**BEFORE THE**
**U.S. DEPARTMENT OF TRANSPORTATION**
**WASHINGTON, DC**

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| **Application of** | ) | |
| | ) | **Docket No. OST-2013-0204** |
| **NORWEGIAN AIR INTERNATIONAL LIMITED** | ) | |
| | ) | |
| **for an exemption under 49 U.S.C. § 40109 and a foreign air carrier permit pursuant to 49 U.S.C. § 41301 (US-EU Open Skies)** | ) | |

# JOINT REPLY OF AIR LINE PILOTS ASSOCIATION, TRANSPORTATION TRADES DEPARTMENT, AFL-CIO AND THE EUROPEAN COCKPIT ASSOCIATION TO COMMENTS ON DOT'S JANUARY 30 NOTICE


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**Attorneys for Air Line Pilots Association**


**Dated: February 21, 2014**

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**JOINT REPLY OF AIR LINE PILOTS ASSOCIATION, TRANSPORTATION TRADES DEPARTMENT, AFL-CIO AND THE EUROPEAN COCKPIT ASSOCIATION TO COMMENTS ON DOT'S JANUARY 30 NOTICE**

The Air Line Pilots Association, the Transportation Trades Department and the European Cockpit Association[1] hereby submit the following reply to the comments that have been filed in response to DOT January 30 Notice. The Notice requested comments on the written "Summary of Information provided by the European delegation" ("DOT Summary") pertaining to the current and planned long-haul operations of Norwegian

[1] The Air Line Pilots Association ("ALPA") and the Transportation Trades Department, AFL-CIO ("TTD") and the European Cockpit Association ("ECA") are referred to jointly as the "Labor Parties."

Air Shuttle ASA and its affiliated companies, Norwegian Long Haul AS and Norwegian Air International.[2]

As shown by Labor Parties' earlier filings in the proceeding, and as shown below, NAS/NAI is using an opportunity created by the ATA to undermine labor standards and principles contained in the laws of Parties to the Agreement in a manner that is inconsistent with the public interest and Article 17 *bis* of the ATA. Given that Ireland has now granted NAI operating authorization, DOT should notify the aeronautical authorities of Ireland that it believes the conditions prescribed in Article 4 of the ATA for the grant of appropriate authorizations have not been met and intends to deny. *See* ATA Article 6 *bis.* Should the European Commission or a Member State seek consultations under ATA Article 6, the Department should be prepared to require the Norwegian Group to respond to the attached Request for Information and Documents (Attachment 1 hereto). In addition, the Department should be prepared to ask Norway, Ireland and the Commission to respond to the question set forth in ALPA's Answer to DOT's Notice (at 16-17).

[2] Norwegian Air Shuttle ASA ("NAS") and its affiliated companies, Norwegian Long Haul AS ("NLH") and Norwegian Air International ("NAI") will be referred to as the "Norwegian Group."

## DISCUSSION

The evidence submitted by the Labor Parties' and other parties in this proceeding demonstrates that approval of NAI's application for a foreign air carrier permit would not be consistent with the public interest and Article 17 *bis* of the ATA. Nothing in the February 13 Comments of NAI (or in any other submission submitted in response to DOT's January 30 Notice) detracts from that conclusion.

### 1. THE RECORD EVIDENCE SHOWS THAT NAS HAS ESTABLISHED NAI AS AN IRISH COMPANY IN ORDER TO AVOID NORWEGIAN LAW.

The record evidence shows that NAS has established NAI outside of Norway to avoid Norwegian laws. ALPA Answer to Application of NAI ("ALPA Answer") at 3 & Exs. 4-6; Declaration of Jack Netskar ("Netskar Dec.") ¶ 12 (filed with ALPA's Answer); Answer of PARAT to DOT Notice ("PARAT Answer") at 3 & Appendix 1.

NAI states that "the EU delegation conveyed explicitly and correctly Norwegian International 'chose Ireland because as an Irish carrier it would have access to significant additional traffic rights not available to it as a Norwegian carrier, access to additional financing options under OECD rules, and access to insurance and financing rebates because Ireland is a Cape Town Convention Signatory.'" Comments of NAI to DOT Notice ("NAI Comments").

