



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

Issued by the Department of Transportation
on the 29th day of October, 2004

Ferreteria E Implementos San Francisco

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

Docket OST 2004-16943

Served October 29, 2004

CONSENT ORDER

This consent order concerns unauthorized service by Ferreteria E Implementos San Francisco (Ferreteria), which performed operations as a common carrier without the requisite economic authority from the Department. It directs Ferreteria to cease and desist from such future unlawful conduct and assesses a compromise civil penalty.

Ferreteria is a commercial air service provider using 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 transportation operations with large aircraft that are offered to the 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 Ferreteria nonetheless performed common carriage service throughout its corporate existence. Ferreteria's unauthorized service as a common carrier, in addition to violating the certificate requirements of Title 49, constitutes 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 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

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).

citizen “undertaking by any means, directly or indirectly, to provide air transportation.”⁴ “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 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

On the question of whether the company has held out air transportation, Ferreteria states that it neither advertised nor directly solicited business. However, since at least 2003, Ferreteria has used YS-11 and Convair 440 aircraft on a number of occasions to provide air cargo transportation to a number of different customers, including several air charter brokers. The Office of Aviation Enforcement and Proceedings (Enforcement Office) has concluded that Ferreteria’s use of these air charter brokers was an impermissible indirect holding out.⁸ Even assuming that the carrier did not actively solicit business, its operations involved the provision of air transportation to a number of diverse entities and, by doing so, it engaged in a course of conduct that, when viewed objectively, evinced a willingness to serve members of the public indiscriminately.⁹ Thus, the Enforcement Office concludes that, in effect, Ferreteria gained a reputation for a willingness to provide transportation by air to the public, while operating without an effective certificate issued under 49 U.S.C. § 41101. Accordingly, Ferreteria has thereby held out and engaged in common carriage without appropriate economic authority.

In mitigation, Ferreteria states that it did not intend to violate the Department’s licensing requirements and points out that at all times in this matter it has cooperated fully with the

⁴ 49 U.S.C. § 40102(a)(2).

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).

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 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 an air charter broker, agent, or affiliated company. See, e.g., *Ameristar Airways, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-8-9 (Aug. 12, 2004); *AGS Partnership, Violations of 49 U.S.C. §§ 41101 and 41712*, Order 2004-2-7 (Feb. 9, 2004).

⁹ 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).

Enforcement Office. Ferreteria maintains that since it obtained its Part 125 operating authority it has conducted its operations with the full knowledge of the FAA, which agency, according to the carrier, never questioned whether Ferreteria was operating within the boundaries of Part 125. Thus, Ferreteria believed that, in the absence of any objections by the FAA as to the nature and scope of its operations, it was operating in a fully compliant manner. Ferreteria also states that it believed, in good faith, that it was operating within the confines of Part 125 by limiting almost all of its recent operations to serving the specialized needs of the automotive and oil drilling equipment sectors of the United States' economy, whose shipping needs, it avers, could not necessarily have been satisfied by other providers of air transportation.

Ferreteria's understanding of the permissible scope of its authorized Part 125 operations is misguided at best. Even assuming that in its recent operations the carrier limited its service to the automotive and oil drilling equipment industries, those industries consist of hundreds of different individual companies across the country and Ferreteria's actions demonstrated that it was willing to serve indiscriminately all within those industries.¹⁰ Moreover, the scope of Ferreteria's operations in terms of ultimate customers far exceeded any reasonable interpretation of the boundaries of private carriage for hire, including that enunciated more than 25 years ago by the Civil Aeronautics Board (CAB), which held jurisdiction over aviation licensing matters prior to the Department.¹¹ Accordingly, the Enforcement Office believes that it is clear that the carrier either knew or should have known that it was engaging in unauthorized common carriage.

The Enforcement Office views seriously Ferreteria's violations of the Department's licensing requirements. We have carefully considered the facts of this case and continue to believe enforcement action is necessary. Ferreteria, 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 by engaging in common carriage directly or indirectly, and to an assessment of \$20,000 in compromise of potential civil penalties. Of this amount, \$10,000 shall be due and payable within 30 days of the issuance of this order. The remaining \$10,000 shall be suspended for two years after the issuance of this order and then forgiven unless Ferreteria violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Ferreteria may be subject to additional enforcement action. This compromise is appropriate in view of the nature and extent of the violations in question and serves the public interest. Moreover, it represents a

¹⁰ 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 (5th Cir. 1993) (carrier that held out its service only to rock and country music stars was nevertheless engaged in common carriage).

¹¹ 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).

deterrent to future air transportation operations without appropriate economic authority by Ferreteria 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 Ferreteria E Implementos San Francisco 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, Ferreteria E Implementos San Francisco engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. Ferreteria E Implementos San Francisco and all other entities owned and controlled by, or under common ownership and control with Ferreteria E Implementos San Francisco and their successors and assignees, are ordered to cease and desist from further similar violations of 49 U.S.C. §§ 41101 and 41712;
5. Ferreteria E Implementos San Francisco is assessed \$20,000 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, \$10,000 shall be due and payable within 30 days of the issuance of this order. The remaining \$10,000 shall be suspended for two years after the issuance of this order and then forgiven unless Ferreteria E Implementos San Francisco violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Ferreteria E Implementos San Francisco may be subject to additional enforcement action. Failure to pay the penalty as ordered shall also subject Ferreteria E Implementos San Francisco to the assessment of interest, penalty, and collection charges under the Debt Collection Act; 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 initiative.

BY:

**ROSALIND A. KNAPP
Deputy General Counsel**

(SEAL)

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