

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION
98 SEP -3 PM 3:14
DOCKET SECTION

42395

LOVE FIELD SERVICE INTERPRETATION
PROCEEDING

Docket OST-984363-18

CONSOLIDATED ANSWER OF
CONTINENTAL EXPRESS, INC.

Communications with respect to
this document should be sent to:

David Siegel
President
CONTINENTAL EXPRESS, INC.
15333 JFK Boulevard
Houston, TX 77032

And

R. Bruce Keiner, Jr.
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
(202) 624-2615

Counsel for
Continental Express, Inc.

September 3, 1998

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

LOVE FIELD SERVICE INTERPRETATION : Docket OST-98-4363
PROCEEDING :

CONSOLIDATED ANSWER OF
CONTINENTAL EXPRESS, INC.

Although the people of Dallas and Cleveland have already been deprived of nonstop jet service between Love Field and Cleveland Hopkins airports on Continental Express¹ 50-seat Embraer 145 aircraft for far too long, American, the City of Fort Worth ("Fort Worth") and the Dallas-Fort Worth International Airport ("DFW") are now asking the Department to delay this proceeding for months by seeking deferrals of the reasonable comment dates established by the Department, requesting an unprecedented "disclosure" of documents by the Department, deleting a critical issue and attempting to add an issue into this proceeding which requires no further consideration.

¹ Common names for carriers are used.

September 3, 1998

Continental Express opposes the American, Fort Worth and DFW requests in their entirety and urges the Department to deny them all for the following reasons:

1. For years, American, Fort Worth and DFW have attempted to block competition at Love Field, and the parties and their counsel have been involved in litigation on Love Field most recently since at least October of 1997. Thus, the parties cannot claim surprise that the Department has an interest in interpreting and enforcing the Federal laws which pre-empt airports from unlawfully limiting the operations of airlines., Ironically, the parties which now claim they and their counsel are far too occupied with litigation in Texas to respond to the Department's order only recently passed up an opportunity to agree to abating those Texas proceedings pending action by the Department to interpret the relevant federal laws. Given the Department's critical role in interpreting federal aviation law and the current schedules for the proceedings in Texas, the Department must promptly determine its interpretation of the questions raised. The requests for delay are intended only to delay even further Continental Express's entry into the Dallas Love Field-Cleveland Hopkins route, and they should be denied promptly. By deciding these critical issues now, the Department can spare the parties the years of litigation which resulted in a pyrrhic victory for Centennial Airport when the FAA determined that Centennial must be opened to scheduled service or lose eligibility for future airport grants. See "FAA Orders Centennial to Reverse Ban On Scheduled Service Or Lose Funding," Aviation Daily, August 28, 1998 .

2. DFW asks the Department to drop from all consideration the question whether “a major carrier may bind itself through its use agreements with the DFW Airport Board that it will not exercise the authority granted by its certificate to operate flights from Love Field that are consistent with the Wright and Shelby Amendments.” DFW argues that a major carrier may indeed bind itself to preclude operations lawful under the Wright and Shelby amendments, but it provides no basis whatever for failing to consider the issue in proceedings before the Department. Although DFW claims that Western Air Lines, Inc. v. Port Authority of New York & New Jersey, 658 F. Supp. 952,958 (S.D.N.Y. 1986), affd, 817 F.2d 222 (2d Cir. 1987) “squarely decided” that “a carrier can agree contractually with an airport not to exercise certain aspects of its federal authority” (DFW Petition at 4), even DFW does not have the audacity to claim that the courts there considered the Wright and Shelby amendments or the unique circumstances at Love Field. Although the Port Authority of New York & New Jersey may have dealt appropriately with congestion and noise problems at La Guardia, the decisions in Western do not deal with the DFW use agreements, Love Field or the Wright and Shelby amendments.