As a preliminary matter, it is important to note that no matter what the Norwegian Group's reasons for establishing a subsidiary are, if that act undermines the

labor standards and labor-related principles in the Parties' laws, it is inconsistent with Article 17 *bis*. But the Labor Parties' February 14 Answers to DOT's Notice also showed why each of these asserted reasons is insubstantial and appear to be manufactured only to respond to the opposition to NAI's application. As far as the Labor Parties are aware, these reasons never appeared publicly until this case began. They are inconsistent with news reports that repeatedly gave the reason that NAS would move its long-haul operations out of Norway to avoid Norwegian laws. ALPA Answer at 4 & Exs. 7-9; Netskar Dec. ¶ 10. They are also inconsistent with what the Royal Norwegian Ministry of Transport and Communication says about NAS's reasons: NLH had, in a letter to the Ministry, "been very clear about that the company's planned moving of its long haul activity to Ireland is due to [the fact] that the Norwegian immigration legislation was not amended." PARAT Answer Appendix 2 at 2 (translation). No other reason was mentioned. The legislation that NAS/NLH sought to have amended requires that Norwegian labor legislation applies to employees on board Norwegian aircraft. *Id*.[3] In face of this overwhelming evidence, there can be little doubt that NAS sought to establish its long-haul operations outside of Norway to avoid the application of Norwegian labor laws to its air crew. However, should NAI continue to contest this point, DOT should require the Norwegian Group to provide the information and

[3] Norway has granted NLH a temporary exemption from this requirement that permits it to operate two Irish registered aircraft. These exemptions are scheduled to expire on June 24 and August 24, 2014. DOT Summary at 1.

produce the documents specified in the Request for Information and Documents attached to this Reply.

## 2. ESTABLISHMENT OF NAI AS AN IRISH CARRIER UNDERMINES THE LABOR-RELATED STANDARDS AND PRINCIPLES CONTAINED IN THE LAWS OF NORWAY AND THE U.S.

### A. Norway is a Party to the ATA.

NAI appears to argue that the only law that the Department should look at is EU or U.S. law. NAI Comment at 7-8 and n.21. If that is what NAI is arguing, then it is incorrect on this score. The term "Party" in the Agreement means "the United States, the European Union and its Member States, Iceland and Norway." U.S-EU (Iceland, Norway) Air Transport Agreement, June 21, 2011(emphasis added).[4]

### B. NAS's Establishment of NAI as an Irish Carrier Will Undermine the Standards and Principles in Norway's Employment Laws.

ALPA has shown that "but for" the ATA, NAS could not own and control a subsidiary in Ireland. ALPA Answer at 7-8. The use of this opportunity afforded by the ATA is not to be used to undermine the standards and principles in Norway's laws. *Id*. The very fact that NAS is attempting to move its long-haul operations out of Norway undermines the standards and principles in Norway's labor laws.

NAI asserts that the European delegation provided DOT with "detailed information on salaries and working conditions that clearly demonstrate that

[4] This document is available at http://www.state.gov/e/eb/rls/othr/ata/i/ic/170684.htm.

Norwegian will, in fact, promote – not undermine – 'high labor standards.'" NAI Comments at 4. They also claim that "EASA regulations prescribe the working conditions on all Norwegian International flights" and that, "in conformity with the Rome Convention and EU Regulation 593/2008, Norwegian International applies the law of the country where an employee is hired and based to that person's employment relationship with the Company." NAI Comments at 7-8. NAI then goes on to assert that "the majority of employees employed by Norwegian International's affiliated companies are unionized and, that as the EU delegation recognized . . . the Norwegian group has 'no tradition of discouraging unionization.'" *Id*. at 8.

These assertions do not hold up under scrutiny.

The European delegation did not provide the U.S. with "detailed salary and working conditions." The salary information provided by the EU delegation was a chart that showed what purported to be "dollarized average gross payments" for certain flight crew categories of Norway, Spain, Thailand and the U.S. DOT Summary at 2. There is no source given for the numbers and there was no indication whatsoever as to how the numbers were calculated. As ALPA and ECA pointed out, the numbers appeared to be something other than total compensation and, at least for pilots, a first step in evaluating the total compensation would be to reduce the Thailand numbers and raise the Norway, Spain and U.S. numbers by 20-25 percent to account for pension and

other social costs. ALPA Answer to DOT Notice at 7-8; ECA Answer to DOT Notice at 4-5.

