

DEPARTMENT OF TRANSPORTATION  
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DOCKET SECTION

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THE CITY OF FORT WORTH, TEXAS

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION

42208

LOVE FIELD SERVICE  
INTERPRETATION PROCEEDING

Docket OST-98-4363 - 2

**MOTION OF THE CITY OF FORT WORTH, TEXAS, TO DISMISS PROCEEDING**

The City of Fort Worth, Texas ("Fort Worth"), respectfully moves the Department of Transportation (the "Department") to dismiss this Proceeding:

1. Based on the Civil Aeronautics Board's mandate, on April 15, 1968, Fort Worth entered into a Contract and Agreement with the City of Dallas, Texas ("Dallas"), by which the two Cities formed a joint venture to finance, construct, and operate Dallas-Fort Worth International Airport ("DFW Airport"). Effective as of November 12, 1968, the City Councils

of Fort Worth and Dallas passed their 1968 Regional Airport Concurrent Bond Ordinance authorizing the joint issuance by the two Cities of DFW Airport Revenue Bonds.’ Since 1968, almost annually, the two Cities have passed Supplemental Bond Ordinances authorizing the issuance of hundreds of millions of dollars in additional DFW Revenue Bonds. The 1968 Regional Airport Concurrent Bond Ordinance is incorporated by reference into each DFW Airport Revenue Bond as a part of the contract between Fort Worth and Dallas, as Issuers, and the bondholder.

2. Fort Worth has a strong interest in multiple capacities in the matters described in the Department’s Order Instituting Proceeding ("OIP"), served August 25, 1998: as an owner in the joint venture that owns and operates DFW Airport; a party to the April 15, 1968, Contract and Agreement with Dallas; a municipality that passed (together with Dallas) the 1968 Concurrent Bond Ordinance; a joint issuer (with Dallas) of hundreds of millions in outstanding DFW Revenue Bonds; the owner of Meacham Field (another airport, along with Love Field, that is subject to the 1968 Concurrent Bond Ordinance); and a City whose citizens have a vital interest in the health and continued growth of DFW Airport.

3. Fort Worth is the plaintiff in *City of Fort Worth, Texas, v. City of Dallas, Texas*, No. 48-171109-97, in the 48th District Court, Tarrant County, Texas (the “State Court Action”) referred to on page 2 of the OIP. Fort Worth is also one of the appellees in a pending appeal arising from temporary injunctions issued in the State Court Action. That appeal is *Continental Airlines, Inc., et al., v. City of Fort Worth, Texas, et al.*, No. 02-98-211 -CV, before the Court

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‘Fort Worth and Dallas, both Texas home-rule cities, have acted jointly to finance, construct, and operate DFW Airport pursuant to statutory authority granted by the Texas Legislature in Texas Transportation Code § 22.072.

of Appeals for the Second District of Texas. The issues described on page 4 of the OIP are within the jurisdiction of the Texas Court of Appeals. Fort Worth is a defendant in the three federal actions described on page 2 of the OIP.

4. The Department, the Secretary of Transportation, the Federal Aviation Administration, and the Administrator of the FAA are defendants in ***City of Dallas, Texas, v. Department of Transportation, et al.***, No. 3-97CV-2734-T, in the United States District Court for the Northern District of Texas, which has been consolidated with ***Continental Airlines, Inc., et al. v. City of Dallas***, No. 3-98-CV-1197-R in the same federal district court.

5. Although Fort Worth shares the view of the Department that the legal issues pending before the Texas courts and the United States District Court for the Northern District of Texas must be resolved, Fort Worth disagrees that the Department may inject itself into the pending judicial proceedings to “rule on” federal law issues joined in those proceedings, as it proposes to do. With all respect for the Department, Fort Worth strongly objects to this proceeding and moves the Department to dismiss the proceeding as a violation of the Constitutional requirement of separation of powers and well-established and extremely important principles of federalism.

## SEPARATION OF POWERS

6. There are ongoing actions before Texas and federal judiciaries in which the federal law issues on which the Department proposes to issue a Declaratory Order already are joined. Yet, the Department proposes to “issue a ruling on the federal law questions that are the principal issues underlying the litigation.” OIP pp. 3, 5. The Department opines that “a ruling by us on these issues should eliminate much of the pending litigation.” *Id.* The Department sees the issues it intends to “rule on” as legal issues of “straightforward statutory interpretation,” turning on the meaning of certain federal statutes. The Department intends to “issue a decision on the issues underlying the litigation.”

