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

Issued by the Department of Transportation
On the Tenth day of August, 2011

Aviation Advantage, Inc.	**Docket OST 2011-0003**
Violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR Part 380	**Served August 10, 2011**

CONSENT ORDER

This consent order concerns violations by Aviation Advantage, Inc., (AAI) of the licensing requirements of 49 U.S.C. § 41101 and public charter regulation in 14 CFR Part 380, as well as violations by the company of 49 U.S.C. § 41712, which prohibits unfair and deceptive practices and unfair methods of competition. In 2009, AAI advertised public charter flights, through its agents, without complying with the disclosure requirements in 14 CFR Part 380. In 2010, AAI engaged in air transportation without holding requisite economic authority from the Department of Transportation (Department) in violation of 49 U.S.C. §§ 41101 and 41712. This order also concerns separate violations of 49 U.S.C. § 41712 arising from AAI's marketing and selling of air transportation on a direct air carrier that did not hold economic authority from the Department to engage in air transportation. This order requires AAI to cease and desist from such violations and assesses the company a compromise civil penalty of $150,000.

Applicable Law

In order to engage in air transportation, citizens of the United States[1] are required under 49 U.S.C. § 41101 to hold economic authority[2] from the Department, either in the form

[1] A "citizen of the United States" includes a corporation or association 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] This authority is separate and distinct from any safety authority required by the Federal Aviation Administration.

of a certificate of public convenience and necessity or in the form of an exemption from the certificate requirement, such as that available to indirect air carriers[3] functioning as public charter operators pursuant to 14 CFR Part 380. "Air transportation" includes the transportation of passengers or property by air as a "common carrier" between places in different states of the United States or between a place in the United States and a place outside of the United States.[4] In the context of aviation, a "common carrier" is a person or other entity that, for compensation or hire, holds out to the public transportation by air between two points.[5] A holding out can occur by direct means[6], by indirect means[7], or by reputation[8]. A carrier that limits its holding out to a defined class or segment of the public, e.g., country music stars, baseball teams, or high net-worth individuals, is considered a common carrier nonetheless if it indicates a willingness to serve all within the class or segment.[9]

With respect to public charter exemption authority under 14 CFR Part 380, section 380.25 provides that no charter operator shall operate, sell, receive money from any prospective participant, or offer to sell or otherwise advertise a charter or series of charters, until the Department has accepted a public charter prospectus covering that air transportation. Acceptance of a prospectus is, in part, contingent upon the charter operator's certification that certain safeguards are in place, such as a contract with an authorized airline and an escrow account, to protect consumers' payments for the specific flights listed in the prospectus. Operating or advertising flights without an approved public charter prospectus constitutes engaging in air transportation as an indirect air

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[3] An entity that is directly engaged in the operation of aircraft that are used to provide air transportation is a "direct air carrier". An entity that is not a direct air carrier, but that contracts in its own right to provide air transportation to members of the public is an "indirect air carrier".

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

[5] *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516, 522-23 (5th Cir. 1993).

[6] E.g., *Airmark Aviation, Inc., Violations of 49 U.S.C. §1371,* Order 92-2-14 (Feb. 11, 1992)(carrier obtained charter customers through a sales presentation given by the carrier's president).

[7] E.g., *Contract Air Cargo, Inc., Violations of 49 U.S.C. §§41101 and 41712,* Order 2005-3-39 (Mar. 30, 2005)(carrier *inter alia* performed sub-service for direct air carriers that were licensed to engage in air transportation and transported the cargo of an air freight forwarder that was engaged indirectly in air transportation pursuant to 14 CFR Part 296); *IDM Corporate Aviation Services, LLC, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2007-2-6 (Feb.5, 2007)(carrier provided lift to customers obtained by an air charter broker acting as the carrier's agent).

[8] 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)(by serving a number of customers, carrier engaged in a course of conduct that evinced a willingness to provide passenger air transportation to the public); see also *Southeast Airlines, Enforcement Proceeding,* 32 C.A.B. 1281, 1285 (1961) citing *Transocean Air Lines, Inc., Enforcement Proceeding,* 11 C.A.B. 350, 353 (1950).

