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

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)	)	

MOTION FOR PERMISSION TO FILE AND JOINT REPLY OF AIR LINE PILOTS ASSOCIATION (ALPA), TRANSPORTATION TRADES DEPARTMENT, AFL-CIO (TTD) AND EUROPEAN COCKPIT ASSOCIATION (ECA) TO REPLY OF NORGWEIAN AIR INTERNATIONAL LIMITED (NAI)

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Dated: January 7, 2014

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MOTION

ALPA, TTD and ECA (Joint Parties) hereby move for permission to reply to the December 31, 2013 Consolidated Reply of NAI (NAI Reply).[1] The Joint Parties believe that this reply will help clarify key questions that need to be addressed in order to resolve the ultimate issue in this case: whether grant of a foreign carrier permit to NAI is in the public interest.

[1] NAI did not file a motion requesting permission to file its Consolidated Reply, as required. (*See* Rule 6(b) & (c)). The Joint Parties, however, do not object to DOT considering the NAI Reply so long as the Department considers this Reply as well.

DISCUSSION

NAI's Consolidated Reply vividly illustrates why its application for a foreign air carrier permit should be denied. The Applicant does not deny any of the assertions made in the Joint Parties' answers to its application as to how it intends to conduct its business or the reasons behind how it intends to conduct that business. In addition, NAI's arguments as to why the Department should approve its application rest on a fundamental misunderstanding of the rules and procedures that govern the issuance of authority to provide international air transportation under the U.S.-EU Air Transport Agreement (ATA or Agreement).

I. NAI DOES NOT CONTEST THAT ITS BUSINESS PLAN – INCLUDING ITS EFFORT TO BECOME AN IRISH AIR CARRIER – IS BASED ON AVOIDING THE APPLICATION OF NORWEGIAN LAW TO ITS AIR CREW.

In their answers to NAI's application, the Joint Parties asserted that the express purpose of NAI seeking to operate as an Irish air carrier is for NAI's parent company – Norwegian Air Shuttle (NAS) – to avoid having Norway's social laws apply to its long-haul operations. ALPA Answer at 6; TTD Answer at 1; ECA Answer at 7. These answers and the Joint Reply of Delta, United, American and US Airways also showed that NAI plans to take over the long-haul 787 operations now being conducted by Norwegian Long Haul (NLH), another NAS subsidiary. ALPA Answer at 6; ECA Answer at 3; Joint Reply of Delta, United, American and US Airways at 2 and Attachment. These answers also showed that:

- The pilots who operate NLH's aircraft are employed not by NLH but by a pilot supply company under individual employment contracts governed by Singapore law. ALPA Answer at 3; ECA Answer at 5-6.
- The pilot supply company rents these pilots to NLH, which domiciles them in Thailand. ALPA Answer at 3; ECA Answer at 5-6.
- The terms and conditions of employment of these pilots are substantially inferior to those that apply to the pilots employed by NAS even though NAS operates smaller aircraft than NLH. ALPA Answer at 6; ECA Answer at 7-8.
- These terms and conditions include provisions that effectively prohibit the pilots from taking up work-related concerns directly with NLH and from providing information about their employment contract or NLH's business to (it appears) anyone. ALPA Answer at 3.
- Norway has sought to have Norwegian social laws apply to the NLH air crew but NAS has worked to avoid this from happening first by registering the 787s operated by NLH in Ireland and now by seeking to establish an Irish air carrier to conduct the operations currently being done by NLH. ALPA Answer at 3-4; TTD Answer at 3-4; ECA Answer at 3.

NAI has contested none of these showings.

II. NAI IS NOT CORRECT THAT IT MEETS THE CONDITIONS FOR BEING GRANTED AUTHORITY TO PROVIDE FOREIGN AIR TRANSPORTATION UNDER THE U.S.-EU/NORWAY/ICELAND AIR TRANSPORT AGREEMENT (ATA OR AGREEMENT).

Grant of a Permit to NAI Would Be Inconsistent With the Public Interest and With the Intent of the ATA.

NAI argues that the issues raised by the many parties that have opposed its application are "large scale policy issues that are inappropriate for consideration on an ad hoc basis" and are "outside this proceeding." NAI Reply at 3. In NAI's view, the appropriate venue for considering these issues is the Joint Committee. *Id.* at 3-4, 14. NAI further believes that should it obtain the Irish air operator certificate (AOC), it has a "fundamental . . . right[]" to a permit (*id*. at 9), and that DOT should then simply "follow the Agreement's direction to issue the requisite operating authority." *Id.* at 7. We submit that NAI is wrong on every count.