7. The Department does not have power to act as some sort of a “super court,” capable of reaching *sua sponte* into lawsuits pending before the judicial branch in order to “decide” or “resolve” legal issues in those actions. The Department is an agency of the Executive Branch without power to invade the province of the Judicial Branch or to “decide” and “resolve” questions of law that are pending before the judiciary. *See, e. g., Loving v. United States*, 116 U.S. 1737, 1743 (1996) (“one branch of the Government may not intrude upon the central prerogatives of another”); *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1452-53 (1995) (separation of powers precludes another branch from telling the judiciary to reach a particular result in a pending case); *United States v. Nixon*, 418 U.S. 683, 704-05 (1974) (it is the province of the judiciary “to say what the law is”); *Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1543 (1996).<sup>2</sup>

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<sup>2</sup>In *Miller* the Eleventh Circuit observed that “it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction . . . .” 66 F. 3d at 1144.

8. This proceeding, as described in the OIP, is an unconstitutional attempt by an Executive Branch agency to reach beyond the boundaries of Executive power. Even though the Department may believe it can act more expeditiously than the Courts, that provides no justification for exceeding the Department's Constitutional authority. *See INS v. Chadra*, 462 U.S. 919, 951 (1983).

9. One of the purposes of the separation of powers principle is to "safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government. ' " *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). The OIP states that the Department has been "urged" by powerful members of Congress "to protect the federal interests" perceived to be "at stake. " OIP p. 3. According to an article in **THE DALLAS MORNING NEWS** of August 29, 1998 (copy attached hereto as Exhibit A), the legislators' letters went beyond urging the Department to take **some** action. The legislators insisted that the Department take **particular** action on at least some of the matters now at issue in this proceeding.

10. As another separation of powers problem, the Department proposes to rule in this proceeding on the scope of its own federal statutory jurisdiction over Love Field, at the expense of local airport owners' proprietary rights and powers. This raises the inherent problem of Executive Branch self-dealing and regulatory bias against which the separation of powers principle was intended to protect. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986).

11. Any reasonable observer of this proceeding would already have serious concerns about agency bias. During the course of the temporary injunction proceeding in the State Court

Action, attorneys for Continental Express, Inc., appeared on the morning of July 1, 1998, with the letter from the Department's General Counsel that is referred to in footnote 2 in the OIP. Mr. Siegel, the recipient of the letter, testified that he had requested the letter on June 29, 1998, one day before it was issued on June 30, 1998. That the Department was able and willing to issue a multi-page reply to Mr. Siegel's request literally overnight in time for use during Mr. Siegel's testimony in the temporary injunction hearing, without notice to the other parties is unorthodox and at least remarkable.

12. The Department's ***Love Field Amendment Proceeding***, Order 85-12-81 (December 31, 1985), provides no precedent for the Department's actions in this proceeding. The issues in the ***Love Field Amendment Proceeding*** were not pending before any state or federal court. The Department did not purport in the ***Love Field Amendment Proceeding*** to reach into pending litigation or to "decide" or "resolve" "principal issues," in order to "eliminate much of the pending litigation," as the Department says it intends to do here. Fort Worth has found no precedent for the Department's actions in this proceeding. Indeed, precedent demonstrates that the types of legal questions the Department proposes to "rule on" and "decide" in this proceeding are properly decided through the normal trial court and appellate judicial process. ***E.g., Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir.), cert. denied, 117 S.Ct. 81 (1996); *Western Air Lines v. Port Authority*, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988).**<sup>3</sup>

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<sup>3</sup>In the Department's Brief dated August 16, 1979, in Southwest Airlines Automatic Market Entry Investigation, Docket No. 34582, the Department correctly stated that "the extent of an airport proprietor's power continues to be the subject of an evolving case law." The Department advised the CAB that "the authority of the City of Dallas to limit the types of uses at Love Field will have to be decided by the courts, since the [Airline Deregulation

13. The Department and the Secretary of Transportation are parties to the action in the United States Court for the Northern District of Texas and may file briefs and argue before that Court, if the Court proceeds to decide the issues identified in the OIP. The Department should participate in the judicial process, not attempt to take it over.