As for working conditions, there was no mention of them in the information presented by the European delegation. All that NAI offers here is that EASA regulations would prescribe some working conditions during NAI's flights. But the EASA regulations only have to do with safety requirements, not with working conditions. Commission Regulation ("EU") No. 1178/2011, 3 Nov 2011 (laying down technical requirements and administrative procedures related to civil aviation aircrew). "Working conditions" or "conditions of employment" as the idea appears in Norwegian and U.S. labor law, embrace a much wider range of matters: e.g. retirement programs, medical coverage, the way work is performed, vacations, days off, requirements for layover and training accommodations, bidding rights and the like. In addition, the EASA safety rules, as with FAA regulations, are minimum standards that can be improved upon in collective bargaining. The NAI flight crew will be deprived of bargaining over these matters by virtue of NAS's unilateral decision to move its long-haul operations out of Norway and put them under an Irish AOC. This undermines the labor standards and principles in Norway's labor laws.

The assertion that the Norwegian Group has "no tradition of discouraging unionization" similarly lacks merit. PARAT – the union for NAS's pilots and flight attendants – has convincingly shown that NAS has engaged in a systematic effort in the

last few years to discourage unionization and this effort has resulted in the portion of NAS employees who are unionized dropping from nearly 96 percent to under 50 percent. PARAT Answer at 5 & Appendix 2. And, of course, no NLH/NAI aircrew are represented by unions: the employment relationship is set up in a way to preclude that result. Finally, the European delegation did not "recognize" that NAS had "no tradition of discouraging unionization." The delegation merely passed on information that NAS had provided it. It turns out that the information was misleading or, more accurately, incorrect.

NAI's claims that it "applies the law of the country where an employee is hired and based to that person's employment relationship to the company," NAI Comments at 7-8, and that it recruits pilots and flight attendants "in the local markets where they are based," *id*. at 6, are also problematic. These statements raise more questions rather than provide answers and highlight the problems with the Norwegian Group business model. In which "country" are the pilots "hired and based?" Is it the law of one, two, or even more countries that applies to the employment relationships? The long-haul pilots must all hold EASA licenses and European passports. Answer of ECA to NAI Application at 5 & attached NLH/NAI recruitment advertisement. So they are recruited and maybe even "hired" in one or more European countries. But their employment contracts are with a Singapore employment company and the contracts are governed by Singapore law. So, are they "hired" there? Basing is another matter, and it certainly

appears that wherever NLH/NAI pilots might be hired, they are not, unless by happenstance, based there. According to the recruitment advertisement the pilots will be based not in Europe, not in Singapore (where, incidentally, none of the Norwegian Group even offers air service), but in Thailand. *Id*. Similarly, the NLH/NAI pilots are not recruited in the local markets where they will be based as they are recruited in Europe, not in Thailand. So there is no "country" where a pilot is "hired and based." So which country's (or countries') laws apply to a pilot's relationship with the company? And if it is more than one country's laws, to which aspect of the employment relationship does each country's law apply? Unless DOT does not grant NAI's application at this juncture – which it should not – the Department should find out the answers to these questions before it makes a final determination on the application. *See* attached Request for Information and Documents.

## 4. NAI DOES NOT SATISFY ALL THE APPLICABLE REQUIREMENTS FOR RECEIVING A FOREIGN AIR CARRIER PERMIT.

NAI suggests that it has satisfied all the applicable requirements to receive a foreign air carrier permit that its application is consistent with precedent and that DOT should "now promptly grant" its permit. NAI Comments at 3, 9. But the very authority NAI cites in support of these arguments shows that where it is appropriate – as the record in this proceeding amply shows it is – DOT is required to take a close look to determine whether the grant of a particular permit is in the public interest.