An applicant seeking operating authority under the provisions of the ATA does not have an unconditional right to have its application approved and there is no "direction" in the Agreement that requires authority to be granted in each and every case. Rather, the very provisions of the ATA relied on by NAI (*id.* at 6) make it clear that what the ATA provides is an <u>opportunity</u> for an airline (a status that NAI has not yet achieved) to receive appropriate authority and permissions <u>if</u> it meets certain requirements, including that the airline "is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air

transportation by the Party considering the application." ATA, Article 4; *see also* ATA, Article 6 (requiring that an applicant for operating authorization meet the requirements of Article 4). The "laws and regulations normally applied" include the requirement that a grant of the authority sought "will be in the public interest." 49 U.S.C. § 41302. Thus, the ATA did not diminish DOT's authority to determine – separate and apart from any processes set up under the Agreement – whether any particular grant of a foreign air carrier permit is in the public interest. ALPA Answer at 5, n.2.

The ATA does establish a recognition procedure for fitness determinations. Article 6 *bis* ¶1. But fitness is only one of the criteria an applicant must meet. Consistency with the public interest is another, and there are no mutual recognition procedures for determining whether that criterion has been satisfied. Indeed, the Memorandum of Consultations that accompanied the 2010 Protocol that amended the Agreement emphasizes this: "The delegations affirmed that the procedures for reciprocal recognition of regulatory determinations with regard to airline fitness and determinations in the new Article 6 *bis* are not intended to modify the conditions prescribed under the laws and regulations normally applied by the Parties to the operation of international air transportation referred to in Article 4 of the Agreement." ALPA Answer Ex. 13 (Memorandum of Consultations ¶5).

As for NAI's contention that the Joint Committee has exclusive jurisdiction over the issues raised in the answers to NAI's application, Article 17 *bis* of the ATA makes it

clear that the Parties to the Agreement did not give the Joint Committee sole authority over how the principles set out in that article – including the principle that the "opportunities created by the Agreement are not intended to undermine labour standards" – are to be applied. When arguing to the contrary, NAI tellingly omits the pertinent language of that provision. NAI Reply at 8-9. That language states the principles set out in the article "shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement . . . ." (Emphasis added.) Plainly, consideration by the Joint Committee is not the sole mechanism for addressing behavior at odds with the ATA and the decision whether to grant a foreign air carrier permit is the United States (through DOT) "implement[ing] the Agreement." Simply put, DOT has full authority to evaluate – separate and apart from the fitness and citizenship determinations that are subject to the recognition procedures – whether or not a grant of the authority sought by NAI would be in the public interest.

As the Joint Parties have shown in their answers, the public interest analysis includes an evaluation of the effect of a permit award on fair wages and working conditions and on strengthening the competitive position of U.S. carriers to ensure at least equality with foreign air carriers and why approval of NAI's application – which is expressly predicated on a scheme to undermine labor standards – is inconsistent with those elements of the public interest. ALPA Answer at 4-5; TTD Answer at 4-5.

The public interest also naturally embraces whether approval of NAI's application is consistent with the intent of an air transport agreement. "The opportunities created by the Agreement are not intended to undermine labour standards . . . ." ATA, Article 17 *bis*. The Joint Parties have shown that the use by NAS of an opportunity that exists only by virtue of the ATA – the effort to establish an Irish entity that hopes to provide international air transportation to the U.S. – to avoid and undermine Norwegian labor standards (and ultimately U.S. standards as well) is at direct odds with this clearly expressed intent of the Parties as to what is an acceptable use of the Agreement. ALPA Answer at 8-13; TTD Answer at 3-4.

In light of the text of the ATA, it is puzzling that NAI asserts that the Agreement "does not define any mandatory or prohibited labor practices, nor does it empower a Party, on the basis of allegations related to the 'social dimension' such as those asserted by the Answering Parties, to take unilateral action to deny operating authority to an airline that satisfies the requirements of Article 4." NAI Reply at 11. The ATA expressly says that the opportunities made available by the Agreement are not to be used to undermine labor standards and that this principle is to guide the Parties as they implement the Agreement. Article 4 expressly reserves to the Parties the authority to evaluate whether an applicant meets the laws and regulations normally applied to the operation of international air transportation, and Article 17 *bis* makes it clear that

consideration by the Joint Committee is not the exclusive, but an additional, avenue for addressing behavior inconsistent with the Agreement.

NAI's contention that "there is nothing in either the text or the negotiating history of Article 17 *bis* to support the view that it was intended by the negotiating Parties to negate fundamental air service rights secured in the first-stage agreement . . ." (NAI Reply at 9-10), is even more puzzling. First, as shown above, no applicant has ever had an unconditional right to provide air transportation services under the ATA. Second, there is ample text and negotiating history that demonstrate that NAI's application cannot be waived through. As shown by the Joint Parties in their answers to NAI's application, the concern that the designation provision in the Agreement could lead to the use of flags-of-convenience to evade labor laws and to lower labor standards was a central topic of both the Stage 1 and Stage 2 negotiations. ALPA Answer at 8-13; TTD Answer at 2-3. These concerns received as much consideration as almost any topic in the Stage 2 negotiations, and were at the core of the two labor forums held by the European Commission. ALPA Answer at 9-10. NAI seems to contend that the negotiators abandoned the effort to try to fashion a meaningful response to these concerns and quotes from ALPA's answer to support this contention: "'the proposals . . . to address the labor-management challenges raised by trans-national airlines were ultimately rejected by unions on both sides of the Atlantic. They also were not pursued by the U.S. and EU negotiators.'" NAI Reply at 11, quoting ALPA's

Answer at 12. Not only has NAI once again omitted key text, it has misquoted ALPA's answer as well. The pertinent language from ALPA's answer read (with text omitted by NAI underlined): "The limited proposals offered by Mr. Chêne to address . . . [etc.]"

