

STATEMENT OF MATTHEW V. SCOCOZZA
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DEPARTMENT OF TRANSPORTATION
before the
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
SUBCOMMITTEE ON AVIATION
REGARDING H. R. 2575
JUNE 6, 1985

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THE DEPARTMENT IS PLEASED TO TAKE THE OPPORTUNITY TO COMMENT ON H. R. 2575. THE PROPOSED LEGISLATION IS DESIGNED PRIMARILY TO ADDRESS CONCERNS ARISING FROM THE POSSIBLE TAKEOVER AND SUBSEQUENT LIQUIDATION OF TRANS WORLD AIRLINES AND OTHER U. S. FLAG CARRIERS SERVING VARIOUS INTERNATIONAL POINTS.

I WOULD FIRST LIKE TO REVIEW BRIEFLY THE PRESENT STATE OF THE LAW AND THE DEPARTMENT'S POWERS AND DUTIES UNDER IT. MOST IMPORTANT, DOT AUTHORITY DOES NOT INCLUDE THE POWER TO PASS JUDGMENT PER SE ON CARRIER STOCK TRANSACTIONS, UNLESS ANOTHER AERONAUTICAL ENTITY OR COMMON CARRIER IS INVOLVED; JURISDICTION OVER SUCH MATTERS IS THE PROVINCE OF THE COURTS AND THE S. E. C. THE FEDERAL AVIATION ACT DOES, HOWEVER, PROVIDE THAT CARRIERS MUST CONTINUE TO BE FIT TO HOLD THEIR LICENSES. THAT PROVISION IS IN SECTION 401(r) OF THE ACT. IT REQUIRES A CARRIER TO MAINTAIN ITS FITNESS TO CONTINUE TO BE LICENSED, AND PERMITS DEPARTMENT OF TRANSPORTATION REVIEW OF A CARRIER'S "FITNESS" TO HOLD CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND TO OPERATE AS AN AIR CARRIER, AS WELL AS DEPARTMENTAL ACTION AGAINST A CERTIFICATE IF THE AIRLINE DOES NOT CONTINUE TO BE

FIT. IT IS PRIMARILY THIS SECTION OF THE ACT THAT TRANS WORLD AIRLINES INVOKED IN REQUESTING THE DEPARTMENT TO CONDUCT AN INVESTIGATION TO DETERMINE TRANS WORLD'S PRESENT AND FUTURE FITNESS.

THE DEPARTMENT AND THE CIVIL AERONAUTICS BOARD HAVE TOGETHER EXERCISED THIS POWER RARELY, WITH ROUGHLY A DOZEN PROCEEDINGS IN THE LAST FEW YEARS. (THIS TOTAL DOES NOT INCLUDE REVOCATIONS OF CERTIFICATES FOR FAILURE TO BEGIN SERVICE WITHIN TWO YEARS OF RECEIVING CERTIFICATE AUTHORITY, PURSUANT TO PART 204.8 OF THE DEPARTMENT'S RULES.) MOST OF THE CASES HAVE INVOLVED TRULY SERIOUS SITUATIONS WHERE A CARRIER HAS LOST ITS INSURANCE OR FAA OPERATING AUTHORITY, OR FOR OTHER REASONS HAS CEASED OPERATIONS AS AN ONGOING AIRLINE. IN OTHER CASES, FLAGRANT MANAGERIAL PROBLEMS, BLATANT FAILURE TO COMPLY WITH THE LAW, AND IMPENDING OR ACTUAL BANKRUPTCY HAVE JUSTIFIED INSTITUTING A PROCEEDING UNDER SECTION 401(r).

BOTH SECTION 401(r) AND SECTION 401(g)(1) OF THE ACT EMPOWER THE DEPARTMENT, WHENEVER IT FINDS THAT A CARRIER HAS FAILED TO COMPLY WITH THE CONTINUING REQUIREMENT THAT IT BE "FIT, WILLING, AND ABLE" OR WHERE "THE PUBLIC CONVENIENCE AND NECESSITY SO REQUIRE", TO TAKE ACTION AGAINST THAT CARRIER'S OPERATING RIGHTS, INCLUDING SUSPENSION, MODIFICATION, OR EVEN REVOCATION OF ITS CERTIFICATE AUTHORITY. UNDER EITHER SECTION, HOWEVER, THE DEPARTMENT CAN TAKE ACTION AGAINST A CARRIER'S OPERATING RIGHTS ONLY AFTER NOTICE AND AN OPPORTUNITY FOR HEARING ARE PROVIDED. UNDER SECTION 401(g)(1), THE CARRIER MAY REQUEST A FULL ORAL EVIDENTIARY HEARING BEFORE ACTION IS TAKEN.