Thus, NAI cites (1) a House report that says that "[i]n most of these cases, there are no substantial issues," and so a grant of authority is in the public interest in those cases, NAI Comments at 9; (2) Article 4 of the ATA which refers to the "'conditions . . . normally applied to the operation of international air transportation,'" *id*. at 10; and (3) Article 6 *bis* of the ATA which states that a Party will not look into an applicant's fitness and ownership unless the Party has "a specific reason for concern . . . that the conditions prescribed in Article 4 . . . have not been met," *id*. As ALPA and ECA have shown, NAI's application is not "most cases," that the Norwegian Group business model provides a "specific reason for concern," and that "the laws and regulations normally applied" contain a public interest test that dictates that NAI's application should not be granted.

While the ATA established a recognition proceeding for fitness determinations, fitness is only one criterion an applicant must meet. Consistency with the public interest is another, as is consistency with the ATA, and there is no mutual recognition procedure for these determinations.

As for NAI's assertion that the application is consistent with precedent, the response is simple: There is no precedent for NAI's application. This is the first time DOT has been presented with clear evidence of an applicant whose business plan, if allowed to proceed, would undermine the principles of Article 17 *bis* of the ATA.

**5. THE LABOR PARTIES DO NOT CONTEND THAT THE ATA CREATED NEW LABOR STANDARDS; RATHER ARTICLE 17 *BIS* WAS DESIGNED TO DETER AND PREVENT THE USE OF OPPORTUNITIES MADE AVAILABLE BY THE AGREEMENT TO UNDERMINE THE PARTIES' EXISTING LABOR STANDARDS AND LABOR-RELATED PRINCIPLES.**

NAI argues that Article 17 *bis* "does not create new labor standards or override the existing laws, regulations, and practices of either the EU and its Member States or the U.S. that address airline employment and labor issues." NAI Comments at 8. ALPA and ECA do not contend that it does.

Rather, we contend that Article 17 *bis* is intended to do is just what it says – to deter and prevent the use of opportunities made available by virtue of the ATA to undermine the existing laws, regulations and practices of the Parties that address labor and employment law.

The negotiating history of Article 17 *bis* is set forth in ALPA's Answer. ALPA Answer at 7-13 & Exs. 16-24. This history is supplemented and fully corroborated by the Declaration of Martin Chalk ("Chalk Dec.") (Attachment 2 hereto), the President of the European Cockpit Association from 2005 to 2011, a period that covers the time in which the labor concerns addressed by Article 17 *bis* were considered at length by the EU and U.S.

The ECA was a stakeholder that participated as a member of the EU delegation at every negotiating session and every Joint Committee meeting during that time period

and Mr. Chalk either participated personally or oversaw ECA's participation in meetings. He demonstrates that:

(1) The elimination of the nationality clause and the "European carrier concept" raised a "question of major importance for airline workers both in the EU and the U.S." because the "EU had no EU-wide law that governs critical aspects of the employment relationship for airline workers." Chalk Dec. ¶ 5.

(2) Of particular concern to EU and U.S. airline workers was that the EU had no EU-wide law that governed the selection of employee representatives or the negotiation and enforcement of collective bargaining agreements. These matters were, instead, left to the national laws of the Member States. *Id*. ¶¶ 5, 6.

(3) The labor representatives to the negotiations were concerned that this fragmented legal structure could lead to "forum shopping" by European airlines to take advantage of more favorable labor standards in another Member State. *Id*. ¶ 13.

(4) The EU-wide laws "were perceived as part of the problem because they were complex, vague, and difficult to apply, and served to encourage, rather than discourage," the problem that the labor parties sought to address. *Id*. ¶ 13.

(5) The EU examined the fragmentation/forum shopping issues closely, both in two special "labor forms" and in an analysis undertaken by a specially appointed expert. *Id*. ¶ 14.

(6) In order to be responsive to the fragmentation/forum shopping concern, the EU proposed including a provision in the ATA that addressed this issue. The EU proposal, after ratification at the negotiating table, eventually became Article 17 *bis* of the Agreement: a "succinct but flexible provision that was designed to address the forum shopping concern." *Id*. ¶ 15.

(7) Article 17 *bis* "has, and had, no other function than to prevent an airline using their preferred labor regulations in one country from undermining the labor rights in another." *Id*.