Similarly, DFW claims that because the American frequent flyer program contracts considered in American Airlines, Inc. v. Wolens, 513 U.S. 219, 115 S. Ct. 817 (1995) did not involve enactment or enforcement “of any, law, rule regulation or other provision having the force and effect of law,” the efforts by DFW and its

allies to enforce both contract provisions and the terms of the 1968 Regional Airport Concurrent Bond Ordinance (“Bond Ordinance”) cannot be pre-empted by federal aviation laws enforced by the Department. The Supreme Court held that the purely private contract dispute was not preempted because only the terms of the parties’ bargain, “with no enlargement or enhancement based on state laws or policies external to the agreement,” need be examined. Wolens, 513 U.S. at 223, 115 S. Ct. at 826. “Thus, when a contract claim cannot be adjudicated without resort to outside sources of law, the claim is still preempted by the ADA.” Smith v. Conair, Inc., 134 F.3d 254, 257 (4th Cir. 1997). Prohibiting Continental Express from operating “routes and services” at Love Field necessarily requires interpretation and application of a Bond Ordinance which directs that “legally permissible” regulation shall be imposed to discourage service at Love Field (Bond Ordinance § 9.5), and the contract between Continental Airlines, Inc. and DFW says Continental Airlines will “conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth area to, from, and at the [DFW] Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance” (Restated Use Agreement at 14, § 3.2), which is clearly a local law.² Since the question being considered by the Department is whether enforcement of the contract and bond ordinance are “legally permissible” under the federal Wright and Shelby

² Continental Express is not a party to the contract between Continental Airlines and DFW.

amendments, DFW has failed to demonstrate any reason the Department should drop consideration of this issue. Local regulations by airports must be “carefully scrutinize(d)” to “insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.”³ Conducting such scrutiny pursuant to the federal aviation laws in this proceeding is clearly within the Department’s responsibilities.

3. At the same time DFW asks the Department to drop consideration of issues which are appropriately before it, DFW also seeks to add an issue which requires no further examination. To start with, DFW has the facts wrong. Continental Airlines operates no flights whatever between Love Field and Houston. Continental Express, a separately certificated air carrier, operates such flights using 50-seat Embraer aircraft. Such operations have always been entirely exempt from the prohibitions affecting service at Love Field. As the Department and the courts have long recognized, aircraft with a design capacity of 56 passengers or less have never been constrained by the Wright Amendment’s prohibition on interstate service. In 1985, the Department unequivocally determined that “operations by either a certificated or non-certificated carrier using small aircraft are exempt from the Amendment with respect to Love Field operations” and said that Delta could list in its reservations systems connecting flights operated at Love Field with small

³ See British Airways Board v. Port Authority, 564 F.2d 1002, 1011 (2d Cir. 1977), quoted by the Western court at 658 F. Supp. 958.

aircraft by carriers holding certificates. (See Love Field Amendment Proceeding, Order 85-12-81 at 13) Although Southwest argued that permitting large certificated carriers to operate small aircraft at Love Field “leaves a gaping loophole in the statutory scheme because it allows large airlines to use small aircraft as ‘feeders’ for interstate operations,” the D.C. Circuit upheld DOT’s decision. (Continental v. DOT, 843 F.2d 1444, 1454 (D.C. Cir. 1988))⁴ More recently, the Department confirmed this interpretation of the court’s decision when it said, “The Department held that any carrier could operate unrestricted Love Field service with aircraft that had no more than 56 seats, even if the airline used larger aircraft elsewhere in its system. . . .” and noted that “[o]n review the U.S. Court of Appeals affirmed the Department’s order, including its interpretation of the commuter aircraft exemption.” (See DOT General Counsel Nancy McFadden’s letters of September 16, 1996 to Mr. Bruce Leadbetter at 2 and of June 30, 1998, to Mr. David Siegel at 4-5) If there was any lingering doubt that Congress intended to limit Love Field to short-haul aircraft with fewer than 56 seats, that doubt has been quelled by the Shelby amendment, which permits unrestricted service with long-haul aircraft reconfigured to hold fewer than 56 seats. In denying DFW’s request to consider in this proceeding Continental Express’s offer of connecting service without limitation on its Love Field-Houston Intercontinental flights, the Department should state the