### **FEDERALISM**

14. As the Department knows, the four questions of law that the Department proposes to “rule on” or “decide” are currently pending before the trial and appellate courts of the State of Texas. The State Court Action has been pending since October 10, 1997. Yet the Department now announces--eleven months after the State Court Action was commenced--that it intends to issue an almost-immediate declaratory order purporting to decide certain questions of statutory construction in order to “end the pending litigation. ” The principles of federalism and comity prevent such an attempted interference by the Department with the “fundamental Constitutional independence” of the state courts. ***Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970).**

15. Fundamental tenets of federalism would prohibit a federal court from issuing the declaratory order that the Department proposes to issue. In ***Texas Employers’ Ins. Ass’n v. Jackson***, 862 F.2d 491, 504-508 (5th Cir. 1988) (en banc), ***cert. denied***, 490 U.S. 1035 (1989), the Court held that the fundamental principles of federalism embodied in the Anti-Injunction Act, 28 U. S .C. § 2283, prohibit a federal court from issuing a declaratory judgment addressing

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The Department advised the CAB that “the authority of the City of Dallas to limit the types of uses at Love Field will have to be decided by the courts, since the [Airline Deregulation Act] does not provide for [CAB] administration of section 105(b)(1) [the Act’s reservation of local airport owners’ proprietary powers and rights .]” Department Brief at pp. 15- 16.

federal preemption questions already pending as defenses before a state court. Since the federal judiciary may not issue a declaratory order deciding federal preemption issues pending in a state judicial proceeding, it seems axiomatic that the Department, an Executive Branch agency, may not purport to do so.

16. The Department's insistence that it intends to decide only federal law questions does not justify its proposed interference with the state judicial process. The Supreme Court has reaffirmed, time and again, the view embodied in the Constitution that the state courts are capable of protecting federally-created rights, even where there is a claim that federal law has preempted state law. **See *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988)** ("respondents must present their pre-emption argument to the Texas state courts, which are presumed competent to resolve federal issues"); ***Amalgamated Clothing Workers of American v. Richman Bros. Co.***, 348 U.S. 511, 517-18 (1955) (rejecting the contention that the importance of prompt vindication of federal labor policy justifies federal interference in state court proceedings).

17. Fort Worth strongly disagrees that the Department has the authority to decide questions already pending in the State Court Action. Fort Worth also disagrees that the Department's rulings will have any preclusive effect in the pending Texas (or federal) judicial proceedings. Nevertheless, the Department seems to intend that its opinion on federal law issues will be dispositive of those issues in the State Court Action. See OIP p. 3 ("a ruling by us on these issues should eliminate much of the pending litigation"); p. 5 ("We . . . wish to issue a ruling promptly in order to end the pending litigation insofar as it involves the two [sic] federal law issues we plan to address. "). This, in our federal system, the Department cannot do.

18. The Department may intervene in the State Court Action if it believes its views should be heard. Texas judicial procedure freely allows intervention. Texas Rule of Civil Procedure 60. Or, the Department may appear before the Texas courts as an amicus curiae.

19. The Department should dismiss this proceeding immediately as precluded by the Anti-Injunction Act and the general principles of federalism that Act expresses. This proceeding is fundamentally flawed. It will multiply, not end, litigation. Unless dismissed, it will simply require the parties to litigate in additional forums, and it will create and embroil the parties in unnecessary and ill-advised conflicts between independent branches of Government and between the federal and state governments.

#### **CONCLUSION AND PRAYER**

20. This proceeding violates the Constitutional requirement of separation of powers and well-established principles of federalism. Fort Worth objects to the proceeding and does not consent to the proceeding.

21. For all reasons stated above, Fort Worth moves the Department to dismiss this proceeding.

Dated: August 31, 1998

Respectfully submitted,



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**ATTORNEYS FOR THE  
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CERTIFICATE OF SERVICE

I hereby certify that I have on August 31, 1998, served the foregoing Motion of the City of Fort Worth to Dismiss Proceeding on the following persons at the following addresses by United States Mail:

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# Business

Weather  
Texas & Southwest

Saturday, August 29, 1998

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## Letters behind DOT's Love Field intervention

By Terry Maxon

Staff Writer of The Dallas Morning News

For nearly 11 months, the U.S. Department of Transportation remained silent as Fort Worth, Dallas, a number of airlines, Dallas/Fort Worth International Airport and others slugged it out over the future of Love Field.

That changed last week when DOT officials started a proceeding to decide what limits the cities can place on Love Field, a federally

### Lawmakers complain service, federal authority in jeopardy

funded airport that twice has been the subject of federal laws governing its use. Transportation Secretary Rodney E. Slater decided to act after receiving two strongly worded letters from two powerful lawmakers — Senate Majority Leader Trent Lott and Rep. Bud Shuster, chairman of the House Transportation and Infrastructure Committee.

In their letters to Secretary Slater, Mr. Lott, R-Miss., and Mr. Shuster, R-Pa., complained that the Love Field battle was hindering airline service at the Dallas airport and contravening federal law.