FINALLY, SECTION 401(g)(3) PERMITS SIMILAR ACTION, WITHOUT THE NECESSITY OF A HEARING, IF THE CARRIER HAS FAILED TO PROVIDE REGULARLY SCHEDULED SERVICE IN AN INTERNATIONAL MARKET FOR AT LEAST 90 DAYS, FOR OTHER THAN SEASONAL REASONS.

ALTHOUGH THESE POWERS REPRESENT THE DEPARTMENT'S MOST SIGNIFICANT AUTHORITY IN THIS AREA, TWO OTHER PROVISIONS BEAR MENTION. SECTION 204 AUTHORIZES THE DEPARTMENT "TO PERFORM SUCH ACTS, TO CONDUCT SUCH INVESTIGATIONS, TO ISSUE AND AMEND SUCH ORDERS, AND TO MAKE AND AMEND SUCH GENERAL OR SPECIAL RULES, REGULATIONS, AND PROCEDURES" AS IT MAY DEEM NECESSARY TO CARRY OUT THE PROVISIONS OF THE ACT AND TO PERFORM ITS POWER AND DUTIES UNDER THE ACT. FINALLY, SECTION 415 ALLOWS US TO "INQUIRE INTO THE MANAGEMENT" OF AIR CARRIERS AND, IN FURTHERANCE OF THAT GOAL, TO REQUIRE REPORTS AND OTHER INFORMATION FROM THEM.

IN ADDITION, WE BELIEVE THAT IF IT APPEARS LIKELY, ON THE BASIS OF A STRONG SHOWING, THAT SERVICE ON A VALUABLE, LIMITED-ENTRY INTERNATIONAL ROUTE WILL BE OR IS BEING REDUCED IN ANTICIPATION OF LIQUIDATION, THE DEPARTMENT HAS TWO OTHER IMPORTANT SOURCES OF AUTHORITY. UNDER SECTION 408(a)(2), THE DEPARTMENT MAY PASS JUDGMENT ON SALES OF A CARRIER'S AIRCRAFT, IF THE BUYER IS A PERSON "SUBSTANTIALLY ENGAGED IN THE BUSINESS OF AERONAUTICS." THE SALE MUST INVOLVE A SUBSTANTIAL PORTION OF THE CARRIER'S ASSETS IN ORDER TO BE SUBJECT TO THIS REVIEW. A BLANKET EXEMPTION FROM THIS PROVISION NOW EXISTS, BUT IT MAY BE TERMINATED WITH RESPECT TO ANY TRANSACTION THAT THE DEPARTMENT FINDS INCONSISTENT WITH THE PUBLIC INTEREST. ALSO,

SECTIONS 401(h) AND 408 OF THE FEDERAL AVIATION ACT REQUIRE THE DEPARTMENT'S APPROVAL OF ANY TRANSFER OF A ROUTE CERTIFICATE FROM ONE CARRIER TO ANOTHER. THE DEPARTMENT IS THUS IN A POSITION TO DETERMINE WHETHER A TRANSFER OF ROUTE AUTHORITY IS IN THE PUBLIC INTEREST, AND TO APPROVE OR DISAPPROVE THE TRANSACTION.