⁴ DFW did not join Southwest’s appeal on this issue. (See 843 F.2d 1454)

obvious: operations with aircraft designed to carry a maximum of 50 seats are entirely exempt from the restrictions imposed by the Wright and Shelby amendments

4. The most egregious effort to prevent the Department from deciding the very aviation law issues entrusted to its jurisdiction is Fort Worth's motion to dismiss the Department's proceeding altogether. Given the fact that the Department has repeatedly reviewed and decided the scope and applicability of the Wright Amendment and determined pre-emption issues, the mere fact that court proceedings are also under way does not preclude the Department from reaching its own decisions on the important federal aviation issues at stake. Litigants will doubtless debate the effect of the Department's determinations, but Fort Worth has provided no reason the Department should shirk its duty to continue deciding the Love Field issues it has dealt with for years. Finally, the Fort Worth claim that the Department's decision to expedite action prior to judicial decisions on motions for summary judgment and the Department's prompt issuance of a letter on its longstanding interpretations of the Love Field legislation and related factual issues reflect "agency bias" is plainly absurd.⁵

⁵ Fort Worth's unprecedented "request for disclosure" by the Department is nothing more than a vain attempt by Fort Worth to find some basis for insinuations Fort Worth made during questioning of a Continental Express witness in court without having any basis for those insinuations. Under these circumstances, the Department should deny Fort Worth's "request" forthwith.

For the foregoing reasons, Continental Express urges the Department to deny the requests for extensions of time, alterations to the questions posed in the Department's order, dismissal and disclosure.

Respectfully submitted,

CROWELL & MORING LLP

By: 
R. Bruce Keiner, Jr.
rbkeiner@cromor.com

Counsel for
Continental Express, Inc.

CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on all parties served with the Department's order in this proceeding in accordance with the Department's Rules of Practice.


R. Bruce Keiner, Jr.

September 3, 1998
1538931

SERVICE LIST (OST-98-4363)

Consolidated Answer of Continental Express, Inc.
(Love Field Service Interpretation Proceeding)
September 3, 1998
Page 1

John J. Corbett
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Washington DC 20005
(City of Dallas)

Sam A. Lindsay
City Attorney
City of Dallas
1500 Marilla, Room 7BN
Dallas, TX 75201

Dee J. Kelly
Marshall M. Searcy, Jr.
Brian S. Stagner
Kelly, Hart & Hallman, P.C.
201 Main Street, Suite 2500
Fort Worth, TX 76102
(City of Fort Worth)

Wade Akins
City Attorney
1000 Throckmorton
Fort Worth, TX 76102

Michael F. Goldman
Bagileo, Silverberg & Goldman L.L.P.
110130th Street, N.W.
Suite 120
Washington DC 20007
(Dallas/Ft. Worth International
Airport)

Kevin E. Cox
Deputy Executive Director
DFW International Airport
P.O. Drawer DFW
Dallas/Fort Worth, TX 75261

Anne H. McNamara
Senior Vice President
and General Counsel
American Airlines Inc.
Box 619616
Dallas/Fort Worth, TX 76155

Carl B. Nelson Jr.
Associate General Counsel
American Airlines Inc.
110117th Street, N.W.
Suite 600
Washington DC 20036

Rebecca G. Cox
Vice President, Government Affairs
Continental Airlines Inc.
1350 I Street, N.W.
Washington DC 20005

Edward P. Faberman
Ungaretti & Harris
1747 Pennsylvania Avenue, N.W.
Suite 900
Washington DC 20006-4604
(Legend Airlines)

T. Allan McArtor
President and CEO
Legend Airlines
7701 Lemmon Avenue
Dallas, TX 75209

James F. Parker
Vice President-General Counsel
Southwest Airlines
2702 Love Field Drive
Dallas, TX 73235