In short, it was only the specific limited suggestions offered by Mr. Chêne that the negotiators rejected as being insufficient to achieve their objectives. ALPA Answer at 11-12; TTD Answer, Attachment 1. But there was no abandonment by the Parties of the effort to develop a meaningful response to the flag-of-convenience/social dumping concerns. Rather, they recognized, as had Mr. Chêne, that the EU Member States could not change their labor laws in the time frame in which the Parties wished to complete their negotiations. However, they did wish to address the labor concerns. The result of their efforts to fashion a meaningful response is Article 17 *bis*. This Article affirms the Parties' intention that the opportunities made available by the Agreement are not to be used in certain ways and addresses the labor concerns and can be applied to specific behavior as the Parties "implement the Agreement." That behavior might also be considered by the Joint Committee pursuant to Article 18, but it is altogether possible that the Agreement can be implemented in a way that avoids particular consequences and thus reduces or eliminates the need for Joint Committee consideration. Here, where NAS/NAI does not contest that it is using an opportunity available only because of the Agreement to avoid and undermine labor laws of one of the Parties to the Agreement, the intent of Article 17 *bis* should be fully implemented by DOT.

III. NAI'S CLAIM OF DISPARATE TREATMENT, AND ASSERTION THAT REJECTION OF ITS APPLICATION WOULD LEAD TO THE RETURN OF THE "DARK ERA" OF OPPRESSIVE REGULATION, ARE GROUNDLESS AND SHOULD BE REJECTED.

NAI conjures up a whole closet-full of bogeymen and hobgoblins in a transparent effort to spook DOT into granting its application. Thus, NAI raises the possibility that it may not receive equal treatment (NAI Reply at 13-14), and that a failure to grant its application would signal the return to a "dark era," complete with "complicated licensing hurdles," "foreign demands to 'pay again' for air services already secured," and a "potential 'race to the bottom' in international relations." *Id.* at 7. These claims are rhetorical phantoms and DOT should ignore them.

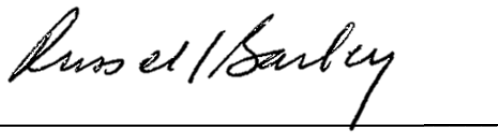
NAI correctly notes that "Department precedent reflects a strong commitment to equal, non-discriminatory treatment of similarly-situated carriers." *Id.* at 13. The Joint Parties also agree that "[e]qual treatment considerations should also guide the Department in this proceeding." *Id.* at 14. But what NAI overlooks is that it is not similarly situated with the other carriers that have taken advantage of DOT's streamlined application procedures for EU carriers. It is unique. No other carrier that has availed itself of those procedures has expressly sought to use an opportunity made available by the Agreement to avoid (and thereby undermine) the labor standards of one of the Parties to the Agreement. Its singular business plan is directly at odds with key public interest factors as well as with the intent of the ATA. Accordingly, its application should be rejected.

The fact that the NAS/NAI business plan is unique is also the answer to all of the applicant's claims that denial of its application could lead to a return to a "dark era" of excessive regulation. DOT has been fully committed to facilitating the exercise by EU airlines of the opportunities under the Agreement, as NAI's own notation of Department's expeditious issuance of air transportation authority to a large number of EU carriers demonstrates. *See* DOT orders cited at NAI Reply, p. 6 n. 15. Denial of NAI's application would not be a stepping back from the Parties' commitments under the ATA. Rather, it would comport with the intent of the Parties as to how the Agreement is to be implemented. NAS/NAI's proposed way of doing business would undermine that intent. If there is any "race to the bottom" that might be triggered by how NAI's application is treated, it would be – should the application be approved – toward opportunities made available by virtue of the Agreement being used to undermine labor standards. The Parties had ample evidence before them of the effects of flags-of-convenience in the maritime sector, and sought to avoid the facilitation of similar business models in the U.S.-EU air transportation market. While one of the objectives of the ATA is to promote competition in the international aviation marketplace, the Parties have placed parameters on the way airlines may use the opportunities provided by the Agreement. Approval of NAI's application would render those parameters meaningless.

CONCLUSION

For the foregoing reasons and the reasons set forth in the answers in opposition to NAI's application, DOT should deny the application.

Respectfully submitted,



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January 7, 2014

CERTIFICATE OF SERVICE

I certify that I have, on this 7th day of January, 2014, served the foregoing Motion and Joint Reply by causing a copy to be sent by electronic mail to the addresses identified below:

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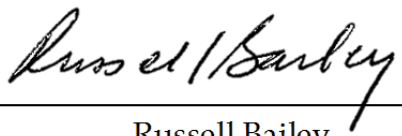

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