

STATEMENT OF SAMUEL PODBERESKY
ASSISTANT GENERAL COUNSEL FOR
AVIATION ENFORCEMENT AND PROCEEDINGS
U.S. DEPARTMENT OF TRANSPORTATION
before the
GOVERNMENT ACTIVITIES AND TRANSPORTATION SUBCOMMITTEE
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

JUNE 25, 1990

MADAM CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE ON GOVERNMENT ACTIVITIES AND TRANSPORTATION, MY NAME IS SAMUEL PODBERESKY AND I AM THE ASSISTANT GENERAL COUNSEL FOR AVIATION ENFORCEMENT AND PROCEEDINGS OF THE U.S. DEPARTMENT OF TRANSPORTATION. I AM PLEASED TO BE ABLE TO APPEAR BEFORE YOU TO COMMENT UPON MY OFFICE'S HANDLING OF THE THIRD-PARTY ENFORCEMENT COMPLAINT FILED BY 23 UTAH TRAVEL AGENCIES ON SEPTEMBER 1, 1988, AGAINST DELTA AIR LINES AND THREE OTHER UTAH TRAVEL AGENCIES -- MORRIS/ASK MR. FOSTER, MURDOCK TRAVEL, INC. AND BONNEVILLE-BEEHIVE TRAVEL GROUP -- IN WHICH THE 23 AGENCIES ALLEGED ANTICOMPETITIVE PRACTICES.

BEFORE DISCUSSING THE MATTER OF PARTICULAR CONCERN TO THE SUBCOMMITTEE, IT IS IMPORTANT THAT YOU BE AWARE OF THE OVERALL ENFORCEMENT RESPONSIBILITIES OF MY OFFICE AND HOW THEY RELATE TO THE COMPLAINT.

THE OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS ENFORCES THE AVIATION ECONOMIC REQUIREMENTS INHERITED BY THE DEPARTMENT OF TRANSPORTATION FROM THE CIVIL AERONAUTICS BOARD (CAB) IN 1985. RECENTLY, ENFORCEMENT ACTIVITIES HAVE CENTERED ON VIOLATIONS OF

THE AIRLINE CONSUMER PROTECTION RULES, REPORTING REQUIREMENTS, CHARTER REGULATIONS, ADVERTISING REQUIREMENTS, AND PROHIBITIONS AGAINST UNAUTHORIZED COMMERCIAL OPERATIONS. THE DEPARTMENT HAS THE AUTHORITY TO ISSUE CEASE AND DESIST ORDERS AND, IN APPROPRIATE CASES, ASSESS CIVIL PENALTIES THROUGH CONSENT AGREEMENTS AND ADMINISTRATIVE HEARINGS. WE CAN ALSO SEEK INJUNCTIVE RELIEF IN THE DISTRICT COURTS.

WITH RESPECT TO THE COMPUTER RESERVATION SYSTEM (CRS) INDUSTRY AND THE RELATIONSHIP BETWEEN TRAVEL AGENCIES AND THE AIRLINES THAT OWN OR CONTROL THOSE SYSTEMS, THE DEPARTMENT HAS A SET OF RULES (14 CFR PART 255) WHICH WE ENFORCE. SECTION 255.6 OF THOSE RULES SETS FORTH SEVERAL SPECIFIC PROVISIONS APPLICABLE TO THE TRAVEL AGENT - AIRLINE/VENDOR RELATIONSHIP. THE CRS RULES WERE ADOPTED IN 1984 UNDER THE AUTHORITY OF SECTION 411 OF THE FEDERAL AVIATION ACT, WHICH PROHIBITS UNFAIR AND DECEPTIVE PRACTICES AND UNFAIR METHODS OF COMPETITION. MY OFFICE AND THE DEPARTMENT HAVE TAKEN A NUMBER OF STEPS SINCE THE CRS RULES WERE ADOPTED, INCLUDING ENFORCEMENT ACTION, TO ADDRESS VIOLATIONS AND POTENTIAL VIOLATIONS OF THE CRS REQUIREMENTS.