Mr. Chalk concludes with a question: If Article 17 *bis* is not clearly designed to prevent forum shopping, what is it intended to prevent?

In short, we are asking to have the Agreement interpreted in accord with its plain meaning and intent.

We would encourage the European Commission, Norway and Ireland to reconsider their views in light of this negotiating history and in view of the fact that many components of the Norwegian Group's "story" that the European delegation delivered on its behalf are incomplete, misleading and/or false.

## 6. THE PARTIES SUPPORTING NAI'S APPLICATION DO NOT ADDRESS THE CORE CONCERNS OF ALPA AND ECA.

The supporting third-parties to NAI's application (City of Orlando, Visit Orlando, Orlando Airport, Orange County, Florida; Broward County Aviation Department; Washington Airports Task Force: Port of Oakland; Travel Technology Association; Irish Minister of Transport; Norway's Transport Ministry; the European Low Fare Airline Association Federal Express Corp.) do not address, the fundamental labor concerns at the core of the Labor Parties' opposition.

One naturally expects the airports, their communities, and travel industry groups to favor new service because these serviced are perceived to benefit them. But none of these parties have addressed the undermining of labor standards that the Norwegian Group's business plan would bring. Moreover, none has addressed the fact that implementation of Norwegian's business plan would put U.S. carriers such United, Delta, and American and their employees at a competitive disadvantage. The Labor

Parties have not opposed the many applications of EU carriers for new authority which the ATA has made possible but we are confronted here with a business model that the Agreement was designed to deter. The Department should view these expressions of support to be inapposite.

Similarly, the Irish and Norwegian transport ministries do not meaningfully address the Labor Parties' labor concerns. In his letter, the Norwegian Transport Minister makes a passing reference to the labor article and suggests that whatever the Labor Parties' concerns may be they can be handled after NAI's application is approved. This position seems at odds with the Minister's letter to the European Commission discussing the labor fragmentation challenges confronting the EU and its Member States. ALPA Answer Attachment 2 (Ketil Solvik-Olsen letter to Siim Kallas) ALPA Answer to DOT Notice at 13). The concerns set out there would seem to be arguments that would support addressing the challenges before, rather than after, the Norwegian Group model is placed in operation in the trans-Atlantic market.

The Irish letter is devoted in large measure to discussing the Irish authorities' safety record. The Labor Parties' recognize the IAA's record of competence with respect to aviation oversight and have not raised safety oversight issues in this proceeding.

The European Low Fare Airline Association ("ELFAA") counts NAI's parent, Norwegian Air Shuttle, as a member. *See* http://www.elfaa.com/members.htm, last

visited Feb. 21, 2014. It dismisses the concerns of the opponents of NAI's application as "defensive, protectionist concerns" which are outweighed by a "desperate[] need [for] the availability of low fares," ELFAA letter at 3, but provides no legitimate reason for sweeping Article 17 *bis* aside.

Finally, with respect to the filing by Federal Express Corporation, ALPA understands, and is sympathetic to, the fact that FedEx's international business is built upon the existence of liberal traffic rights for cargo as embodied in Open Skies agreements generally. But the Parties to the ATA expressed their intent that the opportunities made available in the Agreement are not to be used in a particular way. NAI's business plan is unique and unprecedented. Denial of its application should not affect legitimate expectations of other carriers under the ATA or other air service agreements.

**CONCLUSION**

We recognize that fare competition can be a good thing, so long as it is carried out in accordance with law. But as shown in the Labor Parties' filings throughout this proceeding, the Norwegian Group's service proposal is starkly at odds with the U.S.-EU Air Transport Agreement.

The CEO of NAS, Bjorn Kjos, was recently quoted touting the benefits of low-cost service verses the potential adverse effect on the quality and quantity of airline jobs saying, "If I was a politician, I wouldn't give a shit about the airline side." Gwyn

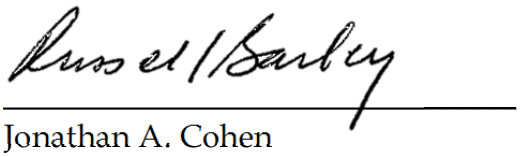
Topham, *How are Norwegian Air Shuttle's low-cost US flights financially possible?*, The Guardian, Feb. 4, 2014, at 3.[5]

DOT should not accept Mr. Kjos's invitation. Such an approach is plainly unacceptable.

