TTD A BOLD VOICE FOR TRANSPORTATION WORKERS

STATEMENT OF
EDWARD WYTKIND, PRESIDENT
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

BEFORE THE
HOUSE AVIATION SUBCOMMITTEE
ON THE
U.S.-E.U. OPEN SKIES AGREEMENT
and the
"ACTUAL CONTROL" OF U.S. AIR CARRIERS
NOTICE OF PROPOSED RULEMAKING

February 8, 2006

Let me first thank you Mr. Chairman and Ranking Member Costello for holding this hearing and for inviting us to testify on the Department of Transportation's (Department or DOT) proposal to make significant and fundamental changes to the rules governing foreign control of U.S. airlines. The Transportation Trades Department, AFL-CIO (TTD) [1] and our affiliated unions, including the Air Line Pilots Association, who's President, Captain Duane Woerth is also testifying today, have a vested and direct interest in the Department's notice of proposed rulemaking (NPRM). For reasons I will expand on in a moment, TTD is opposed to this NPRM and we are already on record with the Department urging that this proposal be withdrawn. Hopefully, the Department will heed the bi-partisan warnings that Members of Congress have clearly sent and not finalize the dramatic changes it proposed just a few months ago.

Bipartisan Legislation Gaining Momentum

On this point, I want to thank Mr. Oberstar, the Ranking Member of the full Committee, and Mr. LoBiondo, a distinguished member of this Subcommittee, for introducing legislation (H.R. 4542) that would bar the Department from moving to a final rule on foreign control for one year after enactment. And I want to thank Chairman Young and the Ranking Member of the Subcommittee, Rep. Costello, for supporting and co-sponsoring this legislation. The bill would also require the DOT to submit a report to Congress 90 days after enactment on the consequences of allowing greater foreign control over U.S. airlines. This legislation now has 115 cosponsors including 22 Members of this Subcommittee.

---

[1] TTD is the transportation umbrella organization for the AFL-CIO and represents 29 affiliated unions. Specifically, our aviation affiliates are the: Air Line Pilots Association; Association of Flight Attendants-CWA; Communications Workers of America; International Association of Machinists and Aerospace Workers; International Federation of Professional and Technical Engineers; National Air Traffic Controllers Association; Professional Airways Systems Specialists; and the Transport Workers Union of America.

Similar legislation (S. 2135) has been introduced in the Senate by Senator Daniel Inouye (D-HI), the Co-Chair of the Senate Commerce Committee.

Separate from the legislation, 85 Members of the House have voiced their "strong opposition" to the NPRM, specifically asking the Secretary to withdraw the proposal and noting that the "Department has overstepped its authority." A similar letter has been sent by United States Senators Frank Lautenberg, George Voinovich, Daniel Inouye, John Corzine and Mike DeWine.

The growing bipartisan opposition to the Administration's proposal is indeed warranted and quite frankly not surprising given Congress's traditional role in shaping aviation policy. More to the point, and as explained below, this proposal is directly contrary to the statute and goes beyond the authority Congress has granted to DOT.

NPRM Threatens Industry, Jobs

From a policy perspective, implementation of the NPRM would weaken the aviation industry at the worst possible time. It would directly threaten the jobs and rights of the hundreds of thousands of workers we represent as companies are given yet another tool to seek out and utilize the lowest cost labor available. National security concerns, despite the DOT's claims to the contrary, remain unaddressed and there is a real question of whether carriers controlled by foreign interests will be as willing to do their share in meeting the nation's national defense priorities. The proposal itself appears unworkable. Splitting control of an airline between U.S. and foreign citizens not only has no support in the law, but creates a multitude of operational problems that raise a number of questions that the DOT should be forced to answer.

And let me just echo the frustrations of several Members of Congress that this proposal was drafted and introduced with no apparent input from Congress and specifically this Committee. While we are pleased the Subcommittee has made it a priority to hold this hearing, it does not serve as a substitute for the substantive input and consultation that DOT should have pursued as it sought to undertake such a significant change in aviation policy. Given the upheaval and dislocation we have seen in the industry over the past several years, workers cannot be asked to simply accept this dramatic departure from longstanding rules that from our perspective would only create additional problems for U.S. aviation.

The burden is on the Administration to make the case that allowing foreign entities to control U.S. airlines serves the best interests of the aviation industry, its employees and our nation. We respectfully submit that to date the Department has not met this burden and instead has simply asserted an unsupported and flawed argument that relaxing foreign involvement rules will spur foreign investments in U.S. airlines that in turn will somehow save the industry. The problem with the Department's stated rationale is that it is not supported by any real and persuasive evidence. The financial challenges confronting the industry are well known – fuel prices have skyrocketed, pension obligations must be met, security costs and fees have increased, a system capacity crisis is looming, and air carriers have largely been unable to price their product at a level sufficient to achieve and maintain profitability. It is hard to understand how allowing foreign interests, including foreign airlines, to control U.S. carriers would solve any of these problems.