[9] *Woolsey,* 993 F.2d at 524 n.24; *Intercontinental, U.S., Inc., Enforcement Proceeding,* 41 C.A.B. 583, 601 (1965).

carrier without economic authority in violation of 49 U.S.C. § 41101. Under Department enforcement case precedent, violations of section 41101 also constitute an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712.[10]

Furthermore, public charter operators that have an approved public charter prospectus must disclose in all solicitation materials the name of the charter operator and the direct air carrier. In addition, solicitation materials that state a price must include or make reference to the operator-participant contract that is required for all public charter operations. Failure to include such disclosures violates 14 CFR § 380.30 and 49 U.S.C. § 41712.

As a separate matter, the Department has found entities that have facilitated the unlawful common carriage operations of third parties to have themselves engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712 when they knew or should have known that the unlicensed third parties lacked economic authority.[11]

Background

AAI is a Georgia corporation that specializes in marketing and selling public charter air transportation. A recent investigation by the Department's Office of Aviation Enforcement and Proceedings (Enforcement Office) revealed that for periods of time during 2009 and 2010, AAI operated public charters without having met the requirements of 14 CFR Part 380 and 49 U.S.C. § 41101.

Specifically, in May 2009, AAI entered into a Public Charter Sales Agency Agreement separately with Imperial Palace of Mississippi (IP) and Grand Casino of Biloxi (Grand Casino). Under these agreements, IP and Grand Casino each agreed to act as AAI's agent to sell seats on public charter flights between Atlanta (ATL) and Gulfport/Biloxi, Mississippi, (GPT) that AAI proposed to operate as an indirect air carrier.[12] Subsequently, AAI filed a public charter prospectus and received the Department's approval for the ATL-GPT flights. However, AAI's agents, IP and Grand Casino, failed on a number of occasions to comply with the public charter solicitation requirements set forth in 14 CFR § 380.30. In solicitation materials published on Grand Casino's website and via direct mailings, Grand Casino on AAI's behalf failed to disclose the public charter operator and direct air carrier ultimately responsible for operation of the flights, and there was no reference to the charter operator's operator-participant agreement as

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[10] E.g., *OneSky Network, LLC, Violations of 49 U.S.C. § 41101 and 41712 and 14 CFR Part 399,* Order 2007-6-1 (June 4, 2007).

[11] E.g., *Platinum Jet Management, LLC, et al, Violations of 49 U.S.C. §§ 41301, 41703, and 41712,* Order 2006-6-14 (June 12, 2006) and *Darby Aviation, Inc., d/b/a AlphaJet International, Violations of 49 U.S.C.§ 41712,* Order 2005-12-1 (Dec. 1, 2005).

[12] The public charter flights between ATL and GPT continued until January 8, 2010.

required by Part 380. In IP's direct mailings, IP on AAI's behalf failed to reference the charter operator's operator-participant agreement as required by 14 CFR 380.30. In addition to violating Part 380, such activities constitute a separate violation of 49 U.S.C. § 41712.

In December 2009, the parties created an addendum to each agreement, under which IP and Grand Casino were to act as AAI's agents to sell seats on a series of public charter flights between Columbus, Georgia (CSG), Fort Lauderdale (FLL), Orlando (SFB), and Jacksonville (JAX) on the one hand, and GPT on the other. IP and Grand Casino promoted on their websites "air-hotel packages" that included roundtrip airfare between all of the aforementioned city pairs. Solicitation materials were also made public through direct mailings to each company's targeted customers and Grand Casino published advertisements for the packages in several regional newspapers.[13] AAI then contracted with various aircraft operators to operate the flights promoted by IP and Grand Casino. However, AAI failed to file any public charter prospectus for these flights.[14] By soliciting and selling these public charter flights without first filing with the Department a public charter prospectus, AAI violated 14 CFR 380.25 and 49 U.S.C. § 41101 and engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712.

A separate matter concerns AAI's marketing and sale of air transportation provided by Capital Airways, LLC, (Capital Airways) a large aircraft operator that at the time held safety authority from the FAA in the form of an operating certificate that allowed it to conduct flights pursuant to 14 CFR Part 125. Operations under this FAA regulation are limited to private carriage.[15] At all times relevant to this matter, Capital Airways did not hold economic authority from the Department to engage in air transportation, i.e., operate flights in common carriage. Notwithstanding this fact, in 2010, Capital Airways operated multiple roundtrip flights between SFB, FLL, and JAX on the one hand, and GPT on the other, pursuant to an Exclusive Use Aircraft Charter Agreement between AAI and Capital Airways. Although a statement in the AAI-Capital Airways agreement purported to limit the passengers to be transported to "employees, guests, members and clients" of AAI, the Enforcement Office has confirmed that seats on these flights were marketed and sold by IP and Grand Casino through advertisements to the general public under the aforementioned Public Charter Sales Agency Agreements and their addenda. At the time AAI entered into a contract with Capital Airways, AAI knew or should have known that

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[13] Although a large percentage of the packages sold by IP and Grand Casino were marketed through direct mail advertisements to targeted customers and were priced for transportation on the same flight either as "complimentary" or below actual operating costs, the air transport included in these packages is nevertheless a public charter operation, for which Departmental economic authority is required.

