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

Issued by the Department of Transportation
On the Fifth day of January, 2011

Capital Airways, LLC	**Docket OST 2011-0003**
Violations of 49 U.S.C. §§ 41101 and 41712	**Served January 5, 2011**

CONSENT ORDER

This consent order concerns unauthorized air transportation by Capital Airways, LLC, (Capital Airways). Since at least April 2010, Capital Airways has engaged in air transportation without holding the requisite economic authority from the Department. This order directs Capital Airways to cease and desist from such future violations and assesses Capital Airways a compromise civil penalty of $175,000.

In addition to complying with applicable Federal Aviation Administration (FAA) safety-related requirements, in order to engage directly or indirectly in air transportation, a citizen of the United States[1] is required to hold economic authority from the Department pursuant to 49 U.S.C. § 41101, or an exemption from that provision.[2] "Air

[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] Economic authority is granted to large aircraft operators, e.g., operators of MD-83 aircraft like that of Capital Airways, in the form of a certificate of public convenience and necessity. Before granting an applicant economic authority in this form, the Department must find it to be "fit," which entails a determination that the carrier is owned and controlled by U.S. citizens and has adequate financial resources, a competent management team, and a positive compliance disposition. This fitness requirement is a continuing one, and the Department monitors "certificated" carriers to ensure their compliance. Certificated carriers must also meet certain Departmental economic rules, such as liability insurance requirements (14 CFR Part 205) and, where applicable, financial security requirements designated to protect charterers' funds and expectations (14 CFR 212.8 and 380.34). In addition, carriers operating large aircraft in air transportation must also receive safety certification from the FAA under 14 CFR Part 121, the most stringent requirements related to safety, and comply with the appropriate set of associated operating rules prescribed by that agency. Large aircraft operators that engage in common carriage without the appropriate DOT and FAA authorizations harm consumers by denying them the level of protection

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.[3] Common carriage, in the context of air service, consists of the provision or holding out of transportation by air to the public for compensation or hire.[4] From the standpoint of the requirements of section 41101, the holding out of air service, as well as the actual operation of that service, constitutes "engaging" in air transportation.[5] Under Department enforcement case precedent, violations of section 41101 also constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.[6]

Capital Airways is a citizen of the United States organized under the laws of the Commonwealth of Virginia and an operator of aircraft pursuant to 14 CFR Part 125. Authority under this FAA regulation is limited to private carriage operations.[7] Notwithstanding this proscription, since at least April 2010, Capital Airways has held out and performed significant common carriage service using an MD-83 aircraft (N982CA) in contravention of 49 U.S.C. §§ 41101 and 41712. Specifically, in April 2010, Capital Airways entered into contracts with Aviation Advantage, Inc., (AAI) a brokerage firm through which Capital Airways operated several weekly roundtrip charter flights transporting passengers who purchased the air transportation as part of hotel-air packages sold by two casinos.[8] By contracting for and transporting the common carriage traffic obtained by the casinos and AAI, Capital Airways indirectly held out and operated air transportation.

---

afforded by duly licensed carriers that have been found fit by the Department and are complying with the proper FAA safety regulations. In addition, such operators, whose regulatory compliance costs are lower, place duly licensed common carriers at a competitive disadvantage.

[3] 49 U.S.C. §§ 40102(a)(5), (a)(23), and (a)(25).

[4] See, e.g., *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993).

[5] 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.

[6] See, e.g., *Principal Air Services, LLC, and David C. Bernstein, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2006-7-13 (Jul. 11, 2006).

[7] 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."

[8] 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 a public charter operator, charter broker, freight forwarder, agent, or affiliated company. See, e.g., *Contract Air Cargo, Inc., Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2005-3-39 (Mar. 30, 2005).

In addition, between September and December 2010, Capital Airways provided single entity[9] charter air service to a significant number of college sports teams through contracts with Global Airline Services, Inc., an air charter broker. By doing so, it engaged in a course of conduct that evinced a willingness to provide passenger air transportation to the public, thereby constituting an unlawful holding out and operation of common carriage via reputation.[10] The number of customers that Capital Airways served far exceeds any reasonable interpretation of the boundaries of private carriage for hire under relevant Department precedent.[11]

In mitigation, Capital Airways asserts that with respect to the casino transportation contracts, Capital Airways entered into agreements that created single-entity charters, and to the extent the operations were noncompliant it was due to a counterparty's failure to conform to the contract, and Capital Airways' failure to timely identify such nonconformity. Capital Airways further asserts that as to the de facto holding out of air transportation services as evidenced by multiple end users, Capital Airways did not actually engage in any solicitation of air transportation services and instead responded to unsolicited requests for service from a charter broker claiming to be the agent to each of the end users. Capital Airways states that the services covered here were provided for a short time period. Lastly, Capital Airways notes that it is currently pursuing certification by the Department under 49 U.S.C. § 41102 and the FAA under 14 CFR Part 121.

The Enforcement Office views seriously the violations of the Department's licensing requirements by Capital Airways. After a careful examination of all of the available information, including that provided by the firm, the Enforcement Office continues to believe that enforcement action is warranted. In this connection and in order to avoid litigation, the Enforcement Office and Capital Airways have reached a settlement of this matter. Without admitting or denying the violations described herein, Capital Airways agrees to the issuance of this order to cease and desist from future violations of 49 U.S.C. §§ 41101 and 41712, and to an assessment of $175,000 in compromise of potential civil

---

[9] A single-entity charter is a charter for the entire capacity of the aircraft, the cost of which is borne by the charterer and not directly or indirectly by the individual passengers.

[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; *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2003-12-23 (Dec. 29, 2003) *Intercontinental, U.S., Inc., Enforcement Proceeding*, 41 C.A.B. 583, 601 (1965).

[11] In what it termed "a close one," the CAB, which held jurisdiction over aviation licensing matters prior to the Department, deemed as private certain air service operations by Part 125 operators Zantop International Airlines (Zantop) and Air Traffic Service Corporation (ATSC) 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). Aside from the limited number of customers served by Zantop and ATSC, 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 that needed by the "Big Three." *Id*. at 1553. Today, by contrast, in the markets at issue here served by Capital Airways—public charters and the transportation of sports teams—there are numerous duly licensed common carriers capable of providing air transportation service equivalent to that which Capital Airways provides.

penalties otherwise assessable against it. This compromise is appropriate in view of the nature and extent of the violations in question and serves the public interest. Moreover, it creates a deterrent against future similar unlawful practices by Capital Airways and other entities that lack economic authority from the Department to engage in air transportation.

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 Capital Airways, LLC, 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, Capital Airways, LLC, engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712.

4. We order Capital Airways, LLC, and all other entities owned or controlled by, or under common ownership with Capital Airways, LLC, and their successors and assignees to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712.

5. We assess Capital Airways, LLC, a compromise civil penalty of $175,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3, above. Of this total penalty amount, $87,500 shall be due and payable in ten equal monthly installments of $8,750 each, with the first installment due and payable on or before March 1, 2011, and the remaining nine installments due and payable no later than the first day of each month between April 2011 and December 2011. The remaining $87,500 shall be due and payable if, within one year following the date the first payment is due under this order, Capital Airways, LLC, violates the cease and desist provisions or the payment provisions of this order, in which case, the entire unpaid portion of the civil penalty shall become due and payable immediately. Failure to pay the penalty as prescribed shall subject Capital Airways, LLC, to the assessment of interest, penalties, and collection charges under the Debt Collection Act and to possible enforcement action for failure to comply with this order; and

6. Payments 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 transfers 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 ten 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)

An electronic version of this document is available on the at
www.regulations.gov