A bold voice for transportation workers

THE TIME IS NOW TO ACT ON OPEN SKIES

In the halls of Congress and the Executive Branch, at the bargaining table, and during international trade negotiations, labor unions have long been the vanguard of the fight for legal and regulatory regimes that promote workplace safety, guarantee dignified employment conditions, and provide fair wages and benefits. For an equal amount of time, unscrupulous corporations and other actors have sought to undermine these core tenets. Today, the airline industry and its workforce faces a pernicious and existential threat from so-called "Flag of Convenience" (FOC) air carriers and other forms of labor arbitrage operating under novel corporate structures designed to skirt these key responsibilities and undermine competition.

The FOC model is far from unprecedented and its effects are well known. In the maritime industry, ships must generally be registered in a single country, which regulates the safety of ships, their crews, and ensures compliance with environmental, labor, and tax standards. Since the 1950s, ship owners have increasingly sought to register their vessels in countries where standards are lax or nonexistent. In turn, this has incentivized nations to encourage "on-paper" registration within their borders in return for continued disinterest or unwillingness to provide meaningful legal or regulatory oversight of their activities. As a direct result, these FOC nations have fostered an international maritime industry in which the abandonment of seafarers at distant ports, refusal to pay wages, and absolute denial of collective bargaining rights are commonplace. Today, the vast majority of shipping that once took place on U.S. ships crewed with U.S. mariners is now done upon vessels and crews flagged in one of a handful of countries that has opened its doors to this model.

Regrettably, the stage has been set for a similar path in the aviation industry. Following the dissolution of bilateral European air service agreements in the late 1990's, the U.S.-EU Air Transport Agreement (Agreement or Open Skies agreement) was ratified in 2007. The multilateral nature of the agreement increased the possibility for FOC air carriers or other forms of "atypical" employment practices that harm worker organization and bargaining. While the EU formed a common European aviation area in which EU carriers could operate within and from, they did not harmonize labor laws or airline licensing authorities. As a result, power was consolidated with carriers and their management, who were given an easier path to locating employee contracts in whichever country presented the lowest common denominator of labor and wage protections, oversight, and enforcement.

At the time, U.S. and European unions raised concerns over the future proliferation of FOC air carriers, and the potential for the use of third-party employment firms or temporary contracts to misclassify or avoid traditional employment responsibilities. This model would make pilots and cabin crew subject to the laws and regulations of the nation governing the third party, as opposed to the origin of the airline. In turn, this could needlessly bring the abuses of the international maritime industry and the requisite loss of domestic maritime jobs to the aviation sector.

In response, a 2010 amendment to the EU-U.S. Air Transport Agreement was agreed to, known as article *17 bis*, which sought to prevent the spread of FOC schemes by ensuring that opportunities created under the Agreement could not be used to undermine the existing labor rights of employees. Despite these efforts, the threat of FOC operations has only increased. To date, the Department of Transportation (DOT) has failed to take strong action to prevent labor arbitrage in the airline sector, even granting a foreign air carrier permit to a company that was explicit in its plans to operate a FOC scheme. Most distressingly, DOT took a limited view of the legal power of *17 bis* in order to reach this conclusion and mistakenly interpreted that it could not be a determining factor in whether or not to grant a foreign air carrier permit. This decision ran contrary to the negotiated history and intent of *17 bis*. DOT also refused to conduct a congressionally imposed public interest test. We know that these efforts will not be the last. If DOT's current failure to provide meaning to *17 bis* and use its own statutory authority over foreign air carrier permits endures, there will undoubtedly be further FOC entrants, unshackled of obligations to pay employees fairly, engage in bargaining, or abide by safety standards.

DOT currently has the tools to stop the spread of FOC carriers and related forms of labor arbitrage. We call on DOT to develop a clear policy to apply the public interest test in all foreign air carrier licensing cases, ensure that statutory economic regulatory criteria are always considered, and to express its intent to impose conditions or terms on any incumbent carrier it finds to not be in the public interest. Additionally, the Department should revise its interpretation of *17 bis* to adhere to the original intent of the agreement. Finally, DOT should work with the State Department to require labor conditions in new open skies agreements, including prohibitions on FOC air carriers. In so doing, the Department would give real meaning to the obligations Congress has tasked it with and empower and labor rights within our air service agreements.

Simultaneously, we continue to call for expeditious passage of The Fair and Open Skies Act, last introduced by Chairman Peter DeFazio in the 116th Congress, which garnered 156 bipartisan cosponsors. The legislation requires DOT to apply the public interest test to foreign air carrier applications, effectively restoring the standard that has been both the law and practice of the Department since the inception of Open Skies, as well as implementing new criteria targeted at eliminating naked labor arbitrage. It also mandates that DOT consider all statutory economic criteria for application decisions, including whether a foreign air carrier is "encouraging fair wages and working conditions" and "strengthening" domestic airlines to ensure "equality with foreign air carriers." Installing these requirements provides strong and long-term protection against current and future labor rights abuses in our international aviation system.

Today we arrive at a critical juncture. TTD unions have long fought to make certain that our airline industry can pair good working conditions, wages, and benefits with the highest levels of safety and efficiency. Allowing the unfettered propagation of the erosion of labor rights in violation of the intent of both the Open Skies Agreement and federal statute will ensure that neither standard can be guaranteed in the future. We call on both Congress and the Department of Transportation to take the forward-thinking actions necessary to cull the deleterious effects of the flag of convenience model while we still have the opportunity.

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