DOT should notify the aeronautical authorities of Ireland that the conditions prescribed in Article 4 of the ATA for the grant of appropriate authorizations have not been met and that DOT intends to deny the application. Further, should the EU or a Member State seek consultations under Article 6 of the ATA, DOT should require the Norwegian Group to respond to the attached Request for Information and Documents. In addition, DOT should be prepared to ask the European Commission, Norway and Ireland to respond to the information requests set forth in ALPA's Answer to DOT's Notice.

Respectfully submitted,

[signatures on following page]



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[5] This document is available at http://www.theguardian.com/business/2014/feb/04/norwegian-air-shuttle-low-cost-gatwick-bjorn-kos.

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February 21, 2014

**CERTIFICATE OF SERVICE**

I certify that I have, on this 21st day of February, 2014, served the foregoing Joint Reply of Air Line Pilots Association, Transportation Trades Department, AFL-CIO, and

the European Cockpit Association and to Comments on DOT's January 30 Notice by causing a copy to be sent by electronic mail to the addresses identified below:

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Russell Bailey

# ATTACHMENT 1

**REQUEST FOR INFORMATION AND DOCUMENTS**

General Instructions

1. The following definitions of terms used in this request apply:

A. "Documents" is used in the broadest sense and includes, but is not limited to, all writing, communications, drawing, graphs, charts, records, audio and visual recordings, and all written, printed, typed, electronic, computerized or graphic matter or other tangible things, of every kind and description, however produced or reproduced, whether draft or final, original or reproductive, signed or unsigned, in the possession, custody, or control of Norwegian Air Shuttle AS, Norwegian Long Haul AS and/or Norwegian Air International Limited or their respective officers, agents, employees, members, partners, attorneys, experts, consultants, participants, stakeholders, other representatives, and any other person acting on behalf of it.

B. "Concerning" means that which refers to, mentions, relates to, reflects, contains, embodies, summarizes, describes, discusses, responds to, has been made available to, comments upon or in any manner pertains to the subject matter of the request in whole or in part.

C. "And" and "or" mean "and/or" and "any" and "all" mean "any and all." "Including" means "including but not limited to."

D. Terms in the singular include the plural and terms in the plural include the singular. The present tense includes the past and future tenses.

E. "Norwegian Group" refers to Norwegian Air Shuttle AS, Norwegian Long Haul AS, Norwegian Air International Limited and/or any corporate affiliates as well as their officers, directors, employees, agents, members, partners and other natural persons or entities acting on behalf of them.

F. "Pilots" means airline pilots who are employed directly by Norwegian Group or employed under contracts with Global Crew Asia Pte., Limited, or another crew leasing company, for Norwegian Group as the client to operate Norwegian Group aircraft.

G. "Communication" means any oral or written utterance, notation, or statement of any nature by and to whomever made, including but not limited to correspondence, conversations, agreements, e-mails, faxes, and other understandings between or among two or more persons.

G. "Application" means the pleading captioned "Application of Norwegian Air International Limited for a Foreign Air Carrier Permit" in Docket OST-2013-0204, plus all of its exhibits, amendments and supplements.

Documents to be Provided

1. All documents concerning the discussion to cease having the long-haul operations of the Norwegian Group performed by a Norwegian air carrier.

2. All documents concerning the decision to have the long-haul operations of the Norwegian Group performed by an Irish air carrier.

3. All documents concerning the decision to have the Pilots who work aboard the long-haul flights of the Norwegian Group be covered by an employment contract governed by Singapore law.

4. All documents concerning the decision to have the Pilots who work on board the long-haul flights of the Norwegian Group based in Thailand.

5. All documents concerning the scheduling of Pilots and provision of hotel and other accommodations for Pilots in connection with Norwegian Group's purported Bangkok "base," and concerning the scheduling of Pilots and provision of hotel and other accommodations for Pilots during "Extended Outstation Layovers" in Europe.

