



U.S. House of Representatives
Committee on Transportation and Infrastructure

Washington, DC 20515

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March 14, 2007

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The Honorable Mary E. Peters
Secretary
U.S. Department of Transportation
400 Seventh Street, SW
Washington, D.C. 20590

Dear Secretary Peters:

We have reviewed the proposed Open Skies agreement between the United States (U.S.) and the European Union, and are concerned that it may lead to a change in U.S. law and policy to permit greater foreign control of U.S. airlines. The draft agreement is ambiguous on this issue. Without further assurance that the law or policy on foreign control of U.S. airlines will not be changed, we cannot support the agreement. If the agreement becomes final, we will be carefully reviewing any subsequent Department of Transportation (DOT) decisions made in cases involving foreign control. If these decisions allow greater foreign control, we will consider legislation to require continuation of existing law and policy.

In the earlier stages of the Open Skies negotiations, the DOT issued a Notice of Proposed Rulemaking (NPRM) to allow foreign investors to control all operations of U.S. carriers except those involving the Civil Reserve Air Fleet, security, and safety. There was strong bipartisan opposition to the DOT's NPRM. During consideration of H.R. 5576, the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for Fiscal Year 2007, the House of Representatives adopted, by an overwhelming vote of 291 to 137, an amendment prohibiting DOT from finalizing or implementing the policy proposed in the rulemaking during the next fiscal year. In addition, the Senate Appropriations Committee, by a vote of 19 to 6, approved an amendment to its FY 2007 Transportation Appropriations bill blocking DOT from attempting to change its policies prohibiting foreign ownership of U.S. air carriers. In the face of this bipartisan, bicameral opposition, DOT withdrew the NPRM on December 5, 2006.

The proposed Open Skies agreement indicates that rather than issuing a rule or setting forth U.S. policy for foreign control of U.S. airlines, any such policy will be developed on a case-by-case basis. The critical question is whether this process will result in authorizing foreign control that would not have been authorized under prior policies.

The proposed agreement gives conflicting signals on how the case-by-case process will proceed. The DOT's synopsis of the proposed agreement states that the "text [of the agreement] explains - but does not alter - U.S. law." However, the preamble to the agreement notes that the parties "[recognize] the importance of enhancing the access of their airlines to global capital markets . . . in order to promote the benefits of liberalization in this crucial economic sector" and "share the goal of continuing to open access to markets . . . including the facilitation of investment so as to better reflect the realities of a global aviation industry. . . ." The proposed agreement also makes plans for second stage negotiations that would include discussions of "[a]dditional foreign investment opportunities."

Throughout its 37 year history, the Civil Aeronautics Board (CAB) would not allow an airline to operate as a U.S. carrier unless U.S. interests were in "actual control" of the airline. The Board noted in a 1971 case that the "shadow of substantial foreign influence may not exist" and that the Board will "look behind the form to the substance of the management of an air carrier" to determine whether foreign citizens are exerting control of a U.S. carrier.¹ These policies were continued by the DOT when it took over CAB's responsibilities in 1985. In fact, the DOT has vigilantly enforced the "actual control" standard in subsequent cases, emphasizing that there cannot be a "substantial threat of foreign influence" and that it would look to whether there is foreign control over "substantive management decisions" and that foreign citizens may not have the "substantial ability to influence the carrier's activities."²

We expect the DOT, in reviewing any future investment proposals, will follow its precedents and strictly adhere to the letter of the law that U.S. citizens must have "actual control" of U.S. carriers. Failure to do so will invite legislation to ensure the continuation of existing law and policy.

Sincerely,



James L. Oberstar
Chairman



Jerry F. Costello
Chairman
Subcommittee on Aviation



Frank A. LoBiondo, M.C.

¹ See *Willie Peter Daetwyler*, Order 71-10-14, at 121, quoting *Uraba, Medellin, Central Airways*, 2 CAB 334, 337 (1940).

² See *Wrangler Aviation, Inc.*, Order 93-7-26, at 7-8; and *Acquisition of Northwest Airlines by Wings Holdings*, Order 89-9-51, at 5.