A bold voice for transportation workers

DOT JOINT VENTURE DECISION A PAINFUL STEP BACKWARD.
TRANSPORTATION LABOR OFFERS A PATH FORWARD

The Department of Transportation's (DOT or Department) recent decision to remove a pro-labor clause from a joint venture agreement between Delta Air Lines and LATAM Airlines Group is an unprecedented decision that represents a step backward for U.S. airline employees in antitrust-immunized joint venture (ATI JV) cases. This decision continues decades of elevating consumer benefits over employee rights by the Department. The DOT's decision is also completely inconsistent with the Biden Administration's otherwise extraordinary record on labor matters, including the Administration's stated policy objectives for workers potentially harmed by globalization. An appropriate remedy, at a minimum, requires the Department in future decisions to place conditions to ensure U.S. employees receive a fair share of flying covered by joint venture arrangements, affirmatively make use of its public interest objectives regarding employees in relevant licensing decisions, and rewrite of the Department's outdated international policy statement.

In 1980, Congress passed the International Air Transportation Competition Act of 1979 (P.L. 96-192) requiring the Department of Transportation (DOT or Department) consider the effect its economic regulations have on U.S. aviation workers, including in airline licensing cases. Specifically, that the Department "encourag[e] fair wages and working conditions" for U.S. airline employees (49 U.S.C § 40101(a)(5). However, the DOT has never meaningfully used this criterion out of institutional near-indifference and the longstanding position that labor concerns should have no role in DOT decision-making irrespective of the clear statutory charge. In contrast, the other enumerated public interest criteria, particularly those related to consumer interests and competition, have been regularly used to effectuate Department prerogatives.

The Department's international aviation decisions have been undergirded by a *laissez faire* setting aside of employee interests. In deciding against U.S. and European employee interests in the Norwegian Air International (NAI) decision in 2016, the Department chose to overlook the enumerated "public interest" criteria in its statute and relied instead on the NAI CEO's *voluntary* and non-binding offers regarding hiring as a fig-leaf to dispense with labor's concerns.[1] The DOT commented favorably on "these *voluntarily* offered practices," even though they missed the mark for labor interests on either side of the Atlantic and in any case were unenforceable.[2] Often, the Department suggests that it expects solutions to labor's concerns to come in collective bargaining – a voluntary agreement between parties – not through regulatory action.

With the Biden Administration's stated policy interests to protect U.S. employees including to reverse negative trends to worker power related to "globalization," labor has higher expectations. This July, however, the Department – once again – chose to ignore its legal authority to protect

[1] Final Order. Norwegian Air International. DOT-OST-2013-0204. Pg. 4.
[2] Id. Pg. 5.

employees in a novel and unprecedented domestic licensing case (Waltzing Matilda Aviation LLC) where a U.S. company expressed a desire to source its employees exclusively from a foreign neighbor under foreign labor law because this would enable the airline to "hire crew at cheaper rates." After a prolonged proceeding, the Air Line Pilots Association (ALPA) and the airline voluntarily agreed, as a backstop, to require that the airline would employ only U.S. pilots and base them in the U.S. under U.S. labor law, and that both sides would ask the Department to bind the airline to these requirements in the order that would grant it certificate authority. Rather than put those uncontested requirements in the order, or even comment favorably on the policy and employment merits of the private agreement, however, the Department merely acknowledged the agreement's existence. Transportation labor believes this was a missed opportunity to reset transportation policy to reflect the Biden Administration's commitment to protect workers.

Unfortunately, the Department's strong preference for private, voluntary resolutions of labor issues was abandoned this fall in the joint venture proceeding for Delta Air Lines and LATAM, a major Latin American airline, with the DOT actively intervening to modify a private agreement to labor's detriment. The original structure of the Delta-LATAM JV effectively included an employee protective measure. Such a measure is important because, like other ATI JVs, the Delta-LATAM JV is, for all practical purposes, a merger between a defined grouping of international routes operated by the airlines that requires ATI to cooperate on schedules, fares, and capacity (i.e., number of flights and size of planes), and share the resulting revenues or profits, such that passengers should be indifferent to which of the airlines provides the service. This structure incentivizes the growth of the airlines' joint network, especially where one carrier could not profitably operate without the other's strength. That said, JVs are not an unalloyed good for employees. In some cases, the use of the JV mechanism may effectively shift flying done by the U.S. carrier flight crews to a foreign carrier whose flight crews operate under inferior wage, work rule, and collective bargaining laws. For that reason, in a 2010 ATI JV case, ALPA proposed, but the Department rejected, a request to place conditions on the United Airlines-All Nippon Airways Joint Venture to provide a fair share of joint venture flying to U.S. flight crews. DOT relied instead on a speculative hope for growth: it wrote "[the U.S. carriers], like their partners, have the incentive to increase capacity, *if possible*, which *could* provide more opportunities for pilots and other labor groups…" (Order-2010-10-4-, U.S. Japan Alliance Case, Oct. 6, 2010, 17 (emphasis added).