6. All documents concerning communications between the Norwegian Group with Thailand authorities about the establishment of a Pilot "base," including the provision of Thai work and/or residence permits for Bangkok-based Pilots.

7. All documents concerning whether Norway's laws would permit the operation of Norwegian Group aircraft staffed by flight crew employed by a Singapore company.

8. All documents concerning which countries' laws apply to the aspects of the various employment relationships between the Pilots who work on board the long-

haul flights of the Norwegian Group, on the one part, and 1) Global Crew Asia Pte., Limited, and 2) any corporate entity of the Norwegian Group on the other.

9. All documents concerning the "dollarized average gross compensation payments" that the European delegation provided to the U.S. delegation at the January 8, 2014 meeting of the U.S.-EU Joint Committee.

Information

Please provide a clear statement of which countries' laws apply to the specific aspects of the employment relationship between the pilots who work on board the aircraft in the long-haul operations of Norwegian Group, on the one part, and (1) Global Crew Asia Pte., Limited, or (2) any corporate entity within the Norwegian Group, on the other.

# ATTACHMENT 2

Declaration of Martin Chalk

1. My name is Martin Chalk. I joined British Airways in 1988 after a short spell with the Royal Air Force. I have flown regional turboprop, short-haul narrow body and long-haul wide body aircraft including the Boeing 747-400 and currently the Airbus A380. From 1993 I have been an elected representative within the British Airline Pilots' Association, BALPA, serving at local, company, negotiating board, national board and European levels.

2. From 2005 to 2011 I served as the President of the European Cockpit Association. ECA is the regional body for professional pilots, representing over 38,000 pilots in nearly 40 European Countries. It is responsible for all technical and political representation of professional pilots' interests at the European Institutions.

3. During the negotiations that led to the EU-United States Air Transport Agreement and the 2010 Protocol that amended that Agreement, ECA was a designated labour representative on the European delegation. In common with the United States, the European Commission draws expert advice when negotiating air transport agreements from all parts of the aviation industry, including labour. During the time I was President of ECA, I oversaw the development of ECA's position on the various matters discussed by the Parties to the negotiations, including, specifically, how the matters of concern to ECA and other labour parties should be addressed in the Agreement. This task included meeting or conferring frequently with the negotiators of various Parties to the negotiations. In particular, I met or conferred frequently with the lead negotiators for the European delegation – Mr. Daniel Calleja – and the U.S. delegation – Mr. John Byerly. I also met and conferred with the representatives of many of the Member State Parties to the negotiations.

4. Early on in the negotiations, the two sides agreed that, if an agreement was reached, it would include the right of any airline of the European Union to serve the United States from any point in Europe and would eliminate the "nationality clauses" that were included in all the existing bilateral agreements between European countries and the U.S. This represented a potentially significant addition of rights for EU airlines because the existing bilateral agreements tied the right to serve the U.S. to service from the home country of the EU airline and the "nationality clauses" prevented the nationals of one EU Member State from owning and controlling the airlines of another Member State. This idea of eliminating the nationality clauses and allowing EU airlines to operate from any point in Europe to any point in the U.S. was generally known as the "European

carrier concept." It was crucial to allow the sort of consolidation in Europe from which the U.S. industry had benefitted following deregulation in the late 1970s.

5. The proposal to eliminate the nationality clauses raised a question of major importance for airline workers both in the EU and in the U.S. The EU had (and still has) no EU wide-law that governs critical aspects of the employment relationship for airline workers. In particular, there was no EU-wide law that governed either the selection of an employee representative for a particular category of airline employee (e.g., pilot or flight attendant), or the negotiation or enforcement of collective agreements.

6. The lack of an EU law on these matters left them to the national laws of individual Member States. Frequently (in fact, maybe in all cases), these national laws did not apply beyond the territory of the individual Member State.

7. The Parties to the air services negotiations did not propose to change this employment law framework. In other words, although an agreement might create a "European carrier," it would leave in place the existing national employment laws.

