



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

Issued by the Department of Transportation
on the **1st day of September 2004**

Falcon Air Charter, Inc.

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

Docket OST 2004-16943

Served: September 1, 2004

CONSENT ORDER

This consent order concerns unauthorized air carrier operations by Falcon Air Charter, Inc. (Falcon) which engaged in air transportation without the requisite economic authority from the Department. It directs Falcon to cease and desist from such future unlawful conduct and assesses the company \$50,000 in compromise civil penalties.

Companies engaged in air transportation are required to hold economic authority from the Department under 49 U.S.C. § 41101.¹ A carrier may also operate small aircraft as an air taxi under the exemption authority of 14 CFR Part 298.² Falcon is a charter company that owns a small aircraft and leases another small aircraft, which are currently on the Part 135 certificate of Cherry Air, Inc., an authorized air taxi operator. However, Falcon is not registered as an air taxi under 14 CFR Part 298 and, therefore, does not have the economic authority itself to hold out or to provide air transportation, directly or indirectly.³ Falcon has nonetheless engaged in air transportation as a direct air carrier. Falcon's unlawful operations as an air carrier, in addition to violating the certificate requirements of Title 49, constitute an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. § 41712.

Pursuant to 49 U.S.C. §§ 41101 and 41102, citizens of the United States⁴ may not engage in air transportation unless they hold a certificate of public convenience and necessity

¹ Carriers engaged in air transportation must also be certificated by the Federal Aviation Administration (FAA) under 14 CFR Parts 135 or 121. 14 CFR 119.1.

² Under this exemption, operators must use aircraft designed to have a maximum passenger capacity of not more than 60 seats or a maximum payload capacity of not more than 18,000 lbs. 14 CFR 298.3.

³ Falcon also does not hold requisite safety certification in its own name from the FAA pursuant to 14 CFR Part 135.

⁴ A "citizen" includes a person, partnership, corporation, or association. 49 U.S.C. § 40102(a)(15).

authorizing them to provide air transportation as an air carrier. An “air carrier” means a citizen “undertaking by any means, directly or indirectly, to provide air transportation.”⁵ “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.⁶ 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.⁷ From the standpoint of the requirements of § 41101, the holding out of service, as well as the actual operation of air service, constitutes “engaging” in air transportation.⁸ Violations of § 41101 also constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.

Falcon is the owner of one Falcon 20 aircraft and leases another Falcon 20 aircraft. As noted above, both of Falcon’s aircraft have been placed on the FAA Part 135 operation specifications and DOT air taxi registration of Cherry-Air, Inc., an authorized air carrier. However, Falcon marketed in its own name air transportation using these aircraft through solicitation letters and indirectly via word-of-mouth referral from previous clients.⁹ Thus, the placement of the aircraft on the licensed air carrier’s operating certificate appears to have been one of mere convenience.¹⁰ Moreover, prior to placing its aircraft on the operations specifications of Cherry Air, Falcon marketed and conducted operations in its own name. It is clear that at all times relevant here, Falcon did not act as an agent of the certificate holder or of any other licensed carrier. Rather, acting deceptively on its own or under the imprimatur of another company’s certificate, Falcon held out and engaged in air transportation without appropriate economic authority in

⁵ 49 U.S.C. § 40102(a)(2).

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

⁷ 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).

⁸ 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 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.

⁹ Regardless of whether it holds out air transportation in its own right, or on behalf of an air carrier, the Department has long held that a company may not circumvent the Departmental economic licensing requirements by placing its aircraft on the operations specifications of a licensed carrier and then also providing pilots for air transportation operations involving those aircraft. See *Agro Air Associates, Inc. and Trans International Crew Leasing, Inc., Violations of Section 401 of the Federal Aviation Act Enforcement Proceeding*, Order 91-2-6 (Feb. 7, 1991) (Two related companies, both of which lacked economic authority, acted jointly in order to provide pilots and aircraft for common carriage operations in a manner tantamount to a wet lease, thereby violating the licensing requirement of section 401 of the Federal Aviation Act, now recodified as 49 U.S.C. § 41101.)

¹⁰ Whether, as a practical matter, the certificate holder exercised sufficient operational control over the flights involving the Falcon aircraft on its certificate is a matter for review by the Federal Aviation Administration.

violation of 49 U.S.C. § 41101 and thereby also engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712.

In mitigation, Falcon states that it did not intend to violate the Department's licensing requirements and that, upon being contacted by the Department's Office of Aviation Enforcement and Proceedings (Enforcement Office), it took immediate remedial action. To this end, Falcon has agreed to create an agency relationship with the company that maintains Falcon's aircraft on its certificate. Moreover, Falcon points out that at all times in this matter it has cooperated fully with the Enforcement Office.

We view seriously attempts by unauthorized companies to circumvent Departmental licensing requirements by engaging, as Falcon has, in what is, in effect, a "rent-a-certificate" arrangement with a duly authorized carrier. We have carefully considered the facts of this case, including the explanation provided by the company, and continue to believe enforcement action is necessary. Falcon, 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, and to an assessment of \$50,000 in compromise of potential civil penalties. Of this total penalty amount, \$25,000 shall be paid under the terms described below. The remaining \$25,000 shall be suspended for two years following the issuance of this order, and then forgiven, unless Falcon violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Falcon may be subject to further 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 Falcon, 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 Falcon Air Charter, Inc., violated 49 U.S.C. § 41101, as described above, by engaging in air transportation as an air carrier without appropriate economic authority;
3. We find that by engaging in the conduct described in paragraph 2, above, Falcon Air Charter, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. Falcon Air Charter, Inc., and all other entities owned and controlled by, or under common ownership and control with Falcon Air Charter, Inc., and their successors and assignees, as well as the owners and officers of all such companies, are ordered to cease and desist from further violations of 49 U.S.C. §§ 41101 and 41712;

5. Falcon Air Charter, Inc., is assessed \$50,000 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, \$5,000 is due and payable within 30 days of the date of issuance of this order, \$5,000 is due and payable on December 31, 2004, \$5,000 is due and payable on March 31, 2005, \$5,000 is due and payable on June 30, 2005, and \$5,000 is due and payable on September 30, 2005. The remaining \$25,000 shall be suspended for two years following the date of issuance of this order, and then forgiven, unless Falcon Air Charter, 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 Falcon Air Charter, Inc., may be subject to further enforcement action. Failure to pay the penalty as ordered shall also subject Falcon Air Charter, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act and to enforcement action for failure to comply with this order; and

6. 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.

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)

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