The fact is that U.S. markets are well positioned to offer capital to U.S. airlines and existing rules allow for significant foreign participation and investment. There has been no demonstration that U.S. airlines with a workable business plan have not been able to secure adequate capital under the current ownership and control rules. In fact, United Airlines and U.S. Airways were both able to exit bankruptcy with significant financing without needing a change to the current foreign ownership rules as the Administration has proposed. While DOT may well be trying to provide a benefit to foreign interests, that should obviously not be the objective that drives the Department's international aviation policy.

I do find the Administration's supposed concern for ensuring that U.S. airlines have sufficient capital a bit odd. After all, this is the same Administration that did everything it could to block the emergency cash assistance Congress passed to reimburse the air carriers after they were grounded by our government in the days following the September 11 terrorist attacks. Then the Administration did everything it could to refuse to approve federal loan guarantees that this Committee specifically authorized in the wake of September 11. As you know, over White House objections the Committee provided these badly needed loan guarantees to deal with the longer term economic consequences that the attacks had on our nation's airlines. In the end, of the $10 billion authorized for this program, only $1.6 billion was actually approved by the Administration's Air Transportation Stabilization Board. Finally, Congress had to step in again over Administration opposition to provide extended jobless benefits for the more than 100,000 airline, Boeing and other related industry employees who, through no fault of their own, were among the first economic victims of the September 11 attacks. This record of intransigence and inaction calls into question the true motives behind the Administration's NPRM since its record of assisting the airlines and their employees is suspect at best.

Real Motives Behind NPRM

The real motivation behind this proposal is simple, but quite frankly has been obfuscated by the DOT: to placate the European Union in an attempt to secure a new aviation services agreement. In short, the Administration is giving away too much with this NPRM and is on the verge of making yet another bad trade deal that does not serve the long-term interest of the industry and its workers.

While there is nothing inherently wrong with a new open skies pact, and we have supported sound agreements in the past, the DOT should acknowledge the motivations for issuing this NPRM and have an open debate on whether the proposed agreement with the EU merits allowing foreign entities to control U.S. airlines. Instead the DOT insists that this change would have been proposed regardless of the status of the EU-U.S. talks. I guess the Administration would have us believe it was just coincidental that the NPRM was issued at a critical time in the negotiations – just as the EU delegation team was to return to Washington for final talks. [2]

[2] It is also significant that according to a submission in this docket, Jeffery Shane, Under Secretary for Policy, briefed members of the U.S. and European delegations negotiating the agreement on the NPRM during a "break-out" session from the negotiations. This briefing occurred the same day that the NPRM was published in *the Federal Register* and apparently these negotiators were the first to receive a formal briefing on the proposal.

The Department wants to have it both ways: putting foreign control on the negotiating table as a "carrot" to the EU, but then seeking to hide this reality by claiming altruistic policy motives. This is simply rhetorical fiction and interferes with a realistic evaluation of the NPRM and an honest determination of what is truly at stake. If this proposal is, as most strongly believe, a sop to the EU in an effort to secure an aviation deal, than Administration officials should "come clean" and explain what our country is getting from the EU in return.[3] Even if we were wrong on this point – and we're certain we are not – the NPRM fails on the simple merits for the many reasons we have pointed out in our testimony.

NPRM Runs Afoul of Statute

The fact is, and putting aside for a moment the broader policy problems with this proposal, the Department's NPRM runs directly counter to the plain language and meaning of the statute. The mandate is very clear: **U.S. carriers must be "under the actual control of citizens of the United States."** 49 U.S.C. § 40102(15)(C).

The purpose of the NPRM is equally clear: to allow foreign interests to control the core commercial components of a U.S. carrier's business. This would encompass key areas of a carrier's operation including "choice of markets, type of equipment and rate-setting." 70 Fed. Reg. 67394. It is those decisions and those areas that define what a carrier is and how it operates. To be considered a U.S. airline, U.S. citizens must only retain actual control of four specific areas:

> (1) The carrier's organizational documents;
> (2) The carrier's decisions regarding participating in the Civil Reserve Air Fleet (CRAF);
> (3) The carrier's compliance with security requirements specified by the Transportation Security Administration; and
> (4) The carrier's adherence to safety requirements imposed by the Federal Aviation Administration. 70 Fed. Reg. 67396.