"Congress directed, and the President affirmed, that nonstop flights by 56-seat jets could fly to three states. However, a local

court has decided to overturn Congress' interstate commerce clause," Mr. Lott wrote in a July 22 letter.

"This will threaten our national transportation system if it goes unchallenged. I need your department to enter the net and assert the Federal role," Mr. Lott wrote.

In 1997 changes to federal law, Mr. Lott's state was added to the

list of states that could be reached directly from Love Field. Southwest Airlines Co. has since begun selling tickets for service between Jackson, Miss., and Love Field.

"Americans who use our air transportation system will benefit from the removal of these unnecessary barriers. It is my hope your agency will see that the law is carried out and travelers will reap the benefits of more competition and Please see LAWMAKERS' on Page 3F.

EXHIBIT "A"

# Lawmakers' letters behind DOT's Love Field intervention

Continued from Page 1F.

more efficient travel," Mr. Lott wrote.

In an Aug. 4 letter, Mr. Shuster suggested to Mr. Slater that Love Field limits could threaten federal funding for the airport. The federal government gave Dallas \$16.3 million in federal airport money for Love Field the past five years, he said.

Last Monday, DOT withdrew federal funding for Centennial Airport in Colorado after local officials balked at permitting scheduled airline service at the suburban Denver airport.

Mr. Shuster said he was concerned about Fort Worth state district Judge Bob McCoy's injunction preventing Continental Express from flying between Dallas and Cleveland, Ohio.

From Judge McCoy's ruling, "it appears that the Texas court has already determined that additional flights out of Love Field should be prohibited, regardless of federal laws to the contrary," wrote Mr. Shuster.

Mr. Shuster cited federal laws that

preempt local efforts to restrict an airline's services. The law also requires airports to "be available for public use on reasonable conditions and without unjust discrimination" to qualify for federal aviation funding, he said.

Mr. Shuster noted that the DOT's general counsel, Nancy McFadden, wrote a June 30 letter suggesting that Continental Express could fly long distances from Love Field.

In its order, the DOT cited requests from Dallas and Legend Airlines Inc.

"My concern is not just for Continental Express but for any service at Love Field," Mr. Shuster told Secretary Slater. "If the local communities can limit air service to Love Field, it calls into question who controls interstate commerce and would seem to render meaningless the expansion of the Wright amendment enacted in 1997."

The Wright amendment, signed into law in 1980, limits any scheduled airline service from Love Field to Texas and the four adjoining states. The 1997 change, known as the Shelby amendment, added Mississippi,

"This will threaten our national transportation system if it goes unchallenged. I need your department to enter the net and assert the Federal role."

— Senate Majority Leader Trent Lott, R-Miss., in letter to Transportation Secretary Rodney E. Slater

Alabama and Kansas to the permitted states.

The Wright amendment also exempted commuter aircraft with 56 seats or less from the limits. The 1997 law clarified that exemption so that any airplane with 56 seats or fewer could be used, even if the aircraft was designed to carry more than 56 seats.

Legend, a new airline now applying for federal certification, is planning to fly long distance from Love Field with larger jets configured with only 56 seats. However, its plans have brought protests from American Airlines Inc., the largest carrier at D/FW Airport.

Last October, the day after Congress

amended the Wright amendment, Fort Worth sued Dallas, Legend and others to block any expanded service at Love. American later joined the suit on Fort Worth's side.

The key issue in the suit has been whether Dallas can permit less airline service than is allowed by federal law. Fort Worth says Dallas can limit service and is required to do so by a 1968 ordinance passed by Fort Worth and Dallas. Dallas says that it can't.

The dispute has spurred a number of lawsuits in state and federal court, and settlement talks have not led to a compromise.

Steven Okun, a DOT attorney,

acknowledged that the department has received requests from congressmen and others to resolve the matter.

However, the primary reasons the department got involved were to end the lengthy, costly litigation; the realization that there was little probability that the parties would settle it themselves; and the likelihood that there would be no ruling in state court on the key federal issues.

American has said it would prefer that the dispute be settled between the local parties or in court. Other airlines, including Southwest, Legend and Continental Express' parent, Continental Airlines Inc., have said they are happy that the DOT is now stepping in to decide the issue.

Legend chief executive T. Allan McCarter, whose airline wants to start service in early January, said the Love Field dispute is clearly a federal matter.

"We've been trying to get the Department of Transportation to take action now for over nine or 10 months," he told the Irving Rotary Club last week.