THE DEPARTMENT BELIEVES THAT THIS STATUTORY AUTHORITY HAS PROVEN, AND WILL CONTINUE TO PROVE, ADEQUATE TO MEET ITS REGULATORY NEEDS WITHOUT UNDUE INTRUSION INTO THE OPERATION OF THE MARKETPLACE AND THE INDUSTRY. NONE OF THESE PROVISIONS, HOWEVER, AUTHORIZE THE DEPARTMENT SUMMARILY TO SUSPEND OR "FREEZE" A SCHEDULED CARRIER'S ECONOMIC OPERATING RIGHTS, MUCH LESS TRANSACTIONS IN ITS SECURITIES. FURTHER, ANY ACTION AGAINST A CARRIER'S CERTIFICATE AUTHORITY MUST FOLLOW PROCEDURES PRESCRIBED BY THE ACT AND CASE LAW DEVELOPED IN THE COURTS. THIS AUTHORITY REFLECTS A CAREFUL WEIGHING OF THE NEED FOR FEDERAL INTERVENTION IN THE AFFAIRS OF THE INDUSTRY AGAINST THE BASIC PHILOSOPHY OF LETTING MARKETPLACE FORCES DETERMINE THE CHARACTER OF THAT INDUSTRY AND OF THE CARRIERS AND THEIR MANAGEMENT COMPRISING IT.

TURNING TO THE PROPOSED LEGISLATION, THE DEPARTMENT OPPOSES AS UNNECESSARY EXPANDING ITS AUTHORITY IN THE DIRECTION SUGGESTED HERE. ALTHOUGH WE REGARD A STRONG AND COMPETITIVE U.S. PRESENCE IN INTERNATIONAL AVIATION MARKETS AS VERY MUCH IN THE PUBLIC INTEREST, WE DO NOT BELIEVE THAT ESTABLISHING AN ARBITRARY 90-DAY "CONTINUING FITNESS" HIATUS PERIOD IS NEEDED TO FULFILL OUR OBLIGATIONS UNDER SECTION 401(r) OF THE ACT. WE ARE ESPECIALLY CONCERNED WITH THE

CLEAR SIGNAL THAT THE LEGISLATION WILL INEVITABLY SEND TO THE AVIATION INDUSTRY, THE BUSINESS COMMUNITY, AND THE PUBLIC IN GENERAL: A SIGNAL THAT IN CERTAIN SPECIFIC CASES, WHERE A PARTICULAR GOVERNMENT INTEREST CAN BE ALLEGED, ONE BUSINESS ENTITY AND ITS MANAGEMENT WILL BE SINGLED OUT FOR SPECIAL, PREFERENTIAL TREATMENT AND PROTECTION. WE FIND THIS APPROACH INCONSISTENT WITH THE PRINCIPLES OF DEREGULATION ESTABLISHED BY CONGRESS IN THE 1978 AIRLINE DEREGULATION ACT, IN WHICH INDUSTRIES ARE REGULATED ONLY TO THE DEGREE NECESSARY TO PROTECT THE "PUBLIC INTEREST" AND, ON A MORE GENERAL SCALE, CONSISTENT WITH THE CONCEPT OF A FREE-MARKET ECONOMY.

CERTAINLY, THE PUBLIC INTEREST REQUIRES THAT U.S. CARRIERS CONTINUE TO SERVE FOREIGN MARKETS, COMPETING VIGOROUSLY WITH THE FLAG CARRIERS OF OTHER NATIONS. THIS INTEREST, HOWEVER, MUST NOT BE CONFUSED WITH A PERCEIVED NEED TO OFFER UNDUE PROTECTIONS TO A SPECIFIC AIR CARRIER'S MANAGEMENT, EVEN FOR AN AIR CARRIER ENJOYING A LARGE SHARE OF INTERNATIONAL TRAFFIC. AS WAS DEMONSTRATED WITH THE BANKRUPTCY OF BRANIFF, MECHANISMS EXIST TO FILL EVEN A LARGE AND SUDDEN VOID IN INTERNATIONAL AIR SERVICE. THIS HAS BECOME MORE TRUE AS INTERNATIONAL ROUTES HAVE CEASED TO BE THE EXCLUSIVE PROVINCE OF A VERY FEW CARRIERS, AND INSTEAD HAVE BEEN DISTRIBUTED AMONG OPERATORS OFFERING A WIDE VARIETY OF SERVICES FROM NUMEROUS DIFFERENT GATEWAY CITIES. THE DIVERSIFICATION OF THE INDUSTRY IN THE WAKE OF DOMESTIC DEREGULATION AND A MORE PROCOMPETITIVE U.S. INTERNATIONAL SYSTEM HAVE REDUCED THE EFFECT OF ANY ONE AIRLINE'S RESTRUCTURING.

