



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

Issued by the Department of Transportation
on the twenty-fourth day of July, 2002

Aviation Ventures, Inc., doing business as
Vision Air

Violations of 49 U.S.C. §§ 41101 and 41712,
and 14 CFR Parts 201 and 298

Docket No. OST-2002-12273
Served July 24, 2002

CONSENT ORDER

This consent order concerns unauthorized holding out and operations by Aviation Ventures, Inc., doing business as Vision Air ("Vision Air"), as a commuter carrier conducting daily scheduled air transportation service. Those unauthorized operations by Vision Air, an air taxi, violate 14 CFR Parts 201 and 298 and 49 U.S.C. §§ 41101 and 41712. This order directs Vision Air to cease and desist from future violations and to pay compromise civil penalties.

Vision Air holds authority to operate as an air taxi pursuant to 14 CFR Part 298, and offers air tours of the Grand Canyon. Sections 298.2(e) and 298.21 provide that an air taxi may not operate more than four scheduled flights per week between the same two points according to a published schedule, unless it has first been found fit to operate as a commuter air carrier. Vision Air has held out commuter service without appropriate authority. The unlawful holding out of commuter service by Vision Air has included its publication of "departure times" for its daily flights in its brochures and on its web-site, and publication of a form for reservations on a web-site for its air tours of the Grand Canyon. Through its web-site, Vision Air has held out to the public that its flights are available at four specific departure times each day. The carrier also distributed its schedules and promotional materials to hotel bell captains, travel agents, the Las Vegas Tourist Bureau, and at the Las Vegas Airport.

The Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office) wrote to Vision Air, expressing concern that Vision Air's advertising, airport displays, web-site information, and its solicitation material for its flights indicated that the air service offered was scheduled rather than on-demand, requiring the carrier to be found fit as a commuter carrier.

In response to the Enforcement Office's concerns, Vision Air states that it believes that its service can be distinguished from commuter air service for several reasons. While Vision Air recognizes that aircraft size is not indicative of whether service is scheduled or on-demand, Vision Air notes that the size of its aircraft (both nine and nineteen seaters) is within the size limits for on-demand service. Vision Air also contends that although its departure times may be repeated from day to day, its pattern of operations arises from customer requirements, and does not constitute a schedule or scheduled air service under 14 CFR 298.2(t).

The carrier further asserts that its daily departure times do not include a "contractual obligation" to operate at the specific times listed on that schedule, regardless of demand, as would the service of a scheduled carrier. In addition, according to Vision Air, its brochures and promotional material merely designate "approximate times for patrons to board buses at various hotel pick-up points." Vision Air agrees that the carrier distributes informational materials to bell captains, the Las Vegas Tourist Bureau and booking agents, but claims that this does not amount to a distribution to the "general public." The carrier also agrees that its brochures have been made available in a rack at the Vision Air ticket counter at the airport. Vision Air argues, however, that it created these materials to provide boarding passengers with information about their air tour after they have decided to purchase the tour, and that, therefore, these are not sales literature.

Vision Air also asserts that it is not engaged in scheduled air transportation because its point of departure and ultimate arrival after a return flight are the same. Finally, Vision Air explains that the Vision Air web site, which described the carrier as an "on-demand air taxi," was in a developmental state until it was discontinued shortly before the firm received the Enforcement Office's initial inquiry. According to Vision Air, it did not sell any tours through its web site. Vision Air also explains that it never authorized any travel agent or distributor to represent that Vision Air provided scheduled air transportation.

The Enforcement Office has reviewed Vision Air's statements in explanation and mitigation of its actions but does not find the carrier's arguments persuasive. In light of the facts described above, Vision Air is subject to enforcement action for violating the Department's fitness requirements in 49 U.S.C. § 41101 and 14 CFR Part 298 and its advertising requirements in 49 U.S.C. § 41712 and 14 CFR 201.5(a). *See, e.g.*, Order 2002-5-9 (issued May 9, 2002).

With respect to the arguments raised by Vision Air, it is clear here that Vision Air's repeatedly-published and well-disseminated departure times constitute a

schedule. Thus, both the fact that Vision Air's aircraft were within the size limits for on-demand service, as well as Vision Air's argument that the "level of its contractual obligation" should be determinative, are inapposite.

Vision Air's contention that distribution of informational materials to bell captains, the Las Vegas Tourist Bureau, and booking agents does not amount to a distribution to the "general public" is unsupported and without merit. Moreover, we view the materials created and disseminated by Vision Air at hotels, travel agencies and the airport as solicitation materials functioning to promote sales of its flights and tours to the public. This kind of dissemination clearly constitutes the publication of a flight schedule within the meaning of 14 CFR 298.2(e).

What is more, through its own and other web sites, Vision Air for quite some time announced a "Daily Tour Itinerary" with specified departure times. Vision Air thereby held out to the public that its flights were available at seven specific departure times each day. Even after the time when Vision Air avers that its own web-site was apparently no longer in operation, the same information and schedule of flights continued to be offered on the web site "Destination Las Vegas," through which potential passengers were able to make reservations on Vision Air. Thus, through these sites, Vision Air explicitly held out to the public that its flights were available at seven specific departure times each day.

