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

Issued by the Department of Transportation
on the 22nd day of October, 2004

Red Apple Aviation, Inc.	**Docket OST 2004-16943**
Violations of 49 U.S.C. §§ 41101 and 41712	**Served October 22, 2004**

CONSENT ORDER

This consent order concerns service by Red Apple Aviation, Inc., (Red Apple) that constituted operations in common carriage without the requisite economic authority from the Department. Red Apple is an operator of commercial services with large aircraft operated pursuant to 14 CFR Part 125. Authority under this Federal Aviation Administration (FAA) regulation, however, is limited to private carriage operations.[1] In commercial operations with large aircraft that are offered to the general public, by contrast, a carrier would be operating in common carriage, and must hold economic authority from the Department under 49 U.S.C. § 41101.[2] The Office of Aviation Enforcement and Proceedings (Enforcement Office) asserts that Red Apple has nonetheless performed significant common carriage service since May 2002. Red Apple's unauthorized service as a common carrier, in addition to violating the certificate requirements of Title 49, constituted an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712. This consent order assesses a compromise civil penalty of $60,000 and directs Red Apple to cease and desist from further violations of 49 U.S.C. §§ 41101 and 41712.

Pursuant to 49 U.S.C. §§ 41101 and 41102, citizens of the United States may not engage in air transportation unless they hold a certificate of public convenience and necessity authorizing them to provide air transportation as an air carrier.[3] An "air carrier" means a citizen "undertaking by any means, directly or indirectly, to provide air transportation."[4]

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[1] 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."

[2] Carriers engaged in common carriage with large aircraft must also be certificated by the FAA under 14 CFR Part 121. 14 CFR 119.1.

[3] A "citizen" includes a person, partnership, corporation, or association. 49 U.S.C. § 40102(a)(15).

[4] 49 U.S.C. § 40102(a)(2).

"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.[5] Common carriage, in the context of air service, consists of the provision or holding out of air transportation to the general public for compensation or hire.[6] 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.[7] Violations of section 41101 also constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.

Red Apple leases a Boeing 727-200 from 727 Exec-Jet, LLC, a company also owned by the owner of Red Apple. Red Apple conducted its first revenue flight in May 2002. Initially the owner of Red Apple planned to use the aircraft in connection with his various businesses under 14 CFR Part 91 and to operate private carriage flights under Part 125. However, in addition to its Part 91 operations the carrier began providing air transportation to a number of collegiate and professional sports teams and other non-sports related businesses. In some of these instances, Red Apple's service, which ranged from single flights to extended multiple operations, was provided pursuant to contracts with air charter brokers, who may have been themselves holding out air transportation services to the public.

The Department has held that, even if a carrier has not actively solicited business directly, where its objective conduct involved the provision of air transportation to a number of different entities, it has engaged in a course of conduct evincing a willingness to serve members of the general public indiscriminately.[8] In effect, as news of its operations spread by word of mouth, Red Apple gained a reputation for a willingness to provide transportation by air to at least a class or segment of the public while operating without an effective certificate issued under 49 U.S.C. § 41101.[9] In fact, so well-

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

[6] See, e.g., *Woolsey v. National Trans. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993); *MSG Flight Operations, LLC, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2004-7-3 (Jul. 6, 2004); *SportsJet, LLC, Violations of 49 U.S.C. §§ 41101 and 41712,* Order 2003-12-23 (Dec. 29, 2003).

[7] Prior to 1994, when Title 49 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 § 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.

[8] A holding out of common carriage may occur when a carrier engages in a course of conduct such that it gains a reputation for having a willingness to serve the public. *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).

[9] 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 v. National Trans. Safety Bd.*, 993 F.2d 516

established was Red Apple's reputation that the company was frequently approached by air charter brokers who specialize in arranging air transportation services for members of the public. The Enforcement Office, therefore, believes that Red Apple has engaged in common carriage without appropriate economic authority.