The Delta-LATAM JV is a profit-sharing one; production costs – including the price of labor – are an important consideration for the carriers. Without appropriate remedies, the JV may shift new flying to the carrier with lower labor costs (*i.e.* LATAM) rather than Delta deploying their own aircraft with U.S. flight crews. But the carriers addressed the issue by including in their agreement an equitable distribution of flying between the partners for new *growth* flying which protected U.S. flight crew work (Section 5.3). Labor supported the JV based in part on that provision. The carriers' contractual safeguards therefore ensured the JV would have promoted U.S. job growth in keeping with the statutory public interest criteria.

Yet on June 22nd, the DOT's Order to Show Cause tentatively approved the JV on the condition that the carriers remove that "growth allocation" provision. The Department claimed the provision would increase airfares in the market by constraining LATAM from growing in the near-term.

ALPA, Delta's ALPA pilots (the Delta Master Executive Council), and the AFL-CIO all filed strong objections disputing DOT's entirely speculative competition concerns. Over those objections, the Department maintained its requirement that the carriers strike the growth allocation clause, but this time used a different rationale: that Delta flying, not LATAM flying, would increase. Transportation labor believes the Department's confusing decision to remove the growth allocation clause is at odds with its own Open Skies policy and previous ATI precedents. For decades, the Department's Open Skies policy has depended on an open marketplace to address anti-competitive behavior. In this case, by contrast, the Department has chosen to micromanage this alliance to cure a speculative harm. Additionally, the labor parties believe that the Department was acting directly in contrast to its own statutory public interest objectives by undermining U.S. employee wages and working conditions and weakening the competitive position of a U.S. airline. By taking the unnecessary and unprecedented step of undermining U.S. employee wages and working conditions, the Department's decision flies in the face of the Biden Administration's otherwise sound priorities regarding worker rights, including Executive Order 14025 and the White House Task Force on Worker Organizing and Empowerment's Report.

In the wake of this unfortunate decision, the DOT must revisit its views that place consumer and carrier interests above U.S. airline labor and begin using the powers Congress has given it to promote worker interests and high-road labor policies in the creation and implementation of international aviation policy. This begins with acknowledging and making use of the statutory public interest criteria that relate to U.S. workers and the strength of their airline companies (49 U.S.C § 40101(a)(5) and (a)(15)). For decades the Department has refused to use or acknowledge the obligations Congress tasked it to consider regarding the promotion of fair wages and working conditions for domestic airline personnel. Moving forward, these matters should be evaluated on equal footing with the consumer and competition criteria that the Department so frequently favors.

The Department should place conditions on the approval of future joint ventures to ensure U.S. carriers – and their employees – share fairly and reasonably in flying covered under any such arrangement. Moving forward, U.S. airlines are likely to create ATI JVs with more carriers in South America, Africa, and South Asia where wage and work rule disparities relative to the United States are substantial. The Department should act as a steward of U.S. airline personnel, consistent with the law, to ensure protections exist to prevent the large-scale shifting of U.S. carrier capacity and job opportunities to less expensive foreign labor.

For the licensing of foreign air carriers, the Office of the Secretary should declare, as a formal policy, its intent in applying close public interest scrutiny by imposing conditions, per 49 U.S.C. 41305(b), on permits or exemptions to give effect to the aforementioned public interest criteria related to employees and U.S. air carriers. The Department's authority to do so is

unquestionable.[3] Moreover, the Department's ability to impose permit conditions as necessary to carry out its public interest mandate is available under *all* of our international aviation agreements.

When domestic carriers seek certificate authority to perform scheduled air transportation, the DOT should be similarly vigilant in imposing obligations on carriers whose business models would harm the labor public interest. For example, the DOT should never allow a domestic carrier in name only to import discounted foreign labor to supplant U.S. employees. It should be departmental policy that U.S. air carriers should employ U.S. employees to the greatest extent possible, rather than skirting legal loopholes at the expense of incumbent and prospective U.S. airline personnel.
The DOT should also restore the intent of the parties to the U.S.-EU Air Transport Agreement, with regard to labor standards as expressed through the labor article – Article 17 *bis*. This was a labor clause adopted by the previous Democratic White House but abandoned when first tested. The DOT should take the declared intent seriously by revisiting the legal opinions on the clause issued by the DOT, State, and Justice Departments, and by continuing to engage with the EU and its member states to give meaning to 17 *bis* moving forward.

At a more foundational level, DOT policy guidance for international aviation, developed more than 25 years ago, is outdated and should be revised to reflect modern developments as well as a more expansive view of agency priorities, including those that reflect the contributions of U.S. aviation workers. DOT's lodestar has been a 1995 International Aviation Policy Statement ("Policy") that OST issued shortly after the dawn of the U.S.'s push for "open skies" air service agreements. While DOT offered a nod to "[i]ncreasing productivity and high-quality job opportunities," in practice, DOT targeted its policy to advance an overwhelming preference for globalization and consumer choice in a way that has eclipsed the concerns of U.S airline employees. The statement should be modernized with an eye to the commitments President Biden has made to U.S. workers.

For decades, the DOT has given short shrift to its responsibility to U.S. airline workers. The Department has a clear statutory charge to protect airline personnel, and transportation labor could not be clearer about what the DOT's priorities for airline employees should be moving forward.

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[3] *See, Air Line Pilots Ass'n, Int'l v. Chao*, 889 F.3d 785, 793 (D.C. Cir. 2018)