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BEFORE THE AVIATION SUBCOMMITTEE,
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
CONCERNING SUNSET OF THE CIVIL AERONAUTICS BOARD
June 21, 1984

Madam Chairman and Members of the Subcommittee:

I appreciate this opportunity to appear before you today to discuss the impending sunset of the Civil Aeronautics Board after a more than 40-year regulatory life. As you and the Members of the Committee know, DOT does not believe this Committee should report out any bill that contains changes to the transfer provisions of the 1978 Airline Deregulation Act (ADA). We would like to set forth our reasons for proceeding with the sunset of the CAB without enacting legislation beyond any that might be desired to clarify the transfer of functions to other agencies.

I understand that you desire to limit this hearing to consumer protection matters, but I would like to take this opportunity to summarize the basic features of the Department's plan for CAB sunset and briefly set forth, for the written record, the Department's position on all aspects of the CAB sunset bill, H.R. 5297, sent to you by the House.

The Department's plan for administering CAB functions after sunset is as follows:

- The CAB's international aviation authority, the Essential Air Service Program, and employee protection determinations * will transfer to DOT on January 1, 1985, as explicitly provided in the ADA.

* Employee protection responsibilities subject to U.S. District Court decision of May 17, 1984 (No. 84-0485).

- Also on January 1, 1985, the CAB's antitrust functions will transfer to the Department of Justice, and the CAB's domestic airmail rate authority will transfer to the U.S. Postal Service, as explicitly provided for in the ADA.
- Other CAB functions--domestic airline economic fitness certification, information and assistance to consumers, and airline data collection--were not provided for by the ADA, but DOT has ample authority under other legislation to assure continued airline fitness for safety purposes, to provide information and assistance to consumers, and to collect aviation data.
- By operation of law, the CAB's international authority under section 411 of the Federal Aviation Act (FAAct) will transfer to DOT. The CAB's domestic consumer protection authority will not transfer to DOT. We believe, however, that the Federal Trade Commission (FTC) will be able to regulate air carriers involved in domestic and international transportation in all consumer protection matters currently regulated by the CAB under its section 411 authority, such as unfair advertising, baggage liability, bonding and escrow for charter operations, and the current rulemaking on computer reservation systems.

We are pleased that the House bill, H.R. 5297, would not change the Department's organizational plan for handling CAB functions. Nor does the House bill go beyond existing statutory protections for the Department's formal decisionmaking process after CAB sunset. On the other hand, H.R. 5297 would substantially

revise the jurisdictional arrangement of current sunset law and assign most of the CAB's residual functions to our Department, with the modest exception of most domestic postal matters. Specifically, the House bill would change the jurisdictional arrangement established by the ADA, as follows:

- Authority to approve mergers and agreements and to grant antitrust immunity (sections 408, 409, 412, 414), both in foreign and domestic air transportation, would transfer to DOT rather than to the Department of Justice. However, the domestic authority would lapse January 1, 1989.
- The consumer protection authority relating to "unfair or deceptive" trade practices under section 411 would transfer to DOT. The authority to require airlines to provide "safe and adequate" air transportation under section 404(a) would transfer to DOT rather than lapse.
- The domestic economic "fitness" requirement (section 401) would transfer to DOT rather than lapsing.

Moreover, the House bill includes:

- A provision that explicitly authorizes the transfer of those CAB personnel, including SES personnel, who are associated with the transferring functions.

- A standard savings provision that preserves, until changed, all existing CAB rulings and all pending proceedings.
- A provision that mandates the collection of specified types of airline data and prohibits the collection of certain other data.
- A provision transferring to DOT the CAB's authority to require liability insurance for domestic carriers.
- A provision for the continuation of airmail rate regulation in Alaska, notwithstanding the ADA's provisions for competitive bidding for the carriage of airmail in the remainder of the U.S.
- Numerous provisions involving technical corrections to the Federal Aviation Act and to other statutes substituting DOT or the Postal Service for the CAB, or eliminating obsolete references altogether.

