TTD A BOLD VOICE FOR TRANSPORTATION WORKERS

COMMENTS OF THE
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

BEFORE THE
DEPARTMENT OF TRANSPORTATION
ON THE
ACTUAL CONTROL OF U.S. AIR CARRIERS
NOTICE OF PROPOSED RULEMAKING
Docket No. OST-03-15759

January 6, 2006

The Transportation Trades Department, AFL-CIO (TTD)[1] appreciates the opportunity to submit these comments to the Department of Transportation's (Department or DOT) notice of proposed rulemaking (NPRM) that would make significant and fundamental changes to the rules governing foreign control of U.S. airlines. For reasons expanded on in this submission, TTD is opposed to this NPRM and urges the Department to withdraw this proposal. In short, the NPRM is contrary to the plain meaning of the statute, and is being implemented without adequate input from Congress and a full understanding of the impact this change will have on the aviation industry. What is clear is that allowing foreign interests to control U.S. airlines as proposed in this NPRM would weaken U.S. aviation interests and threaten the jobs and rights of U.S. airline employees at the worst possible time.

Burden on DOT

As a threshold matter, we would argue that the burden is on the Department to make the case that allowing foreign entities to control U.S. airlines serves the best interests of the aviation industry and our nation. We respectfully submit that to date the Department has not met this standard 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.

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[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.

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Access to Foreign Capital Not an Issue

The problem with the Department's stated rationale for this rule 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, and 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 investments. 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. 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.

NPRM Contrary to Statute

Putting aside for a moment the broader policy problems with this proposal, the more fundamental point is that 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 has absolutely no support in the statute. Again, the law requires carriers to be under the "actual control" of U.S. citizens – it 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.

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 to that legislation clearly 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.

The DOT is attempting to characterize this proposal as simply a change to how it interprets what constitutes "actual control." In reality, the NPRM goes significantly further than that approach – it allows foreign interests to exercise actual control over core economic aspects of a U.S. carrier.

Bifurcated Approach Not Realistic

This separation of responsibility scheme 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.

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 the Air Line Pilots Association (ALPA) correctly points out in its comments, 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.

National Security Concerns

For similar reasons we question how U.S. citizens would in reality control decisions regarding whether and how to participate in the CRAF program. The decision 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 reduce the availability of aircraft.

Labor and Employment Implications

We are concerned that the NPRM will only accelerate the troubling trend in the aviation industry to outsource critical jobs to foreign countries, sometimes 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 9/11 attacks, security concerns inherent in third-party maintenance have also been raised and have not been addressed.[2]

The flight attendant profession is also at increased risk as at least one major carrier has proposed filling key positions on international routes with foreign citizens. According to a letter sent by 99 members of the House of Representative to Doug Steenland, President and CEO of Northwest Airlines, this proposal would mean the loss of approximately 2,600 U.S.-based flight attendant jobs.

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.

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 covered by the applicable collective bargaining agreements. In addition, and as pointed out by ALPA in its comments, 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 rights of employees.

NPRM Part of U.S.-EU Agreement

Notwithstanding inconsistent and unconvincing claims to the contrary, this NPRM was issued as part of an effort by the U.S. to win European Union (EU) ratification of a new air services agreement. While there is nothing inherently wrong with a new open skies pact, the DOT should acknowledge the motivations for issuing this NPRM and have a reasoned debate on whether the

[2] Section 611 of Vision 100 required the Transportation Security Administration (TSA) to conduct security reviews and audits of foreign repair stations certified under 14 CFR part 145. TSA was also required to complete a final rule imposing security rules on foreign and domestic stations by August 8, 2004. To date, neither the regulations nor the audits have been completed.

proposed agreement merits allowing foreign entities to control U.S. airlines. 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 – and sought to address a major EU complaint, i.e. that the U.S. offer did not include greater access to the U.S. aviation market.[3]

In the days after this proposal was issued, the DOT acknowledged that the European community wanted to see progress in the removal of U.S. restrictions on foreign investment in U.S. airlines, but then claimed that changes are not a topic of negotiations. This claim is undercut when DOT then asks "our friends in Europe to take our proposal seriously" and explains that it "would facilitate much or all that the European airlines seek to achieve in the near term within a newly liberalized U.S.-EU aviation marketplace ..." Jeffery N. Shane, Under Secretary for Policy, Address before the International Aviation Club (Nov. 8, 2005), (prepared remarks available in the docket of this proceeding).

In short, the Department wants 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 evaluation of what is truly at stake. If this proposal is a component of a U.S.-EU deal then the DOT should say so and explain what it is getting from the EU in return and what the real impact this change in policy will have on the U.S. aviation industry.

We are also concerned that shortly after this proposal was issued, some European interests claimed that it did not go far enough and urged DOT to institute broader modifications to our foreign control and ownership limits. Obviously, we urge DOT to go in the opposite direction.

Congressional Review Is Needed & Warranted

As explained earlier in these comments, TTD believes that the NPRM goes beyond the confines of the statute and changes of this magnitude require Congressional action. And while we would oppose the NPRM in any event, we simply do not understand how the Department can even propose such a fundamental change in policy without involving Congress and explaining the long-term impact of altering the foreign control rules.

As DOT is aware 85 members of the House of Representatives 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 five U.S. Senators.

In addition, legislation has been introduced in the House (H.R. 4542) by Representatives Jim Oberstar (D-MN), the Ranking Member of the Transportation and Infrastructure Committee, and Frank LoBiondo (R-NJ) that would bar the DOT from moving to a final rule on foreign control for one year after enactment. The bill would require DOT to submit a report to Congress 90 days after enactment on the consequences of allowing greater foreign control over U.S. airlines. This

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[3] 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 Registe*r and apparently these negotiators were the first to receive a formal briefing on the proposal.

bill now has 110 cosponsors including the Chair of the Transportation Committee Don Young (R-AK). Similar legislation (S. 2135) has been introduced in the Senate by Senator Daniel Inouye (D-HI), the Co-Chair of the Senate Commerce Committee. It should be clear that Members of Congress on both sides of the aisle, and sitting on the Committees of jurisdiction, have significant concerns about this proposal and are urging DOT not to overstep its authority. We urge DOT to heed these calls and to not move forward with this NPRM.

Thank you for the opportunity to express our views and concerns on this important matter.

Respectfully Submitted,

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