MY OFFICE VIEWS ITS PRIMARY ENFORCEMENT RESPONSIBILITY IN THE CRS AREA TO BE TO ASSURE COMPLIANCE WITH THE DEPARTMENT'S CRS RULES. THE DEPARTMENT OF JUSTICE HAS THE PRIMARY RESPONSIBILITY TO ENFORCE THE ANTITRUST LAWS IN MOST INDUSTRIES, AND BECAUSE OF ITS EXPERTISE, WE WOULD EXPECT THAT AGENCY TO PURSUE VIOLATIONS OF

THOSE LAWS THAT INVOLVE CRS VENDORS AND SUBSCRIBERS. OF COURSE PRIVATE LITIGANTS CAN ALSO SEEK REDRESS, INCLUDING TREBLE DAMAGES, FOR VIOLATIONS OF THE ANTITRUST LAWS IN THE COURTS.

UNDER DOT'S RULES OF CONDUCT, WHENEVER MY OFFICE ASSUMES THE ROLE OF A PROSECUTING OFFICE IN AN ORAL HEARING CASE, ALL ITS SUBSTANTIVE CONTACTS WITH DOT DECISIONMAKING OFFICIALS, INCLUDING THE GENERAL COUNSEL AND THE SECRETARY, REGARDING THAT CASE MUST BE MADE ON-THE-RECORD, IN ACCORDANCE WITH DOT'S SEPARATION OF FUNCTION AND EX PARTE RULES. THUS, MY OFFICE HAS BEEN GIVEN CONSIDERABLE DELEGATED AUTHORITY TO MAKE DECISIONS ON WHETHER AND HOW TO INVESTIGATE AND PROSECUTE ENFORCEMENT CASES.

THE FOLLOWING TWO CHARTS GIVE YOU AN IDEA OF THE EXTENT OF OUR ENFORCEMENT ACTIVITIES SINCE THE DEPARTMENT ASSUMED THE CAB'S RESPONSIBILITIES WITH REGARD TO AIRLINE ECONOMIC REGULATION. BASED ON INFORMATION AVAILABLE TO US, THE LEVEL OF ENFORCEMENT ACTIVITY REFLECTED IN THE CHARTS EXCEEDS THAT WHICH EXISTED AT THE CAB WHEN IT HAD A SIGNIFICANTLY LARGER ENFORCEMENT STAFF.

ENFORCEMENT ORDERS ISSUED AT DOT *

| <u>Year</u> | <u>Number of Orders Issued</u> | <u>Assessed Civil Penalties (\$)</u> |
|----------------|--------------------------------|--------------------------------------|
| 1985 | 7 | 103,500 |
| 1986 | 7 | 238,000 |
| 1987 | 25 | 1,063,000 |
| 1988 | 14 | 203,500 |
| 1989 | 17 | 373,000 |
| 1990 (TO DATE) | 5 | 330,000 |

*In addition to the orders listed, in 1987 and 1988 we entered into seven formal settlement agreements with carriers regarding their scheduling practices.

WARNING LETTERS

| <u>Year</u> | <u>Number</u> |
|----------------|---------------|
| 1985 | 3 |
| 1986 | 3 |
| 1987 | 12 |
| 1988 | 10 |
| 1989 | 23 |
| 1990 (TO DATE) | 6 |

THESE FIGURES INDICATE THAT MY OFFICE IS VIGOROUSLY ENFORCING THE LAWS UNDER OUR PRIMARY JURISDICTION. ON THE OTHER HAND, WE NEED TO BE JUDICIOUS AND FAIR IN EXERCISING OUR ENFORCEMENT AUTHORITY. THE PUBLIC INTEREST IS NOT SERVED BY ARBITRARY OR CAPRICIOUS GOVERNMENT ACTION. THIS IS TRUE WITH RESPECT TO ENFORCEMENT ACTION JUST AS WITH ANY OTHER GOVERNMENT ACTION. IN FACT, IT MAY BE EVEN MORE IMPORTANT WITH RESPECT TO ENFORCEMENT ACTION SINCE SUCH ACTION INVOLVES THE EXERCISE OF PROSECUTORIAL POWERS SUBJECT TO LIMITED REVIEW BY OTHERS. MOREOVER, MY OFFICE MUST ALWAYS BE CONSCIOUS OF OUR RESOURCE

CONSTRAINTS AND THE NEED TO MAKE THE BEST USE OF THE RESOURCES THAT WE HAVE.

NOW I WOULD LIKE TO TURN TO THE SUBJECT OF THE SUBCOMMITTEE'S PARTICULAR INTEREST. THE DEPARTMENT'S RULES OF PRACTICE PERMIT MEMBERS OF THE PUBLIC TO FILE FORMAL COMPLAINTS ALLEGING VIOLATIONS OF OUR REGULATIONS AND THE FEDERAL AVIATION ACT. THE SEPTEMBER 1, 1988, COMPLAINT FILED BY THE 23 UTAH TRAVEL AGENCIES ALLEGED ACTS BY DELTA AND THE THREE LARGE AGENCIES THAT THE COMPLAINANTS BELIEVED WERE VIOLATIONS OF THE DEPARTMENT'S REGULATIONS ON AIRLINE-OWNED COMPUTER RESERVATION SYSTEMS AND UNFAIR AND DECEPTIVE TRADE PRACTICES PROHIBITED BY SECTION 411 OF THE FEDERAL AVIATION ACT. IN ESSENCE, THE 23 AGENCIES OBJECTED TO BENEFITS DELTA ALLEGEDLY OFFERED OR GAVE THE THREE LARGE TRAVEL AGENCIES AS INDUCEMENTS FOR THE AGENCIES TO BOOK CUSTOMERS ON DELTA FLIGHTS AND TO ACQUIRE DELTA'S DATAS II CRS. THE COMPLAINT ALLEGED THAT THE SAME INDUCEMENTS WERE NOT OFFERED OR GIVEN TO THE 23 AGENCIES, THUS PLACING THOSE AGENCIES AT A COMPETITIVE DISADVANTAGE AND INCREASING DELTA'S STRENGTH IN THE SALT LAKE CITY MARKET. DELTA AND THE THREE LARGE AGENCIES DENIED THE ALLEGATIONS AND DENIED THAT THEY WERE INVOLVED IN ANY VIOLATIONS OF OUR RULES OR THE FEDERAL AVIATION ACT.

UNDER OUR RULES OF PRACTICE, AFTER REVIEWING A THIRD-PARTY COMPLAINT AND ANSWER, IF MY OFFICE DOES NOT FIND REASONABLE

GROUND TO BELIEVE A VIOLATION OF OUR RULES OR THE FEDERAL AVIATION ACT HAS OCCURRED OR IF IT BELIEVES THAT ENFORCEMENT ACTION WOULD NOT BE IN THE PUBLIC INTEREST, AN ORDER OF DISMISSAL IS ISSUED. ON THE OTHER HAND, IF WE BELIEVE THAT SUFFICIENT INFORMATION EXISTS TO ESTABLISH A PRIMA FACIE CASE AND THAT ENFORCEMENT ACTION IS IN THE PUBLIC INTEREST, WE MAY FILE OUR OWN COMPLAINT, WHICH WOULD INSTITUTE AN ADJUDICATORY PROCEEDING TO SEEK A CEASE AND DESIST ORDER AND, WHERE POSSIBLE AND APPROPRIATE, CIVIL PENALTIES.

BECAUSE OUR EXPERIENCE INDICATES THAT ADJUDICATORY PROCEEDINGS ARE LONG AND COSTLY BOTH TO THIS OFFICE AND THE ALLEGED VIOLATOR AND BECAUSE INSTITUTING ENFORCEMENT ACTION IN THE ABSENCE OF APPARENT GOOD CAUSE WOULD BE UNFAIR AND AN ABUSE OF THE PUBLIC INTEREST, WE PURSUE ONLY THOSE CASES WHERE WE HAVE TANGIBLE AND CONCRETE EVIDENCE OF SUBSTANTIAL VIOLATIONS. IN DECIDING WHETHER TO PURSUE A CASE, WE ALSO MUST TAKE INTO ACCOUNT THE RESOURCE DEMANDS THE CASE WILL MAKE, THE OTHER WORK THE OFFICE HAS AND THE RESOURCES AVAILABLE TO DO ALL OUR WORK.

IN THIS CONNECTION, MY OFFICE IS COMPOSED OF EIGHT LAWYERS, INCLUDING MYSELF. WE HAVE NO INVESTIGATORS ON OUR STAFF, ALTHOUGH OUR CONSUMER AFFAIRS OFFICE HAS TWO INVESTIGATORS WHO SOMETIMES ASSIST US. OUR PERSONNEL ARE ALL LOCATED IN WASHINGTON, D.C. IN ADDITION TO OUR ENFORCEMENT WORK, THE

OFFICE'S WORK CAN BE DIVIDED INTO THREE BASIC AREAS - PUBLIC COUNSEL ACTIVITIES; FITNESS, INSURANCE AND CHARTER FUNCTIONS; AND PROGRAM FRAUD ENFORCEMENT. CURRENTLY THE FORMAL HEARING CASES IN WHICH WE ACT AS PUBLIC COUNSEL (E.G., JAPAN ROUTE CASES, DISCOVERY AIRLINES FITNESS CASE AND UNITED AIRLINES EMPLOYEE PROTECTION PROGRAM PROCEEDING) ARE TAKING UP THE OVERWHELMING MAJORITY OF MY OFFICE'S TIME AND RESOURCES.

APPLYING OUR CRITERIA FOR DECIDING WHETHER TO PURSUE ENFORCEMENT ACTIONS TO THE INSTANT CASE, WE FOUND THAT THE COMPLAINT OF THE 23 UTAH TRAVEL AGENCIES WAS NOT SUPPORTED BY ANY PROBATIVE EVIDENCE; RATHER, IT MERELY RECITED A LITANY OF UNCLEAR ALLEGATIONS. THERE WERE NO SWORN AFFIDAVITS OF WITNESSES, NO COPIES OF AIRLINE-AGENCY CORRESPONDENCE, AND NO COPIES OF CRS OR OTHER AGENCY-AIRLINE CONTRACTS TO SUPPORT THOSE ALLEGATIONS. IN FACT, THERE WAS NO EVIDENCE TO WARRANT ANY FOLLOWUP ACTION BY MY STAFF. MOREOVER, IT APPEARED THAT EVEN IF ALL OF THE UNSUBSTANTIATED ALLEGATIONS WERE TRUE, ENFORCEMENT ACTION WOULD NOT HAVE BEEN JUSTIFIED. IN GENERAL, THE PRACTICES MENTIONED IN THE COMPLAINT ARE COMMONPLACE IN THE INDUSTRY AND HAVE BEEN FOR SOME TIME. AIRLINES ROUTINELY PROVIDE MARKETING BENEFITS AND ASSISTANCE TO THE TRAVEL AGENCIES THAT PROVIDE THEM A LARGE NUMBER OF BOOKINGS. THIS REFLECTS THE PROPENSITY OF SERVICE AND PRODUCT SUPPLIERS IN EVERY INDUSTRY TO REWARD THEIR LARGEST CUSTOMERS AND MOST PRODUCTIVE MARKETING AGENTS. THERE IS NO PRECEDENT UNDER

DOT'S RULES AND STATUTES TO PROHIBIT AIRLINES FROM REWARDING PRODUCTIVE-AGENCIES, AND AS A GENERAL RULE THE ANTITRUST LAWS DO NOT PREVENT A FIRM FROM PAYING ITS MARKETING AGENTS DIFFERENT LEVELS OF COMPENSATION AND PROVIDING VARYING AMOUNTS OF ASSISTANCE, DEPENDING ON THEIR INDIVIDUAL PRODUCTIVITY.

IN SUMMARY, MY OFFICE'S LIMITED RESOURCES ARE BEING FULLY UTILIZED PURSUING ENFORCEMENT CASES THAT INVOLVE CLEAR-CUT, SUBSTANTIAL VIOLATIONS OF OUR RULES, AS WELL AS CARRYING OUT OUR OTHER IMPORTANT RESPONSIBILITIES. THE COMPLAINT OF THE 23 UTAH AGENCIES PRESENTED NO EVIDENCE THAT VIOLATIONS HAD OCCURRED AND IT DID NOT CONVINCED US THAT ANY ENFORCEMENT ACTION WAS WARRANTED. ACCORDINGLY, UNDER OUR RULES OF PRACTICE, WE DISMISSED THE COMPLAINT.

THAT SAID, I DO NOT MEAN TO IMPLY THAT ACTIVITIES OF THE KIND ALLEGED IN THE COMPLAINT SHOULD OR SHOULD NOT BE PROHIBITED, JUST THAT THEY ARE NOT CLEARLY PROHIBITED UNDER CURRENT RULES. IN THIS REGARD, THE DEPARTMENT RECENTLY COMPLETED ITS AIRLINE COMPETITION STUDY, WHICH LOOKED AT AIRLINE MARKETING TECHNIQUES. THE RESULTS OF THE STUDY TOGETHER WITH THE PUBLIC COMMENTS RECEIVED IN A CURRENT RULEMAKING PROCEEDING DEALING WITH THE DEPARTMENT'S CRS RULES COULD RESULT IN REGULATORY CHANGES THAT COULD AFFECT SOME OF THE ACTIVITIES ALLEGED IN THE COMPLAINT AND MIGHT RESULT IN BENEFITS TO SMALLER TRAVEL

AGENCIES. WHEN THE DEPARTMENT INSTITUTED ITS RULEMAKING PROCEEDING, IT ENVISIONED THAT THE MATTERS RAISED IN SEVERAL PETITIONS FOR RULEMAKING AND ENFORCEMENT COMPLAINTS, INCLUDING THAT OF THE 23 UTAH AGENCIES, WOULD BE FULLY CONSIDERED. WITH RESPECT TO THE MATTERS RAISED IN THE COMPLAINT, RULEMAKING, AND NOT ENFORCEMENT AGAINST A SINGLE CARRIER AND THREE AGENCIES, IS THE PROPER WAY TO CHANGE RULES THAT APPLY TO THE ENTIRE AIRLINE INDUSTRY AND TO PROHIBIT PRACTICES THAT ARE COMMONPLACE, IF IN FACT THAT WOULD BE THE APPROPRIATE COURSE OF ACTION.

FOR THE CONVENIENCE OF THE COMMITTEE, I HAVE ATTACHED WITH MY WRITTEN TESTIMONY A COPY OF DEPARTMENT ORDER 90-1-31 WHICH DISMISSED THE COMPLAINT OF THE 23 UTAH AGENCIES. THE ORDER DESCRIBES THE COMPLAINT AND THE REASONS FOR THE DISMISSAL IN MORE DETAIL. I HAVE ALSO ATTACHED A COPY OF THE ADVANCE NOTICE OF PROPOSED RULEMAKING THAT THE DEPARTMENT ISSUED TO SEEK COMMENT ON CRS ISSUES, INCLUDING MANY RAISED IN THE COMPLAINT.

THAT CONCLUDES MY REMARKS, MADAM CHAIRMAN. I WILL BE GLAD TO ANSWER ANY QUESTIONS.