IN SUM, WE DOUBT THAT THIS LEGISLATION WOULD PRODUCE ANY NEW BENEFITS FOR THE GENERAL PUBLIC. AS TO OUR ABILITY TO PROTECT THE PUBLIC INTEREST BY PREVENTING THE EXERCISE OF CONTROL OF AN AIR CARRIER BY SOMEONE WHO IS UNFIT, WE BELIEVE WE ALREADY HAVE ADEQUATE AUTHORITY TO TAKE ANY NECESSARY ACTION. AS EARLIER DISCUSSED, WE CAN INSTITUTE A FORMAL HEARING PROCESS INTO THE FITNESS OF SOMEONE INVOLVED IN A TAKEOVER EFFORT AND, IF APPROPRIATE, WE CAN ISSUE AN ORDER PREVENTING THAT INDIVIDUAL FROM EXERCISING CONTROL PENDING COMPLETION OF THE INVESTIGATION.

YOU HAVE ASKED THAT OUR TESTIMONY ALSO ADDRESS THE APPROACH TAKEN BY THE SENATE BILL, S. 1218. CHAIRMAN DANFORTH'S BILL WOULD MANDATE THE REVOCATION OF A PARTICULAR CERTIFICATE FOR INTERNATIONAL AIR TRANSPORTATION WHERE A SALE OR TRANSFER, OR ATTEMPTED SALE OR TRANSFER, OF THAT CERTIFICATE OCCURS AFTER A HOSTILE TAKEOVER, AS A PART OF A LIQUIDATION OF AN AIR CARRIER OR OTHER THAN IN THE ORDINARY COURSE OF SUCH AIR CARRIER'S BUSINESS.

AS I NOTED EARLIER WITH REGARD TO THE EXISTING AUTHORITY UNDER SECTIONS 401(h) AND 408 OF THE FEDERAL AVIATION ACT, THE DEPARTMENT'S AUTHORITY TO REVIEW CERTIFICATE TRANSFERS, AS WELL AS SALES OF AIRCRAFT, ALLOWS US TO PROTECT THE PUBLIC INTEREST IN LIMITED-ENTRY INTERNATIONAL ROUTES. THESE CERTIFICATES ARE CONDITIONAL LICENSES GRANTED BY THE UNITED STATES GOVERNMENT AND, IN MANY CASES, THE HOLDERS OF THESE LICENSES HAVE AN OBLIGATION TO PROVIDE SERVICE

CONSISTENT WITH THE ROUTE CASE PROPOSALS WHICH FORMED THE BASIS FOR THE AWARD OF EXPERIMENTAL CERTIFICATE AUTHORITY.

IF THE DEPARTMENT FINDS REASON TO BELIEVE THAT A CARRIER IS SQUANDERING VALUABLE ROUTE OPPORTUNITIES IN LIMITED-ENTRY MARKETS, CONTRARY TO THE PUBLIC INTEREST, WE ARE IN A POSITION TO INSTITUTE PROCEEDINGS TO REVOKE THE CERTIFICATE AND AWARD THE ROUTE TO ANOTHER AIRLINE. OF COURSE, ANY DECISION BY THE DEPARTMENT AFFECTING A CARRIER'S INTERNATIONAL CERTIFICATES WOULD BE SUBJECT TO DISAPPROVAL BY THE PRESIDENT ON FOREIGN POLICY OR NATIONAL SECURITY GROUNDS UNDER SECTION 801 OF THE ACT. ACCORDINGLY, WE BELIEVE S. 1218 IS UNNECESSARY IN LIGHT OF THE DEPARTMENT'S EXISTING AUTHORITY. WE HAVE CONVEYED OUR VIEWS ON THE NEED FOR THIS LEGISLATION TO CHAIRMAN DANFORTH.

IN CONCLUSION, THE DEPARTMENT BELIEVES THE PROPOSED BILLS COULD CREATE MORE PROBLEMS THAN THEY WOULD SOLVE. WE BELIEVE THAT WE HAVE ADEQUATE AUTHORITY TO PROTECT THE PUBLIC INTEREST IN HOSTILE TAKEOVER SITUATIONS LIKE TWA'S. WE RECOMMEND THAT CONGRESS NOT ADOPT THE LEGISLATION BEFORE US.

THAT CONCLUDES MY PREPARED STATEMENT. I WILL BE HAPPY TO ANSWER ANY QUESTIONS THAT YOU MAY HAVE.