In our view, various provisions of the House bill, when taken together, have a real potential to facilitate a reregulatory agenda at some point in the future, although I know such an outcome would be contrary to the thinking of this Committee or the House Committee which wrote H.R. 5297. Let me cite just a couple of reasons why we take this threat seriously.

Despite a general consensus that having to obtain a government license on the basis of "economic suitability" to conduct business is a relic of bygone times, the House bill would preserve the requirement that airlines obtain section 401 fitness certificates as a prerequisite to providing service. The proponents of economic fitness have not argued that this is a safety issue, and I assure you that the safety fitness of new entrants

and established carriers is and will continue to be given rigorous scrutiny by FAA. Nor should continued economic fitness be considered as a consumer protection issue, because there will be adequate authority under Section 411 and the FTC's section 5(a) authority to police against consumer abuses by new entrants.

What is at issue is whether we should retain an economic fitness standard which, in the future, could serve as a foundation for any reregulatory agenda that proves temporarily appealing. Unless the economic fitness provisions are eliminated, this is precisely what could happen, and DOT at a future time could end up giving renewed force and effect to this antiquated barrier to entry. In fact, some have already begun to criticize the CAB for tightening the existing fitness standards, and subjecting potential new entrants to lengthy, costly proceedings and cumbersome economic speculations as to management ability and adequacy of financial plans.

Another example of the continuing threat to airline deregulation is the possibility that a Senate amendment to the House bill that would continue and transfer to DOT section 404(b) authority may be offered in order to reestablish the prohibition on "discriminatory" domestic fares. We realize that air travelers on relatively low-density routes or short flights consider it unjust to pay significantly more on a per-mile basis than transcontinental travelers do. However, reinstating regulation of fares to deal with this would be a major and unjust resumption of regulation with far-reaching consequences for the traveling public and the industry. For this reason DOT would be strongly opposed to this amendment. The larger point we wish to make is that there continues to exist, in some quarters at least, a substantial and growing sentiment for various forms of airline industry reregulation as evidenced by the interest in domestic fare reregulation.

Retention of the fitness certificate and a possible fare reregulation provision are not our only concerns. H.R. 5297 would also perpetuate the present regulatory environment by shifting CAB's antitrust responsibilities to DOT rather than to the Department of Justice (DOJ) as provided under current law. We oppose this change, because the airline industry is mature and should be subject to the same governmental processes as other industries. It isn't legitimate policy in our opinion to shift antitrust oversight from Justice to DOT just because the airline industry is the airline industry. Yet this is what we have in the House bill.

It is true that the Federal Aviation Act requires an assessment of transportation benefits as an element of airline antitrust analysis, but this requirement is not a valid reason to assign antitrust regulatory authority to DOT. At the present time, DOT files comments with the CAB in proceedings where significant antitrust issues must be weighed against transportation benefits and where DOT's expertise can be brought to bear. We will continue to file comments with Justice in such proceedings. Also, we have developed a general agreement with Justice to assure proper division and coordination of Justice's oversight of International Air Transport Association traffic conference agreements on the one hand, and DOT's review and approval of individual tariffs and rates on the other. This arrangement will facilitate carrying out the international responsibilities that will transfer to Justice and DOT from the CAB.

Another objectionable feature of the House bill is the provision amending the Secretary's data collection authority under section 329 of Title 49, United States Code. This provision would mandate for the first time that O&D and service segment data be collected. Secretary Dole testified before

the House that the Department not only has adequate existing statutory authority to collect whatever airline data we believe is necessary but that DOT would continue to collect that data being collected by the CAB at sunset.

Thus the provision in the House bill relating to data collection not only ignores our commitment to ensure responsible reporting, but will also limit the Department's ability to adjust future data reporting requirements to keep abreast of changing market and regulatory developments. The data collection provision in H.R. 5297, simply put, is unneeded and unsound, without any apparent basis in fact or policy.