[14] After being contacted by the Enforcement Office, AAI filed a public charter prospectus, which the Department accepted, covering the remaining flights to be operated.

[15] 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."

Capital Airways did not have economic authority. Through its contract with AAI, Capital Airways held out and provided passenger air transportation to the public, thereby constituting an unlawful holding out and operation in common carriage.[16] By facilitating Capital Airways' unlawful conduct, AAI violated 49 U.S.C. § 41712.

Mitigation

AAI states that it takes compliance with the Department's requirements seriously. Immediately upon being notified of the Department's concerns, AAI terminated its relationship with Capital Airways. According to AAI, at all times prior to such notification, AAI understood that the passengers traveling on flights operated by Capital Airways were limited to pre-existing, preferred customers of IP and Grand Casino who were "fully comped;" that is, none of the passengers paid for their transportation or accommodations. Thus, AAI asserts that it believed that no air transportation (as defined by applicable law) was being held out or sold, that Capital Airways was not operating as a common carrier, and that Part 380 of the Department's rules did not apply. AAI further asserts that it was similarly unaware that IP and Grand Casino were advertising any of the flights discussed in this order on their websites or in other media apart from announcements mailed solely to fully-comped customers.

Decision

The Enforcement Office wants to make clear that the fact that the passengers AAI placed on Capital Airways' casino flights were drawn from a "limited" pool of "pre-existing" customers, does not mean that the air service was outside the scope of common carriage. These passengers were obtained indirectly by Capital Airways through advertising on AAI's behalf by its agents. An entity that is not duly licensed to engage in air transportation, such as Capital Airways, may not carry traffic obtained as a result of the marketing efforts of a third party.[17]

The Enforcement Office has carefully considered all of the information available to it, but continues to believe that enforcement action is warranted. In order to avoid litigation, the Enforcement Office and AAI have reached a settlement of this matter. Without admitting the violations described above, AAI agrees to the issuance of this order to cease and desist from future violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR §§ 380.25 and 380.30, and to the assessment of $150,000 in compromise of potential civil penalties otherwise assessable against it. This compromise assessment is appropriate in view of the nature and extent of the violations in question, serves the public interest, and

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[16] On January 5, 2011, Capital Airways entered into a consent order with the Department in settlement of its violations. *Capital Airways, LLC, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2011-1-2 (Jan. 5, 2011).

[17] E.g., *Contract Air Cargo, supra.*

establishes a deterrent to future similar unlawful practices by AAI and other similarly situated persons and entities.

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 Aviation Advantage, Inc., violated 14 CFR §§ 380.25 and 380.30, as described above, by marketing and selling public charter air transportation without complying with the solicitation disclosure requirements;

3. We find that Aviation Advantage, Inc., violated 49 U.S.C. § 41101, as described above, by engaging in air transportation without appropriate economic authority;

4. We find that, by engaging in the conduct described in paragraphs 2 and 3, above, Aviation Advantage, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;

5. We find that by facilitating unauthorized common carriage by an unauthorized carrier, as described above, Aviation Advantage, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;

6. We order Aviation Advantage, Inc., and all other entities owned and controlled by or under common ownership with Aviation Advantage, Inc., and its successors and assignees to cease and desist from further violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR §§ 380.25 and 380.30;

7. We assess Aviation Advantage, Inc., a compromise civil penalty of $150,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2, 3, 4, and 5, above. Of this total penalty amount, $75,000 shall be due and payable in four equal installments of $18,750 each, with the first installment due and payable on or before August 30, 2011, the second installment due and payable on or before November 30, 2011, the third installment due and payable on or before February 29, 2012, and the last installment due and payable on or before May 30, 2012. The remaining $75,000 shall be due and payable if, within one year following the date the first payment is due under this order, Aviation Advantage, Inc., 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 Aviation Advantage, Inc., 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

8. Payments shall be made by wire transfers 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 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

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