8. The labour representatives were concerned that this fragmented legal structure could lead to "forum shopping" by European airlines to take advantage of more favorable labour standards in another Member State. In particular, we were concerned that the airline of one country might move its operations to another country or might set up a subsidiary in another country to conduct some of the parent company flight operations. We were concerned that an agreement could set up a regulatory framework that would allow for "flags of convenience' such as those that dominate the maritime sector. We raised these concerns repeatedly with the negotiators.

9. The ATA was signed in June 2007. This quickly became known as the "Frist Stage Agreement" because the Agreement stated the Parties' intent to enter into negotiations to amend the Agreement.

10. In late 2007, almost immediately after the First Stage agreement was reached, British Airways (BA) established a wholly-owned subsidiary in France. This airline – the wryly named "Open Skies Airlines" – operated only from continental Europe to the U.S. The British Airline Pilots' Association (BALPA) sought to have its collective bargaining agreement with BA extended to the pilots who were employed by Open Skies. BA refused this request and BALPA

threatened industrial action and eventually sued BA asking the court to find that BA was required to negotiate with it over the terms and conditions of employment for the Open Skies pilots.

11. BA responded to the suit by arguing that the "right of establishment" provision s in European treaty law gave them the right to establish Open Skies Airlines in France and that the operation was beyond the scope of British labour law and the existing collective agreement between BA and BALPA. In light of previous case law (Viking & Laval), BALPA withdrew its suit.

12. When in mid-2008 the U.S. and the European Parties began negotiations to amend the ATA, the labour representatives – including ECA, ETF on the EU side, and ALPA and the AFL-CIO on the U.S. side – strongly pressed the case that any amendments must address the labour issues created by the First Stage ATA. The history of those efforts is set out in the Answer of the ALPA in this proceeding. We pointed expressly to Open Skies Airlines as an example of the type of business operation that was of concern to us.

13. The labour representatives were concerned that the mobility of airline operations could be used to undermine the labour standards in the national laws of Member States through forum shopping. The labour representatives were not concerned primarily about the possibility that forum shopping might undermine EU laws. The EU laws were perceived as part of the problem because they were complex, vague, difficult to apply, and seemed to encourage, rather than discourage, the problem that the labour representatives sought to address. These views were communicated by ECA to the EU negotiators on many occasions.

14. As described in ALPA's answer to NAI's application, the European Commission worked to explore labour's concerns. The Commission held two labour forums to address the concerns, and appointed an expert – Mr. Claude Chêne - to examine the concerns in detail. The forum shopping/ flag of convenience concern was a central issue in both the labour forums and Mr. Chêne's report.

15. In the report, one overriding problem was identified. The issues of negotiation and enforcement of a collective labour agreement and the election of representatives were excluded by current EU Treaties from being legislated for at EU level. It therefore suggested palliative measures which might help alleviate those concerns including the possibility of a preventative clause in the EU-U.S. second stage agreement. Only a meaningful mechanism to address the forum

shopping concern would have been acceptable to labour on either side of the Atlantic. The Commission put a proposal on the table that eventually became Article 17 bis. This provision was a succinct but flexible provision that was designed to address the forum shopping concern. Paragraphs 18 and 19 of the Memorandum of Consultations that accompanied the 2010 Protocol amending the ATA show that both the EU and the U.S. recognized that the issue which was being addressed was the mobility/fragmentation issue posed by the first stage ATA. (A copy of the MOC is attached.) As the Commission was seeking to reduce the opposition of U.S. Labour to relaxation of U.S. ownership and control of airlines legislation, a key EU negotiating target, this was designed to be both meaningful and address directly the forum shopping concept. It has, and had, no other function than to prevent an airline using their preferred labour regulations in one country from undermining the labour rights in another.

16. The British Airways OpenSkies Airline example was often quoted as the challenge which needed addressing. The NAI example is worse, in that it exports the jobs not just to a more management friendly EU State, but to a new employment model in another part of the world altogether. If Article 17 bis is not clearly designed to prevent such a construction for employment; what sort of arrangement is it designed to prevent?

17. I declare under penalty of perjury under the laws of the United State, that the foregoing is true and correct to the best of my belief.

Executed in Ruislip, United Kingdom on February 20, 2014.

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Martin Chalk