In short, the Department is suggesting that carriers can be bifurcated; the commercial part of the company controlled by foreign interests and the safety, security, and CRAF areas supposedly controlled by U.S. citizens. The problem with this approach (in addition to the operational problems discussed below) is that it isn't supported in statute. Again, the law requires carriers to be under the "actual control" of U.S. citizens – the statute does not say that only safety, security and CRAF decisions must be under the actual control of U.S. citizens and the rest directed by foreign citizens.

[3] It is also significant that shortly after this proposal was issued, some European interests claimed that the proposal did not go far enough and urged DOT to institute broader modifications to U.S. foreign control and ownership limits. Obviously, we are urging Congress and the DOT to go in the opposite direction.

Congress Codifies Control Standard

It is also relevant that in 2003, Congress, as part of the Vision 100 – Century of Aviation Reauthorization Act (P.L. 108-176), specifically amended the statute to specify and reaffirm that U.S. citizens must exercise "actual control" over U.S. airlines. The Conference Report accompanying the legislation states that the amendment ensures that **"to qualify as a U.S. airline, it must be under the actual control of citizens of the U.S."** H.R. Conf. Rep. No. 108-334, at 139 (2003). There is nothing in legislative history, let alone the statute, suggesting that the requirement of actual control could be satisfied if U.S. citizens only controlled four specific areas of the carrier's operation. In other words, the DOT is ignoring the plain meaning of the statute and doing so with little regard for the role of Congress in shaping U.S. aviation policy.

The DOT is attempting to characterize this proposal as simply a change in how it interprets what constitutes "actual control." In reality, the NPRM goes significantly further than that approach by permitting foreign interests to exercise actual control over core economic aspects of a U.S. carrier. We urge Congress to reject the Administration's blatant attempt to circumvent the law.

This separation of responsibility scheme embodied in the NPRM is simply a facade the Department is using to deflect expected criticism its proposal has garnered. The fact is that under this proposal the individuals responsible for the specified areas could have to report to, and could be terminated by, a foreign executive. One has to wonder how much "control" these individuals would in fact exercise if their decisions are opposed by their foreign superiors. It is absolute folly to think that a U.S. carrier will make decisions that are contrary to the views asserted by its controlling foreign investor. This phony firewall between a U.S. carrier and its chief foreign investor is an attempt by our government officials to tell both Congress and the EU, respectively, what they need to hear. I suspect there are few in Congress who truly believe that a foreign investor who obtains control over the commercial aspects of a U.S. airline would passively stand back and not assert authority and control over other key areas.

Safety & Security Concerns

Furthermore, safety and security concerns are not issues that can or should be parceled out and separated from the day-to-day commercial activities of the carrier. As ALPA correctly points out, these matters must be integrated and accounted for in all aspects of a carrier. It is simply unrealistic, and quite frankly counterproductive, to ask a carrier to operate with some of the senior executives (because they are foreign citizens) not allowed to make decisions that affect safety and security.

For similar reasons we question how U.S. citizens would in reality control decisions regarding whether and how to participate in the Civil Reserve Aviation Fleet (CRAF) program, which has long been relied upon by the Pentagon for the transport of military personnel and supplies during military conflicts and wars. U.S. air carriers participate in this program to ensure our military has the airlift capabilities it needs. Under the proposed control rules, the decision regarding CRAF participation may technically be left to a U.S. citizen, but a foreign citizen deciding what aircraft to purchase could have a direct impact on whether the carrier will be able to participate in the CRAF program thus undermining national security. It does not take a great deal of

imagination to foresee situations where foreign interests, who control key operational or economic aspects of a U.S. airline, would not want that airline to aid the U.S. military. Given this reality, we question how the DOT will ensure that U.S. citizens are not pressured by their foreign citizen superiors into not participating or otherwise modifying their CRAF participation. Given the importance of the CRAF program to our national security, it makes little sense for the DOT to unilaterally adopt a proposal that could undermine the program's effectiveness and capability.

Finally, let me note that the FAA has made an aggressive push over the years to delegate certain safety inspections and other responsibilities to the private sector. While we have voiced our concern about this practice in the past, as international aviation expands, this concern only intensifies. Specifically, allowing foreign airlines to control U.S. carriers could act to further push this delegation of authority further down the global supply chain and weaken the connection the FAA has to the industry. This is obviously unacceptable and DOT must explain how any change in the foreign control and ownership standards would protect against this trend.

NPRM May Accelerate Outsourcing

We are concerned that the NPRM will only accelerate the troubling trend in the aviation industry to outsource critical jobs to foreign countries, often at the expense of safety and security. The fact is that carriers have often used the global nature of aviation to undercut U.S. wages, standards and collective bargaining rights.