Vision Air is correct that "circle tours" operating from Las Vegas and returning to the same point, may not, in and of themselves, constitute air transportation. However, some of Vision Air's daily flights depart from Nevada and land in Arizona, and thus clearly are in air transportation. Moreover, as an air taxi, Vision Air is an air carrier; therefore, all of its commercial operations constitute air transportation. Therefore, the carrier's arguments about circle tours are misplaced. As stated above, under 14 CFR 298.2(e), any air taxi operator that carries passengers on at least five round trips per week in a market according to a published schedule is classified as a commuter air carrier and must be found fit before operating any air transportation. Since Vision Air has not been found fit to operate as a commuter air carrier, its operations violated 14 CFR Part 298 and 49 U.S.C. § 41101.

Subsequent to the Enforcement Office's letter, Vision Air applied to the Department for a certificate of public convenience and necessity to provide scheduled air service. That application is still pending. The carrier stated that once it was found fit, it planned to "reclassify two of its daily flights as scheduled." In this connection, section 201.5 of the Department's rules provides, *inter alia*, that an applicant for certificate authority shall not advertise, list schedules or accept reservations until the application has been approved by the Department, and that the applicant shall not accept payment or issue tickets for the air transportation covered by its application until the authority has become effective. As stated above, in the absence of a finding of fitness, Vision Air's conduct of commuter operations also violates 49 U.S.C. § 41101, because it lacks the economic authority required to operate such service. By holding out and operating commuter service while its application for commuter authority

was pending, Vision Air violated 49 U.S.C. § 41101 and section 201.5 and engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712.

In further mitigation and explanation, Vision Air also states that it applied for commuter carrier authority when informed by the Federal Aviation Administration (the "FAA") that this would be required in the future of all carriers with operations similar to those of Vision Air. When Vision Air later learned in August 1999 that the FAA would not in fact require additional authority, Vision Air continued to operate as it had but elected to pursue its application for commuter authority nonetheless. According to Vision Air, it assumed that following the FAA change of policy, the Enforcement Office would discontinue its enforcement matter.

While we can appreciate that certain operators may at times be confused about regulatory requirements, this is not an excuse for the non-compliance at issue here, and Vision Air, in particular, should have known that the Department's Enforcement Office, which is part of the Office of the Secretary, and the FAA enforce separate economic and safety statutory and regulatory requirements. Rather than electing to rely upon actions taken solely by the FAA under that agency's authority, it was incumbent upon Vision Air to ascertain from the Enforcement Office the status of the office's enforcement investigation.

The Enforcement Office has carefully considered the facts in this case, including the information provided by Vision Air, but continues to believe that enforcement action is warranted. Vision Air states that it consents to the issuance of this order in order to resolve this enforcement matter, but that it does not agree that it has conducted scheduled air transportation without authorization. Nonetheless, in this connection, the Enforcement Office and Vision Air have reached a settlement of this matter. Aviation Ventures, Inc., doing business as Vision Air, consents to the issuance of an order to cease and desist from future violations of 49 U.S.C. § 41101 and 41712, and 14 CFR 201.5 and Part 298, and to the assessment of \$25,000 in compromise of potential civil penalties. Of that penalty amount, \$12,500 shall be due and payable as follows. The first payment of \$3,500 shall be due within 15 days of the issuance of this order. Three additional payments of \$3,000 each shall be due and payable 30, 60 and 120 days from the date of issuance of this order. The remaining \$12,500 shall be suspended for one year from the date the final civil penalty installment is due, and then forgiven unless Aviation Ventures, Inc., doing business as Vision Air, violates this order's cease and desist or civil penalty payment provisions during that time period. We believe that this compromise assessment is appropriate and serves the public interest. It represents an adequate deterrence to future noncompliance with the Department's licensing requirements by Vision Air and other air carrier applicants, as well as by air carriers and foreign air carriers.

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 this order as being in the public interest;
2. We find that Aviation Ventures, Inc., doing business as Vision Air, violated 14 CFR 298.21(d) and 49 U.S.C. § 41101 by engaging in scheduled air transportation as a commuter air carrier without having first been found fit to do so;
3. We find that Aviation Ventures, Inc., doing business as Vision Air, violated 14 CFR 201.5 by advertising, listing schedules, and accepting reservations for commuter air transportation services prior to approval by the Department of its application to be found fit as a commuter air carrier;
4. We find that that by engaging in the conduct and violations described in paragraphs 2 and 3 above, Aviation Ventures, Inc., doing business as Vision Air, engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712;
5. Aviation Ventures, Inc., doing business as Vision Air, and all other entities owned or controlled by Aviation Ventures, Inc., doing business as Vision Air, and their successors and assignees, are ordered to cease and desist from violations of 49 U.S.C. §§ 41101 and 41712, and 14 CFR 201.5 and Part 298;
6. Aviation Ventures, Inc., doing business as Vision Air, is assessed \$25,000 in compromise of civil penalties that might otherwise be assessed for the violations found in paragraphs 2 through 4 of this order. Of that penalty amount, \$12,500 shall be due and payable as follows. A first payment of \$3,500 shall be due within 15 days of the date of issuance of this order. Three additional payments of \$3,000 each shall be due and payable 30, 60 and 120 days from the date of issuance of this order. The remaining \$12,500 shall be suspended for one year from the date the final civil penalty installment is due, and then forgiven unless Aviation Ventures, Inc., doing business as Vision Air, violates this order's cease and desist or civil penalty payment provisions during that time period;

7. Aviation Ventures, Inc., doing business as Vision Air, shall make the payments set forth in ordering paragraph 6 above 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; and

8. Failure to pay the compromise assessment as ordered shall also subject Aviation Ventures, Inc., doing business as Vision Air, to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with 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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on the World Wide Web at
<http://dms.dot.gov/general/orders/aviation.html>*