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U.S. Department of
Transportation
Office of the Secretary
of Transportation

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GENERAL COUNSEL

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David N. Siegel, President
Continental Express, Inc.
Gateway II, Suite 600
15333 John F. Kennedy Blvd.
Houston, Texas 77032

DEPARTMENT OF TRANSPORTATION
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DOCKET SECT 011

Dear Mr. Siegel:

You have asked us for advice on the Department's position on four issues that you anticipate will be addressed by the parties at a hearing on preliminary injunction motions involving Continental Express' plans to operate flights from Love Field to Cleveland. In a pending state court suit, City of Fort Worth, Texas v. City of Dallas, Texas, et al., Tarrant County District Ct. No. 48-171109-97 (filed October 10, 1997), the City of Fort Worth and the Dallas-Fort Worth International Airport Board ("DFW Board") asked the court to enjoin Continental Express from beginning this service. The court granted their request for a temporary restraining order on June 25 and has scheduled the hearing on their request for a preliminary injunction to begin on June 29.'

The following are the four issues: (i) whether increased operations at Love Field would decrease the safety of airline operations in the Dallas-Fort Worth metropolitan area, (ii) whether increased service at Love Field would lead to a reduction in traffic at DFW or harm DFW's economic viability, (iii) whether the Wright and Shelby Amendment would allow Continental Express to operate Love Field-Cleveland flights with regional jets designed with a capacity of no more than 56 passengers, and (iv) whether the restrictions on Love Field service agreed to by the cities of Dallas and Fort Worth are permitted by federal law.

Continental Express had intended to begin operating flights from Love Field to Cleveland with regional jets that would have a capacity of 50 passengers. This Department is not a party to the state court action, and we have not issued a ruling on the specific issues that will be considered by the court. As is well known, however, the United States airline business and the national airport system are subject to comprehensive federal regulation. See, e.g., Northwest Airlines v. Minnesota, 322 U.S. 292,303 (1944) (Jackson, J., concurring).

We also understand that the court's ruling on the preliminary injunction motions is likely to involve an interpretation of several federal statutes that this Department is responsible for administering. Two of those statutes restrict interstate scheduled passenger service at Love Field. The first such statute is Section 29 of the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980) ("the Wright Amendment"). The second is a provision enacted in 1997, section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L. No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997) ("the Shelby Amendment"), which modified the restrictions imposed by the Wright Amendment. In these statutes, Congress has charged this Department to enforce these restrictions by requiring the Department -- the agency responsible for issuing economic operating authority to U.S. airlines under chapter 411 of subtitle VII of Title 49 of the U.S. Code -- to deny each U.S. airline any authority to operate Love Field service that would violate the statutory restrictions on such service.

I understand that the preliminary injunction hearing will also likely involve the statutory restrictions governing actions by state and local governments affecting airline service. One provision of the statute administered by the Department, 49 U.S.C. 41713(b), prohibits a state or local government from making or enacting a law, regulation, or other provision that is "related to a price, route, or service of an air carrier," subject to an exception for a state or local government's exercise of its proprietary powers as an airport owner or operator.

The hearing may additionally involve other matters that the Department is responsible for regulating, such as the operation of the air traffic control system and the programs for providing grants to airports. See, e.g., Northwest Airlines v. County of Kent, 510 U.S. 355, 366-367 (1994); New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 171-173 (1st Cir. 1989).

In responding to your request for advice, I am relying on past studies and statements by the Department, since we have not issued any findings or rulings on these issues in connection with the current disputes over Love Field service. I am aware of no factual information that would put into question the validity of those past studies and statements. I am primarily relying on the findings of a thorough study conducted by the Department on the probable impact of either a repeal of the Wright Amendment or an amendment of that statute that would allow significantly more service at Love Field, Interdepartmental Task Force on the Wright Amendment. Analysis of the Impact of Changes to the Wright Amendment (July 1992) ("DOT Study"). The study analyzed statutory changes that would allow substantially more service than the changes enacted by the Shelby Amendment. DOT Study at 3. As a result, to the extent that harm could result from the possible statutory changes and consequent increases in Love Field

operations analyzed by the study, any such harm predicted by the study would exceed the harm possible from the expanded service authorized by the Shelby Amendment.

The first issue raised by your letter is whether additional flights at Love Field would affect the safety of airline operations in the Dallas-Fort Worth metropolitan area. The Department's earlier study stated that the Federal Aviation Administration ("FAA") was implementing a new air traffic control system plan which would increase the amount of air traffic capacity in the entire Dallas-Fort Worth metropolitan area. DOT Study at 66. The study concluded that an increase in operations in that area would not affect safety: "The FAA will not permit air traffic safety to be compromised under any circumstances. Safety is ensured by FAA procedures and requirements based on air traffic control and system capacity" DOT Study at 66. See also DOT Study, Executive Summary at 1.

Patrick V. Murphy, the Deputy Assistant Secretary for Aviation and International Affairs, similarly stated on October 21, 1997, before the Subcommittee on Transportation of the Senate Appropriations Committee, that increased Love Field service would not threaten safety, for "we concluded that safety would be maintained by FAA imposed air traffic procedures."

The second issue presented by you concerns the impact of increased Love Field service on DFW's traffic and economic viability. On the basis of a careful analysis, the DOT Study found that allowing expanded service at Love Field would not injure DFW: such changes "will have little if any impact on Dallas-Fort Worth Airport's growth." DOT Study, Executive Summary at 10. The study based that conclusion in part on its finding that DFW Airport was more convenient than Love Field for more residents of the Dallas-Fort Worth metropolitan area and that DFW Airport's advantage in that respect would grow over time. DOT Study, Executive Summary at 12-13. The study's analysis of likely changes in airline operations and DFW Airport's residual fee arrangements with the airlines using the airport, led the study to conclude, DOT Study at 31:

The overall impact on Dallas-Fort Worth Airport from a diversion of service to Love Field (or any change in the Wright Amendment under the existing scenarios) is negligible. . . . [A] reduction in the number of departures, and therefore the landing weights at Dallas-Fort Worth Airport, will not reduce the airport's revenues or its ability to meet its expenses. .