In mitigation, Red Apple asserts that the legal boundary between private and common carriage is not well-defined. The carrier points out that the term "common carriage" is not defined in the Federal Aviation Act or the Federal Aviation Regulations, and, as such, the carrier opines that the term is open to reasonable interpretations. Moreover, in May of 2002, in the original set of Operations Specifications issued to Red Apple by the FAA, the carrier states that the FAA authorized it to perform private carriage operations subject to a form of "limited holding out to the public." Thus, Red Apple maintains that, from the outset, it believed that it had a right to hold itself out on at least some "limited" basis, short of conducting mass advertising or public promotional campaigns as a traditional airline. Red Apple also asserts that the number of private carriage contracts entered into by Red Apple was consistent with FAA Advisory Circular 120-12A and that it has always sought to comply in good faith with all of its obligations under Part 125 and other applicable laws, rules, and regulations. Regarding its interactions with air charter brokers, Red Apple notes that, although there were occasions when it contracted with such companies as principals, there were others in which it contracted with such companies in their capacity as agents for the end-users, a permissible practice enunciated by the Department in its Notice of October 8, 2004. Lastly, the carrier also states that it has cooperated fully with the Department throughout the investigation of this matter and that it ceased all flight operations under Part 125 shortly after learning of the Department's concerns.

The Enforcement Office believes that Red Apple's understanding of the permissible scope of its authorized Part 125 operations is misguided. Although the carrier correctly points out that the term "common carriage" is not defined in Title 49 or in its implementing regulations, the scope of Red Apple's operations in terms of ultimate customers far exceeded any "reasonable" interpretation of the boundaries of private carriage for hire, including that enunciated by the Civil Aeronautics Board (CAB), which held jurisdiction over aviation licensing matters prior to the Department. [10]

With respect to Red Apple's purported reliance on the erroneous entry in its Operations Specifications, the carrier's owner and management staff, who possess significant aviation experience with other companies, either knew or should have known that the entry directly contravenes 14 CFR 125.11(b), which prohibits *any* direct or indirect holding out by a Part 125 carrier. Moreover, although the carrier would argue that its "right" to "limited" holding out entitled it to engage in marketing short of mass

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(5th Cir. 1993) (carrier that held out its service only to rock and country music stars was nevertheless engaged in common carriage).

[10] In what it termed "a close one," the CAB held as private certain air service operations by Part 125 operators 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).

advertising or public promotional campaigns, the carrier undertook affirmative efforts to hold out air transportation via direct solicitation at meetings of industry representatives, a practice the Department has, in the past, deemed to be impermissible by Part 125 operators.[11]

The Enforcement Office views seriously Red Apple's violations of the Department's licensing requirements. We have carefully considered the facts of this case, including the information provided by Red Apple, and continue to believe that enforcement action is necessary. Red Apple does not admit any wrongdoing or violation, but, solely in order to avoid costly litigation, 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 the assessment of $60,000 in compromise of potential civil penalties. Of this total penalty amount, $30,000 shall be paid under the terms described below. The remaining $30,000 shall be suspended for two years following the issuance of this order, and then forgiven, unless Red Apple violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Red Apple may be subject to further enforcement action. The Enforcement Office believes that this compromise is appropriate, serves the public interest, and creates an incentive for all companies to comply fully with the requirements of 49 U.S.C. §§ 41101 and 41712.

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 Red Apple Aviation, 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, Red Apple Aviation, Inc. engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;

4. Red Apple Aviation, Inc. and all other entities owned and controlled by, or under common ownership and control with Red Apple Aviation, Inc., and their successors and assignees, are ordered to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712;

5. Red Apple Aviation, Inc. is assessed $60,000 in compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3, above. Of this total penalty amount, $30,000 is due and payable within 30 days of the date of issuance of this order. The remaining $30,000 shall be suspended for two years following the issuance of this order, and then forgiven, unless Red Apple Aviation, Inc.,

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[11] See, e.g., *Airmark Aviation, Inc., Violations of 49 U.S.C. § 1371,* Order 92-2-14 (Feb. 11, 1992).

violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Red Apple Aviation, Inc., may be subject to further enforcement action. Failure to pay the penalty as ordered shall also subject Red Apple Aviation, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act; and

6. Payments shall be made within 30 days of the date of the issuance of this order 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 motion.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

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