I realize that you and the Committee are most interested in our reasons for objecting to the House bill's disposition of the CAB's consumer protection role. Many seem convinced that the airline industry and its customers will not be able to continue to conduct business as effectively as in the past without continuation of the special supervisory role that the CAB has exercised in the era before deregulation. The House bill would perpetuate the status quo by transferring the CAB's entire "unfair or deceptive trade practices" role under section 411 to DOT and by continuing the section 404(a) "safe and adequate" standard at DOT.

As a general matter, oversight of unfair trade practices is, with few exceptions, exercised by the Federal Trade Commission. The maturity and competitiveness of the airline industry removes any rationale for treating it in a different manner. Consolidating regulatory authority, including consumer protection, into a single agency not only lacks a sound rationale, it creates, as I have said, a readily available foundation for reregulation.

We recognize that many carriers are extremely concerned that the CAB's current CRS rulemaking not be neglected or abandoned after sunset. The Department of Transportation continues to believe that the FTC is not only expert on such trade practice matters, but that it would provide excellent leadership on this issue after CAB sunset. Chairman Miller, speaking for the Commission, has already appeared before you today, and has spelled out the FTC's views in this area.

Secretary Dole has stated that clarifying legislation to make explicit the transfer of consumer protection authority from the CAB to the FTC would be justified. This can be accomplished by simply removing the present bar to FTC jurisdiction that appears in section 5(a) of the FTC Act. Also, we have not opposed the idea of transferring the CAB's consumer regulations directly to the FTC by statute, and authorizing simplified APA procedures for handling aviation consumer protection rulemaking rather than the more complicated Magnuson-Moss procedures normally applicable to FTC rulemaking. By waiving the Magnuson-Moss procedures, Congress would not merely be placing the aviation industry and its consumers on a par with comparable industries, but would in fact be giving it a more expeditious rulemaking procedure.

Finally, there has been concern that a "split" in consumer protection authority would result from our initial proposal, because DOT would succeed to CAB's section 411 authority in foreign air transportation when we inherit CAB's international oversight rule while the FTC would exercise that authority in connection with domestic aviation. In fact, DOT expects to exercise its 411 authority in the context of reviewing tariffs filed for foreign air transportation. Regarding consumer protection regulations in the

international area, we have come to the conclusion that the Department should defer to the FTC under a Memorandum of Understanding or other administrative arrangement so that there is conformity between DOT's and FTC's approaches to consumer protection. If however the Congress decides that it is necessary to consolidate all consumer protection authority in one agency, Secretary Dole testified before the House--and we reiterate now--that she believes FTC is the appropriate place rather than the DOT.

Another consumer issue which has also raised concerns is section 404 authority to regulate smoking on commercial air carriers. It is our opinion that section 404 "safe and adequate" authority will expire upon sunset of the CAB. We do not believe, however, that the absence of federal smoking regulations will be a problem. The majority of airline passengers regularly state a preference to be seated in a nonsmoking area of the plane, and I am confident that the airlines will continue to honor this preference by maintaining separate areas for smokers and nonsmokers.

Section 404 is also the basis for the CAB's rules protecting the rights of the handicapped in air travel. This is an extremely important matter which the Congress has made clear should not be entrusted to the marketplace. The lapse of section 404 will not leave DOT without the ability to continue regulatory protection for the handicapped, because we have adequate authority, through section 504 of the Rehabilitation Act of 1973 and grants made under our Airport Improvement Program, to assure that airlines afford the handicapped nondiscriminatory and safe access to air travel. We are currently exploring the need for rulemaking to establish specific and clear-cut requirements in this area.

In summary, the Department believes that the ADA establishes a sound foundation for CAB sunset and the transfer of its residual functions to DOT and other agencies. For this reason we oppose any legislation beyond that which would clarify the jurisdictional arrangements established by the ADA.

Let me close by offering any assistance we can to the Committee, including drafting assistance, to implement the Airline Deregulation Act. We appreciate this opportunity to be heard on this critical matter, and I would be pleased to respond to any questions that you and the Committee may have.