The third and fourth issues listed in your letter are legal issues -- whether Continental Express may operate longhaul service with regional jet aircraft and whether Dallas as a result of its longstanding agreement with Fort Worth may bar airlines from operating services at Love Field that are permitted by the Shelby Amendment. These issues are controversial, and we recognize that the parties to the dispute over expanded Love Field service have taken directly opposing positions on these issues. Nonetheless, the Department has taken action in the past which bears on these issues.

First, before the Shelby Amendment's enactment, two firms -- Centennial Express Airlines and Dalfort Aviation -- asked the Department whether the Wright Amendment would allow an airline to operate longhaul flights from Love Field with large aircraft reconfigured to hold no more than 56 seats. Each firm had argued that the Wright Amendment would allow such service, since it exempted services operated with aircraft with a passenger capacity of no more than 56 passengers from the various restrictions on Love Field service. I concluded that Dalfort could not lawfully operate such service, and Rosalind A. Knapp, the Deputy General Counsel, stated that the Wright Amendment did not appear to allow Centennial Express to conduct such operations. September 19, 1996, letter from Nancy McFadden, the General Counsel, to Bruce Leadbetter, the Chief Executive Officer of Dalfort Aviation; May 16, 1994, letter from Rosalind Knapp, the Deputy General Counsel, to John Andrews, the President and CEO of Centennial Express Airlines.

While the issue raised by Centennial Express and Dalfort differs from the question asked by you, our responses to the two firms suggest that the operation of longhaul service with regional jet aircraft designed to hold no more than 56 seats would be consistent with the Wright Amendment. Neither of our letters indicated that the firms' proposed operations would be unlawful because they planned to use jet aircraft. Instead, both letters concluded that the proposed operations would be inconsistent with the Wright Amendment restrictions only because the aircraft were originally designed to hold more than 56 seats. The letter to Centennial Express, moreover, stated that the Wright Amendment would permit the firm to operate flights from Love Field to Denver as long as the aircraft were not designed to hold more than 56 seats, May 16, 1994, letter to John Andrews at 2:

As a result, insofar as Centennial Express plans to operate with aircraft originally designed to carry no more than 56 passengers, its flights would clearly be exempt from the [Wright] Amendment's restrictions on interstate service under the literal terms of the statute and under the Department's interpretation [in Order 85-12-81]. Centennial Express, for example, could provide nonstop

service between Love Field and Denver with such equipment without violating the [Wright] Amendment.

Indeed, one of the aircraft included in Centennial Express' proposal -- the Fokker 70 -- is a jet, yet our letter to the firm did not indicate that the aircraft's status as a jet would invalidate the firm's proposed service, if the aircraft were designed to hold no more than 56 seats.

Similarly, my letter to Dalfort did not indicate that the firm's proposed operation would be unlawful because it planned to use jet aircraft. I instead based my conclusion entirely on the firm's plan to use reconfigured large aircraft. Moreover, when Dalfort sought judicial review of my opinion, our brief to the Fifth Circuit Court of Appeals stated, Brief for Respondent, Astraea Aviation, d/b/a Dalfort Aviation v. US. Department of Transportation, 5th Cir. No. 96-60802 (filed June 5, 1997), at 3.5:

[The Department's] opinion by its terms would not keep Dalfort from beginning long-haul jet service from Love Field in view of the recent development of regional jet aircraft. Those aircraft have a designed capacity of no more than 56 seats but can operate over long distances. Although the opinion did not address whether the commuter aircraft exemption would allow Dalfort or another firm to operate long-haul service with regional jet aircraft, the opinion's rationale suggests that the Love Field amendment allows a carrier to operate long-haul service from Love Field with regional jets.

While neither letter specifically addressed the issue of whether the Wright Amendment permitted the operation of longhaul flights with jet aircraft designed to hold no more than 56 seats, the Shelby Amendment essentially overturned my opinion on the issue of using reconfigured large aircraft and would seem to weaken arguments that Congress did not intend to allow the use of jet aircraft for longhaul Love Field service.

The final issue presented by you is the question of whether federal law would allow Dallas to carry out its agreement with Fort Worth to restrict Love Field service. Resolving that issue will involve an interpretation of 49 U.S.C. 41713(b), the section which preempts state and local government regulation of airline rates, routes, and services, subject to an exception for the exercise of its proprietary rights by an airport owner or operator. The Department has not addressed this precise issue.

I can say that the Department has been concerned by past efforts by state and local governments to regulate airline services. For example, the Department and the FAA opposed decisions by some local airports -- Orange County and Westchester County, for example -- to restrict airport operations when the restrictions appeared to be unjustified by legitimate airport needs. The Department opposed efforts by a number of states to regulate airline advertising where the states' proposed advertising guidelines involved a regulation of airline fares and services. See Morales v. Trans World Airlines, 504 U.S. 374,379 (1992). However, in certain circumstances, the Department has taken the position that preemption of state laws need not apply. See American Airlines v. Wolens, 513 U.S. 219 (1995). In sum, preemption in general and the extent of airport proprietor powers in particular have been the subject of substantial Department concern in the past.

I hope this information is helpful.

Sincerely,

A handwritten signature in black ink, reading "Nancy E. McFadden", followed by a long horizontal flourish line.

Nancy E. McFadden