraft as well as aircraft owned by Simmons under its FAA license. Simmons held out its Ocean City service on a website (www.simmonsair.com) in which it used, for a period of several weeks, the name "Simmons Air" and offered a reservations and booking page which quoted a price of \$45 each way. The website also listed as "other destinations" several East Coast cities including Washington, D.C., Richmond, Philadelphia and Boston. In view of the company's holding-out of service on an Internet site and its reference to destinations outside the State of Maryland, its service was clearly interstate in character rather than restricted to consumers within Maryland.

¹ Part 298 of the Department's rules (14 CFR Part 298) provides a limited exemption for air taxis from the certification requirements of section 41101, but air taxis must register with the Department and have in place the requisite insurance coverage. Simmons was not a registered air taxi.

In response to the inquiries of the Office of Aviation Enforcement and Proceedings (Enforcement Office), Simmons initially modified its website to remove any reference to itself as Simmons Air, but the site continued to provide inadequate disclosure of Simmons' role in its advertised air service in violation of the requirements of the statutory provisions cited above. The text of the site, for example, referred to Simmons "flying", which would imply that the company was the direct air carrier, particularly since the site did not make clear whether the company acted as an agent for Part 298 operators or as an agent for the consumer.²

As a separate matter, the Simmons site contained a fare quotation that violates the Department's rule on full-fare advertising, 14 CFR 399.84. Section 399.84 requires, with exceptions recognized in Department enforcement precedent, that fare quotations state the full amount to be charged the consumer.³ Violations of this provision constitute, as well, violations of section 41712. The Simmons site offers air service at \$45 each way, with a comment at the bottom of the screen that "fees and taxes are extra," but without stating the amount of those additional charges and without alerting the consumer to these extra charges by an asterisk or similar mark adjacent to the price.

In mitigation, Simmons asserts that at no time was it engaged in the provision, sale or holding out of interstate air transportation. Accordingly, Simmons does not concede that the Department has jurisdiction in this matter. In this regard, Simmons notes that all of the flights in question were operated solely between two points in Maryland and that the Department has taken the position that intrastate transportation is outside of the Department's economic jurisdiction, if no more than a "*de minimus*" volume of traffic transported on such flights is moving as part of a "continuous" interstate journey. Simmons notes that the Department has provided no factual basis to conclude that more than a "*de minimus*" number of passengers (if any) that traveled on the flights was moving as part of a "continuous" interstate journey.⁴ In addition, Simmons notes that it did not sell interstate transportation (and the Department has not alleged that it did) and that, other than on the website, no advertisement of the flights occurred in any medium outside of Maryland. Finally, Simmons further asserts that the fact that the flights operated to a large airport (BWI) and the fact that the flights were advertised on a website (which, necessarily, is not restricted to a single state) do not change the intrastate nature of the flights or the traffic carried.

In further mitigation, Simmons states that, in commencing the activities referred to herein, it relied on input and advice provided by the Part 135 carrier that initially operated the advertised flights between BWI and Ocean City, including input and advice concerning regulatory matters. In addition, Simmons notes that, upon learning that the

² Simmons might also act as a public charter operator, but it had not at the time sought such authority by filing a public charter prospectus as required by 14 CFR Part 380.

³ See, e.g., *El Al Israel Airlines, Ltd.*, Order 2005-10-6, and our Notices of September 4, 2003, and January 18, 2001; the notices are available at <http://airconsumer.ost.dot.gov/rules/guidance/htm>.

⁴ The Enforcement Office notes that Simmons has not provided convincing evidence that no more than a "*de minimus*" number of passengers were taking "continuous" interstate journeys.

Department had concerns about services being advertised on the Simmons website, Simmons acted promptly and in good faith to take appropriate measures. The CEO of Simmons promptly met with the Department in order to determine what corrective action, if any, should be taken. Simmons states that it immediately retained counsel to assist and advise it, made several modifications to the website in order to address the Department's concerns and took other cooperative actions, even though Simmons did not acknowledge a basis for the Department to assert jurisdiction in the matter. Finally, Simmons states that it has been preparing a new business plan to act as a public charter operator and that it is aware of the applicable requirements contained in Part 380 of the Department's regulations.

We have taken account of the mitigating factors cited by the carrier; however, we continue to believe that enforcement action is warranted in this instance. It is clear that Simmons was engaged in interstate air service requiring certificate or exemption authority from the Department. Simmons held out on an Internet website and operated air service which, while on its face was limited to points in the State of Maryland, was in fact interstate service. By serving a large international airport, Baltimore-Washington International through which thousands of interstate passengers pass daily, the carrier was implicitly seeking a wide clientele, not one limited to intra-state passengers.

Simmons, 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 similar violations of 49 U.S.C. § 41712, as well as 14 CFR 399.84, and to an assessment of \$15,000 in compromise of potential civil penalties of which one-half will be payable according to the payment schedule described below. 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, is intended as a deterrent to future noncompliance with the statutory provisions cited above and 14 CFR 399.84, on the part of Simmons, as well as by other 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 Simmons Air, Inc., violated 49 U.S.C. § 41101 by offering for sale and operating small aircraft service between Ocean City, Maryland, and Baltimore, as described above, without certificate authority under 49 U.S.C. § 41101 or registration as an air taxi under 14 CFR Part 298;
3. We find that Simmons Air, Inc., violated 49 U.S.C. § 41712 by holding out and providing air service between Ocean City, Maryland, and Baltimore, as described above;

4. We find that Simmons Air, Inc., violated 14 CFR 399.84 and 49 U.S.C. § 41712 by failing to disclose properly additional taxes and fees in advertising fares on its Ocean City-Baltimore service, as described above;

5. Simmons Air, Inc., its successors, affiliates, and assigns, are ordered to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR 399.84;

6. Simmons Air, Inc., is assessed \$15,000 in a compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 through 4, of which \$7,500 shall be due and payable within 30 days of the service date of this order. The remainder of the penalty shall be suspended for one year following the service date of this order and then forgiven, provided that Simmons Air complies with the payment terms of this order, as well as its cease and desist provisions, during the suspension period; if it fails to do so, the entire unpaid balance of the penalty shall become due and payable immediately, and Simmons Air may be subject to further enforcement action; and

7. 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. Failure to pay the penalty as ordered shall also subject Simmons Air, Inc., to an assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible 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 motion.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp