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NORWEGIAN AIRLINES INTERNATIONAL'S VIOLATION OF THE US/EU OPEN SKIES AGREEMENT

Tinesha Zandamela¹

Outsourcing labor has become an increasing concern in the United States as unemployment rates have risen and fallen significantly in the past ten years.² In 2013, U.S. companies hired 14 million workers abroad.³ While this outsourcing provides companies with an opportunity to be competitive in a global marketplace, it has a tremendous impact on the U.S. economy. However, the negative economic repercussions—most importantly, less jobs for U.S. workers—do not solely apply to U.S. companies that outsource labor. Often, foreign companies choose not to hire employees from their own countries or from the United States; instead they outsource labor to low-cost countries where they can circumvent labor laws and pay less taxes.

One such foreign company actively outsourcing labor is the Ireland subsidiary of Norwegian Air Shuttle, called Norwegian

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- 1 Tinesha Zandamela is a senior and Honors Student double majoring in sociology and French at Brigham Young University. She plans on attending law school in 2019. She wishes to thank Jacob Roberts and Brett Peper Ruff for their generous efforts in making this article a reality. She would also like to extend special thanks to Kris Tina Carlston, BYU Law Professor David Moore, and the Prelaw Review board.
 - 2 *Databases, Tables & Calculators by Subject: Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT, http://data.bls.gov/timeseries/LNU04000000?years_option=all_years&periods_option=specific_periods&periods=Annual+Data (last visited Dec. 7, 2016).
 - 3 Sarah P. Scott, *Activities of U.S. Multinational Enterprises in 2013*, BUREAU OF ECON. ANALYSIS 8 (2015), http://www.bea.gov/scb/pdf/2015/08%20August/0815_activities_of_multinational_enterprises.pdf.

Airlines International (NAI). This airline flies to the United States and Europe. Upon their creation, they planned to become a competitive airline by lowering costs and by undercutting their competition by offering flights from the East Coast to Europe for less than \$300 roundtrip. However, NAI's CEO claims his target price for a flight across the Atlantic to be \$69.⁴ Their accomplishment solely rewards travelers and comes at too high a price for both U.S. and Norwegian laborers and airlines; NAI is able to offer such low-cost flights by outsourcing labor to low-cost Asian countries, such as Thailand.⁵

To the average American consumer, there is nothing problematic about lowering costs; in fact, it is convenient. The consumers were not the only ones who agreed with NAI; the U.S. Department of Transportation (DOT) decided to tentatively approve a foreign air carrier permit.⁶ This would allow NAI to fly to the United States⁷ despite NAI's direct violation of the amended Article 17 of the Open Skies Agreement (Agreement)⁸—an agreement that was enacted

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- 4 Benjamin Zhang, *Europe's best low-cost airline is invading America, and its U.S. rivals should be afraid*, BUSINESS INSIDER (Jul. 13, 2016, 7:56 PM), <http://www.businessinsider.com/norwegian-air-international-nai-us-2016-7>.
- 5 Claire Zillman, *Pilots battle against 'Walmart-ing' of airline industry*, FORTUNE (May 8, 2014), <http://fortune.com/2014/05/08/pilots-battle-against-walmart-ing-of-airline-industry/>.
- 6 Any airline of a foreign country that wants to conduct commercial operations in foreign air transportation to/from the United States must obtain two authorizations from the DOT: (1) Economic authority from the Office of the Secretary of Transportation and (2) Safety authority from the Federal Aviation Administration. *Foreign Air Carrier Economic Licensing*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/policy/aviation-policy/licensing/foreign-carriers> (last visited Dec. 7, 2016).
- 7 U.S. DEP'T OF TRANSPORTATION, U.S. DOT ISSUES PROPOSED ORDER ON NORWEGIAN AIR INTERNATIONAL (April 15, 2016), [HTTPS://WWW.TRANSPORTATION.GOV/BRIEFING-ROOM/US-DOT-ISSUES-PROPOSED-ORDER-NORWEGIAN-ORDER-INTERNATIONAL](https://www.transportation.gov/briefing-room/us-dot-issues-proposed-order-norwegian-order-international).
- 8 Protocol to Amend the Air Transportation Agreement between the United States of America and the European Community and Its Member States, signed on April 25 and 30, 2007, State Dep't (entered into force June 24, 2010).

between the United States and the European Union (EU) in 2008 and that Norway later signed in 2011—which details that airline industries must follow the labor laws of the respective countries.⁹

Since NAI is in direct violation of the labor portion of the Agreement, the DOT should revoke its permit decision to tentatively allow NAI to fly to the United States, especially in light of the significant impact on labor.

Part I of this paper will discuss an overview of the Agreement, specifically its labor portion, and NAI's violation of the Agreement. Part II will analyze the DOT's decision to offer NAI a permit, notwithstanding the Agreement violation, and the provisions in their permit process that demonstrate why NAI's permit should be reversed. Part III will address potential solutions to these violations.

I. BACKGROUND

The original Air Transport Agreement, known as the US/EU Open Skies Agreement,¹⁰ was signed in 2007 by the United States and European Union and Member States.¹¹ This agreement replaced previous bilateral agreements that were made between the United States and each of the EU member states. The Agreement was created to expand passenger and cargo flights to and from the United States, and to decrease government interference in routes, prices, and capacity.¹² However, this agreement did not leave the international aviation industry completely deregulated. It allowed increased freedom but also created a unilateral agreement for all EU member states and other countries.¹³

9 *Id.*

10 Air Transport Agreement, *opened for signature* April 18, 2007, State Dep't (entered into force April 30, 2007).

11 *Id.*

12 U.S. DEP'T OF STATE, OPEN SKIES AGREEMENTS, <http://www.state.gov/e/eb/tra/ata>.

13 Air Transport Agreement, *opened for signature* April 18, 2007, State Dep't (entered into force April 30, 2007).

After 2007, the United States continued to sign the Agreement with other countries that were not EU member states.¹⁴ On June 24, 2010, after “Second Stage Negotiations,”¹⁵ the United States and European Union (as well as any member states) signed a further agreement that allowed them to amend the previous Agreement.¹⁶

The first paragraph of the amended agreement clearly outlines the reason for the agreement revision:

to build upon the framework established by the Air Transport Agreement between the United States of America and the European Community¹⁷ and its Member States . . . with the goal of opening access to markets and maximising benefits for consumers, airlines, labour, and communities on both sides of the Atlantic.¹⁸

The previous agreement continued to allow the United States and the European Union to be held to one set of standards for airline transportation. The amended Agreement added an environmental portion, and most importantly for the purposes of this paper, Article 17 *bis*,¹⁹ entitled Social Dimension, which clarified standards of labor.

Norway, a country outside of the European Union, signed the Agreement in 2011.²⁰ However, it was not long until NAI decided to outsource labor and lower their prices to compete against other airline carriers, including U.S. carriers. This raised serious controversy

14 Russell E. Tanguay, Jr. “The Future of the US-EU Agreement: A World of Open Skies?” *ISSUES IN AVIATION LAW AND POLICY*, Vol. 9, Issue 2, 241-364. (2010).

15 Karl R. Thompson, OFFICE OF LEGAL COUNSEL, *Interpretation of article 17 bis of the US-EU air transport agreement* (2016).

16 *Id.*

17 *European Community* is synonymous with *European Union*

18 Air Transport Agreement, *opened for signature* April 18, 2007, State Dep’t (entered into force April 30, 2007).

19 *Bis* indicates that this article was amended.

20 U.S.-EU (Iceland, Norway) Air Transport Agreement, *opened for signature* April 16 and 21, 2007, State Dep’t.

among airline unions because of the labor implications—no unions and less jobs for Norwegian and U.S. workers.²¹

Originally in December 2013, NAI submitted an application for both a foreign air carrier permit pursuant to 49 U.S.C. § 41301²² and an exemption found in 49 U.S.C. § 40109.²³ DOT denied an exemption that requested “expedited processing of this application to allow NAI to begin the proposed services as soon as possible.”²⁴ However, this denial of the exemption did not exclude the NAI from being able to fly; the DOT still tentatively approved NAI’s foreign air carrier permit in 2016 by claiming that “the provision in the US–EU Agreement that addresses labor does not afford a basis for rejecting an applicant that is otherwise qualified to receive a permit,”²⁵ despite significant backlash for their violation of the labor portion of the Agreement.

21 Joseph A. Cohen et al., MOTION OF LABOR PARTIES FOR LEAVE TO FILE NEWLY AVAILABLE INFORMATION (June 28, 2016), [HTTPS://WWW.REGULATIONS.GOV/DOCUMENT?D=DOT-OST-2013-0204-15111](https://www.regulations.gov/document?D=DOT-OST-2013-0204-15111).

22 49 U.S.C. § 41301 (2011). Requirement for a permit: A foreign air carrier may provide foreign air transportation only if the foreign air carrier holds a permit issued under this chapter authorizing the foreign air transportation.

23 49 U.S.C. § 40109 (2011). Authority to exempt (a) AIR CARRIERS AND FOREIGN AIR CARRIERS NOT ENGAGED DIRECTLY IN OPERATING AIRCRAFT—(1) The Secretary of Transportation may exempt from subpart II of this part— (A) an air carrier not engaged directly in operating aircraft in air transportation; or (B) a foreign air carrier not engaged directly in operating aircraft in foreign air transportation. (2) The exemption is effective to the extent and for periods that the Secretary decides are in the public interest.

24 NORWEGIAN AIR INTERNATIONAL LIMITED, APPLICATION OF NORWEGIAN AIR INTERNATIONAL LIMITED FOR AN EXEMPTION AND FOREIGN AIR CARRIER PERMIT (Dec. 12, 2013), [HTTPS://WWW.REGULATIONS.GOV/DOCUMENT?D=DOT-OST-2013-0204-0001](https://www.regulations.gov/document?D=DOT-OST-2013-0204-0001).

25 U.S. DEP’T OF TRANSPORTATION, *U.S. DOT Issues Proposed Order on Norwegian Air International* (2016), [HTTPS://WWW.TRANSPORTATION.GOV/BRIEFING-ROOM/US-DOT-ISSUES-PROPOSED-ORDER-NORWEGIAN-ORDER-INTERNATIONAL](https://www.transportation.gov/briefing-room/us-dot-issues-proposed-order-norwegian-order-international).

II. VIOLATIONS OF THE TREATY

A. Article 17 bis Wording

The Agreement is unwaveringly clear in its language to establish explicit guidelines and expectations for each country and its airline carriers. After three years of deliberation and work to amend the Agreement, there was special care taken to outline the terms and conditions of operating an airline carrier in an unambiguous manner. The Agreement lists explicit global standards that were created with the purpose of avoiding potential labor issues.

NAI claims they do not believe they are violating the labor portion of the Agreement,²⁶²⁶ and they are no exception to this belief. The DOT's flagrant disregard for the wording in Article 17 *bis* was apparent when they did not immediately deny NAI a foreign air carrier permit after denying NAI's exemption. The language in the Agreement is clear; therefore, there is no question whether or not NAI is committing a labor violation.

Article 17 *bis* clearly states:

1. The Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws.
2. The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the

social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate.²⁷²⁷

NAI continues to feign ignorance about labor standards; however, they signed the Agreement that already contained the amended Social Dimension portion. Outsourcing labor absolutely violates “high labour standards.”²⁸²⁸ NAI outsources a large portion of their labor to low-cost Asian countries, where laws allow them to pay workers less than a living wage, to work more than reasonable hours, to hire underage children to work, as well as to leave them without an option to dispute their labor concerns. The Agreement also clearly states that airline carriers must follow “labour related rights and principles contained in [the] Parties’ respective laws.”²⁹²⁹

The Agreement is unambiguous; choosing to ignore a major part of an international treaty solely for the sake of convenience sets an incredibly dangerous precedent. NAI’s violation is clear, and while their decision to outsource labor is wrong, the DOT shares responsibility in deciding to perpetuate and reward foreign companies for international treaty violation.

B. DOT Regulations and Standards

In 2013, NAI submitted an application for both a foreign air carrier permit pursuant to 49 U.S.C. § 41301³⁰ and an exemption found in 49 U.S.C. § 40109³¹ requesting that

the Department [of Transportation] issue an exemption and foreign air carrier permit authorizing it to engage in foreign scheduled and chartered air transportation of persons,

27 Protocol to Amend the Air Transportation Agreement Between the United States of America and the European Community and Its Member States, signed on April 25 and 30, 2007, State Dep’t (entered into force June 24, 2010).

28 *Id.*

29 *Id.*

30 49 U.S.C. § 41301 (2011).

31 49 U.S.C. § 40109 (2011).

property, and mail to the full extent allowed under the US-EU Open Skies Agreement, and any future amendments that may provide additional rights to foreign air carriers of the member states of the European Union.³²

The exemption would specifically allow it to expedite the process for its application, and it would allow NAI to begin flying in the United States much faster. The standard application process takes much longer. However, amidst the cries for the DOT to deny NAI a foreign air carrier permit based on their violation of Article 17 *bis*, the DOT denied their request for an exemption since the DOT “typically reserves its exemption powers in awarding foreign air carrier authority to situations where the circumstances of a case are sufficiently clear-cut.”³³

The Agreement is not the only violation the DOT decided to overlook; in 49 U.S.C. § 40101 (Air Commerce and Safety: Policy), the secretary of transportation is required to consider the following, among other issues, when evaluating air carriers:

(4) [T]he availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.

(5) [C]oordinating transportation by, and improving relations among, air carriers, and encouraging fair wages and working conditions.³⁴

The NAI does not encourage fair wages and working conditions because it outsources labor to purposefully circumvent labor laws. For example, the NAI outsources labor to Ireland to circumvent taxes

32 NORWEGIAN AIR INTERNATIONAL LIMITED, APPLICATION OF NORWEGIAN AIR INTERNATIONAL LIMITED FOR AN EXEMPTION AND FOREIGN AIR CARRIER PERMIT (2013), [HTTPS://WWW.REGULATIONS.GOV/DOCUMENT?D=DOT-OST-2013-0204-0001](https://www.regulations.gov/document?D=DOT-OST-2013-0204-0001).

33 U.S. DEP’T OF TRANSPORTATION, ORDER DISMISSING EXEMPTION [(2014), [HTTPS://WWW.EUROCOCKPIT.BE/SITES/DEFAULT/FILES/US_DOT_ORDER_2014-9-1_DISMISSING_EXEMPTION.PDF](https://www.eurocockpit.be/sites/default/files/us_dot_order_2014-9-1_dismissing_exemption.pdf)].

34 49 U.S.C. § 40101 (2011).

and low-cost Asian countries, like Thailand, in order to circumvent both Norway and the United States' working laws. These labor laws in each respective country forbid young people from working over a certain amount of hours and allow for employees to be paid for overtime. This is not only economically problematic for the United States and Norway, but it also is a major human rights violation. Bloomberg reports:

In December, . . . [a] pilots' group called for tighter regulation from the European Union to prevent 'fake self-employment and social dumping practices' by carriers seeking to lower their operating costs. 'They are importing working conditions from Southeast Asia to Europe and the U.S.,' says Lindgren of the Swedish Airline Pilots Association. 'The salaries are lower, the work hours are longer, the pilots' rights to unionize are infringed, and they lack the same social security as pilots in other European and U.S. airlines.'³⁵

Therefore, authorizing NAI to fly to the United States is violating the U.S. Code, which is clearly explained in 49 U.S.C. § 40101—deceptive practices are *not* allowed. Additionally, outsourcing labor to low-cost Asian countries is not “encouraging fair wages and working conditions.”³⁶ Despite the DOT's required commitment to conform to the U.S. Code *and* the Agreement, this was completely overlooked.

The DOT initially recognized that the claims of NAI's labor violation provided sufficient evidence to deny the NAI an exemption and to proceed with an investigation in order to decide whether they could qualify for a foreign air carrier permit. Despite pleas of support for NAI's exemption application from U.S. and EU delegates, the DOT was firm in its decision. The airline continued to operate

35 Justin Bachman and Carol Matlack, *Budget Airlines Shop the World for Cheaper Pilots*, BLOOMBERG (Feb. 11, 2015), <https://www.bloomberg.com/news/articles/2015-02-12/budget-airlines-shop-the-world-for-cheaper-pilots>.

36 49 U.S.C. § 40101 (2011).

flights to the United States under its existing authority, pending the DOT's decision on the NAI formal permit application.³⁷

The DOT's denial of NAI's exemption demonstrates its obvious hesitation at the beginning of this investigation. Considering that the DOT was familiar with the airline, they would have granted an exemption quickly if they did not recognize the substantive merit of the opposing groups' claims. The DOT also denied the United Kingdom-based Norwegian Air Shuttle airline subsidiary for exemption because it lacked a clear-cut answer.³⁸ If this much hesitation surrounds the exemption decision for Norwegian Air Shuttle's different airlines, there is a clear issue and pattern of violations.

And yet, the violations and the previously denied exemption application did not prevent the DOT from extensively reviewing the case and soliciting comments and responses from unions, corporations, and leaders on both sides of the Atlantic when the DOT announced they would tentatively allow the foreign air carrier permit to NAI.³⁹ Federal Express Corporation (FedEx) welcomed the decision, claiming that "the opponents of the proposed Order [the tentative foreign air carrier permit] is a rewriting of the Open Skies Agreement to allow countries to impose on each side the laws of the other side . . . this is the opposite of what was intended."⁴⁰ EU Commissioner for Transportation Violeta Bulc urged the DOT to make a

37 U.S. DEP'T OF TRANSPORTATION, Order Dismissing Exemption (2014), [HTTPS://WWW.EUROCOCKPIT.BE/SITES/DEFAULT/FILES/US_DOT_ORDER_2014-9-1_DISMISSING_EXEMPTION.PDF](https://www.eurocockpit.be/sites/default/files/us_dot_order_2014-9-1_dismissing_exemption.pdf).

38 Bill Carey, *U.S. DOT Denies Norwegian Air UK Foreign Carrier Exemption* (July 16, 2016), AIN ONLINE, <http://www.ainonline.com/aviation-news/air-transport/2016-07-01/us-dot-denies-norwegian-air-uk-foreign-carrier-exemption>.

39 U.S. DEP'T OF TRANSPORTATION, *U.S. DOT Issues Proposed Order on Norwegian Air International* (April 15, 2016), <https://www.transportation.gov/briefing-room/us-dot-issues-proposed-order-norwegian-order-international>.

40 FEDERAL EXPRESS CORPORATION, Response of Federal Express Corporation to Objections to Order to Show Cause (May 14, 2016), [HTTPS://WWW.REGULATIONS.GOV/DOCUMENT?D=DOT-OST-2013-0204-14710](https://www.regulations.gov/document?D=DOT-OST-2013-0204-14710).

definitive decision quickly, while lightly commending them for tentatively approving the permit.⁴¹

However, the opposing side claimed the exact opposite of what FedEx claimed: No one was imposing on the laws of the other countries; they were simply upholding the Agreement. Former Deputy Secretary John D. Porcari is quoted in one motion the Labor Party filed, citing that Article 17 *bis* “unambiguously sets out a clear commitment to protect against air services that ‘undermine labor standards or the labor-related rights and principles contained in the Parties’ respective laws.”⁴² The Labor Party asked the DOT to reverse their tentative foreign air carrier permit decision.⁴³ After recognizing the opposing side, the DOT acknowledged the following:

The labor-related concerns raised by NAI’s opponents warranted proceeding with caution and careful consideration. Given the importance of the arguments raised, especially those about the legal effect of the labor provision of the US-EU Agreement, the DOT went to great lengths to give full consideration to such issues.⁴⁴

Additionally, the DOT’s Office of the General Counsel performed its own international law analysis, the DOT took the “unprecedented step” of consulting the Department of Justice’s Office of Legal Counsel and the Department of State to solicit their views.⁴⁵

In the end, the Department of Justice claimed, “The provision in the US–EU Agreement that addresses labor does not afford a

41 Violeta Bulc, Correspondence from EU Commissioner for Transport Violeta Bulc (July 25, 2016), [HTTPS://WWW.REGULATIONS.GOV/DOCUMENT?D=DOT-OST-2013-0204-15115](https://www.regulations.gov/document?D=DOT-OST-2013-0204-15115).

42 Joseph A. Cohen et al., MOTION OF LABOR PARTIES FOR LEAVE TO FILE NEWLY AVAILABLE INFORMATION (2016), [HTTPS://WWW.REGULATIONS.GOV/DOCUMENT?D=DOT-OST-2013-0204-15111](https://www.regulations.gov/document?D=DOT-OST-2013-0204-15111).

43 *Id.*

44 U.S. DEP’T OF TRANSPORTATION, U.S. DOT ISSUES PROPOSED ORDER ON NORWEGIAN AIR INTERNATIONAL (2016), [HTTPS://WWW.TRANSPORTATION.GOV/BRIEFING-ROOM/US-DOT-ISSUES-PROPOSED-ORDER-NORWEGIAN-ORDER-INTERNATIONAL](https://www.transportation.gov/briefing-room/us-dot-issues-proposed-order-norwegian-order-international).

45 *Id.*

basis for rejecting an applicant that is otherwise qualified to receive a permit.⁷⁴⁶ The DOT used the Department of Justice's claim to solidify its tentative decision. In essence, "does not afford a basis,"⁷⁴⁷ as well as the entire analysis, clearly implies that the labor portion is being violated, but it could not provide a decent basis for a rejection. The precedent being that if you follow all the rules and file correctly, but violate a major part of an international treaty, you may still reap the rewards. This decision was based off special interests, including pressure from NAI, FedEx, and different European governments. There is no dispute that NAI filed correctly, and there is also no dispute or claim that NAI is not violating labor laws.

It is clear that the DOT finds NAI's infringements acceptable, yet does not acknowledge that this behavior, as well as setting this precedent, could damage future agreements and regulations. This precedent would undermine 49 U.S.C. § 40101 and the Agreement by selling out to corporate and consumer interests, instead of complying with an important international agreement and protecting labor in the United States.

III. CONCLUSION

The Agreement is a crucial part of international aviation. Since 2010, jobs in the airline industry have risen exponentially.⁴⁸ The shift from bilateral agreements to a unilateral agreement streamlined the process and created more room for airlines to adjust their routes while still holding airline carriers to a high standard. NAI has continually demonstrated that they will continue to disregard the Agreement's labor portion solely to be competitive in a global market, and the DOT followed suit. It is crucial to use the Agreement for the purposes it

46 Karl R. Thompson, OFFICE OF LEGAL COUNSEL, INTERPRETATION OF ARTICLE 17 BIS OF THE US-EU AIR TRANSPORT AGREEMENT (2016).

47 *Id.*

48 *Databases, Tables & Calculators by Subject: Labor Force Statistics from the Current Population Survey Air transportation*, BUREAU OF LAB. STAT, https://data.bls.gov/timeseries/CES4348100001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true (last visited Jan. 25, 2017).

was intended: creating jobs and making sure airlines follow proper standards. A blatant disregard for 49 U.S.C. § 40101 and the Agreement sets a dangerous precedent: violating international treaties is acceptable on a case-by-case basis. Especially as it concerns labor, the United States, by setting this precedent, will watch more and more jobs move out of the country in favor of financial convenience.

DOT should revoke NAI's permit because of those labor implications and the negative precedent the United States will set by approving violations of labor standards. International treaties must be honored. The United States must set a standard that it is willing to honor treaties, and the DOT has an opportunity to set a precedent demonstrating it keeps its word and understands and follows international law.