In particular, TTD has long voiced opposition to the practice of U.S. carriers outsourcing critical maintenance work to foreign aircraft repair facilities that are not required by the FAA to meet the same safety standards as U.S. stations performing the same type of work. In the wake of the September 11, 2001, attacks, security concerns inherent in third-party maintenance have also been raised but have not been addressed by this Administration.

I should note that in the last FAA Reauthorization bill, this Committee recognized the potential security vulnerabilities of foreign repair stations working on U.S. aircraft. For this reason, this Committee included in its version of the bill a provision designed to begin to address this issue. In the final Conference Report for Vision 100, this provision, with some modifications, was retained. Specifically, Section 611 required the Transportation Security Administration (TSA), in consultation with the FAA, to conduct security reviews and audits of foreign repair stations certified under 14 CFR part 145. The TSA was also required to complete a final rule imposing security rules on foreign and domestic stations by August 8, 2004, or 16 months ago. It is an outrage that to date, these regulations have not even been proposed, let alone completed as required by law. Under the final bill, the TSA was given 18 months after the regulations are finalized to complete the security audits of foreign stations. But since TSA has failed to complete the regulations and the FAA continues to be an apologist for its inadequate surveillance of foreign repair facilities, the time-line for the audits has not even started.

In short, over two years after this Committee identified security risks at foreign stations as an issue that needed to be addressed, TSA and the FAA have done nothing to meet this challenge. To make matters worse, the DOT's Inspector General recently came out with a scathing report

condemning the lack of FAA and carrier oversight of non-certified third party stations. And now the Administration wants to unilaterally allow foreign airlines and other interests to control U.S. airlines. One would have thought that the Administration would get a handle on the outsourcing that occurs under the current regime before it offered a proposal that will actually make this situation worse.

The flight attendant profession is also at increased risk as at least one major air carrier has proposed filling key positions on international routes with foreign citizens. Specifically, Northwest Airlines testified last week in its bankruptcy proceeding that it wants to replace 30 percent of its flight attendants on international routes with non-U.S. workers. This proposal alone would mean the elimination of 800 jobs. In addition, we question how security threat assessments, required of U.S. workers, will be adequately conducted if this proposal is actually implemented.

We have also seen a move to outsource aircraft manufacturing and related work and there has been a significant decline in U.S. employment in this critical industry. Outsourcing not only means the loss of employment opportunities, but also weakens our economy and national security by, among other things, transferring production and technology expertise to other countries. The economic battle between domestic and foreign-based aircraft manufacturers is well-known and will not be re-told in this submission. We would simply note that as foreign interests are allowed to control U.S. airlines, the pressure to utilize non-U.S. companies will only increase, thus further tilting the balance away from domestic production and ultimately harming U.S. economic interests and threatening jobs.

Bargaining Rights at Risk

Carriers have argued in the past that U.S. workers based overseas are not covered by the Railway Labor Act (RLA) and thus are not protected by the applicable collective bargaining agreements. In addition, and as pointed out by ALPA, when two or more U.S. carriers are commonly controlled, the RLA covers the entire workforce and allows employees at the affiliated carriers an opportunity to equalize wages and working conditions. This serves to prevent a carrier from playing one group of workers against the other. But when one of the affiliates is a foreign carrier, and thus not covered by the RLA, all of the employees are placed at a disadvantage.

Under this proposal, foreign airlines that control U.S. airlines could structure their operations so that the U.S. carrier serves as a feeder to the foreign airline. This in turn would allow the transfer of at least some of the jobs to a foreign airline outside the coverage of the RLA, potentially creating a lower wage and benefit scheme and eviscerating the bargaining rights and protections of employees in this nation.

In summary, the Administration's proposal to dramatically alter aviation policy by permitting foreign control of U.S. airlines threatens U.S. aviation and aerospace jobs, undermines bargaining rights, is contrary to our national security and defense interests, poses a risk to aviation safety and security, and violates the plain meaning of the current statute as re-codified by Congress in 2003.

Simply because the DOT and the Department of State are anxious to finalize a new aviation services pact with the EU does not relieve our government of the duty to protect American interests including the interests of aviation employees. We urge Congress to place the burden of proof on this Administration to demonstrate why America's foreign control rules should be changed. The NPRM as constructed fails this most basic test and we urge this Committee to pass H.R. 4542 and ensure that our international aviation policies are used to promote, and not harm, the U.S. aviation industry and its workers.

Thank you for the opportunity to express our views and concerns on the Administration's proposal. I would be happy to answer any questions the Committee may have.