

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION

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DOCKET SECTION

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LOVE FIELD SERVICE

INTERPRETATION PROCEEDING

DOCKET OST-98-4363 - 9

RESPONSE OF LEGEND AIRLINES, INC. TO  
PETITION FOR RECONSIDERATION OF ORDER 98-9-29  
AND MOTION FOR ENLARGEMENT OF TIME  
OF THE DALLAS-FORT WORTH INTERNATIONAL AIRPORT

AND TO

THE MOTION OF THE CITY OF FORT WORTH, TEXAS TO DISMISS  
PROCEEDING,  
THE MOTION OF THE CITY OF FORT WORTH, TEXAS FOR ADDITIONAL TIME  
AND THE REQUEST OF THE CITY OF FORT WORTH, TEXAS FOR DISCLOSURE  
BY THE DEPARTMENT

AND TO

MOTION OF AMERICAN AIRLINES, INC. FOR AN EXTENSION  
OF TIME AND FOR CLARIFICATION OF ORDER 98-8-29

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DATED: September 2, 1998

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AND FOR CLARIFICATION OF ORDER 98-8-29**

On September 1, 1998, the Dallas-Fort Worth International Airport ("DFW") filed a petition with the Department of Transportation ("Department") for reconsideration of Order 98-8-29 and an enlargement of the time period for filing responsive comments. On that same date, the City of Fort Worth filed three motions with the Department -- Motion of The City Of Fort Worth, Texas To Dismiss Proceeding, Motion of The City of Fort Worth, Texas For Additional

Time, and Request of The City of Fort Worth, Texas For Disclosure By the Department. As the ringleader of this cabal, American Airlines, Inc. (“American”) filed on September 2, 1998 for a 60-day extension of the comments.’

Legend Airlines, Inc. opposes any attempt to extend the comment period on Order 98-8-29. This is not an attempt to gain additional time to comment; instead, it is another delaying tactic by two of the parties that have been involved in a thirty-year quest to close down all proposed or actual airline competition in the Dallas-Fort Worth area. While DFW, American and Fort Worth make these requests for additional time, their army of lawyers and consultants are pressing the state court in Fort Worth to accelerate efforts to foreclose all new service at Love Field. Their sole purpose for filing these motions is to delay the Department long enough so that the state court can issue an order that, in the words of Fort Worth’s attorney, “would be preclusive of anything that the Department of Transportation or any federal agency can do.”<sup>2</sup> [August 28, 1998 Hearing before Judge McCoy, *City of Fort Worth, Texas v. City of Dallas, Texas et al.*] According to Fort Worth, “the authority of the City of Dallas to limit the uses of Love Field involves questions for this court [to] decide and not the Department of Transportation.”

American, Fort Worth and DFW have had teams of lawyers and consultants primed to work on these issues since the first Congressional action was taken to address the highly restrictive Wright Amendment. As Bob Crandall stated when he first heard of plans to add

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<sup>1</sup> It is not surprising that American is seeking additional time. Apparently, it believes that its’ new Love Field service can make money (see *Fort Worth Star Telegram*, September 1, 1998) while American is using other new routes to send a message to competitors to stay out of Love Field. The following news report describes American’s latest attempt to destroy all competition: “Analysts said American’s new Houston Service appears to be simply retaliation against Continental’s Love Field plans.” (*Dallas Morning News*, Tuesday, July 21, 1998.)

<sup>2</sup> Mr. Kelly must get his legal theories from the “Republic of Texas.”

service at Love Field, “If the Wright Amendment is ever changed, we’ll sue everybody to close Love Field.”<sup>3</sup> Since Crandall’s pronouncement, legal teams were ready. They started the current state court litigation process on the day after the Shelby Amendment was passed and have been in every forum with a “podium” in the Fort Worth area. They have spent millions on advertisements and campaigns to frighten and mislead the citizens of both cities. Yet they have the audacity to suggest that they don’t have the resources to respond.<sup>4</sup> A very interesting statement in light of their latest 30-page filing. Perhaps if they had been less interested in demeaning Department officials and delaying the process, and more interested in responding, their answers would be ready to file.<sup>5</sup>

For over twenty years, these same parties have frequently asked the Department to rule on issues that they thought would help them or prevent competitors from offering any service from Love Field. It was these same parties that petitioned the Department to investigate proposed Continental Airlines service out of Love Field in 1985. The Department utilized the same procedure in that hearing as it is utilizing in this proceeding. When it suited their purpose, these parties were more than willing to have the Department review other issues concerning Love Field.

Fort Worth’s most outrageous claim may be its statement, “Fort Worth strongly disagrees that the Department has the authority to decide questions already pending in the State Court

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<sup>3</sup> *Dallas Business Journal*, October 4-12, 1996.

<sup>4</sup> The DFW Airport Board “has approved spending an additional \$400,000 for legal fees in its fight over expanded airline service at rival Love Field. The increase brings the total legal services budget for Dallas/Fort Worth Airport’s part of the battle to \$900,000. But that could increase by \$300,000 to \$400,000 if the cases are appealed to the U.S. Supreme Court, airport officials said.” [“D/FW to spend more on legal fees,” *Star-Telegram*, August 8, 1998.]

<sup>5</sup> Legend notes that although Fort Worth whines about the time needed to respond to the Department order, they did not have the courtesy to send Legend’s counsel copies of their filing via fax. As of close of business Tuesday, September 1, it had still not been received.

Action,” A new theory of law: if a state court is reviewing an issue, the federal government must not address the issue. Perhaps it is just another right conferred to the City of Fort Worth by the Bond Ordinance or by some other mythical agreement between the two cities that Fort Worth, DFW and American alone claim exists,

It is alarming that federal issues being determined by the Department are before a state court judge that readily admits “at first blush, I’m not sure that the Department of Transportation has authority to tell a judge what to do.”

The following demonstrates the significant federal issues that are currently before the state court in Fort Worth. From “Answers and Objections to Legend Airlines, Inc.’s First Set of Interrogatories to Dallas-Fort Worth International Airport Board (No. 48-1 71109-97),” filed August 21, 1998:

**Response of DFW Airport to Interrogatories presented in state court**

**Response to Interrogatory No. 3:**

It is DFW’s position that if non-stop interstate service at Love Field beyond the contiguous states on jet aircraft of less than 300,000 pounds gross weight with a passenger capacity of fifty-six (56) or fewer passengers is permitted to operate that it will impair, diminish and reduce the optimum use and development of DFW Airport for scheduled interstate and international passenger service because flights, passengers and revenue will be diverted from DFW Airport to Love Field, shared airspace will become more congested, and the effectiveness of the DFW hub will be diminished.

Response to Interrogatory No. 4:

It is the position of DFW that permitting non-stop interstate service at Love Field beyond the states of Louisiana, Arkansas, Oklahoma and New Mexico will impair, diminish, and reduce the optimum use and development of DFW Airport for scheduled interstate and international passenger service because flights, passengers and revenue will be diverted from DFW Airport to Love Field, shared airspace will become more congested, and the effectiveness of the DFW hub will be diminished.

Interrogatory No. 10:

If you contend that Southwest, by offering through-ticketing from Dallas to Birmingham, Alabama and Jackson, Mississippi is not flying under authority of the Shelby Amendment, identify and describe whether and how such service is legally permissible under the Joint Bond Ordinance.

Answer:

DFW objects to Interrogatory No. 10 to the extent that use of the phrase “under authority of the Shelby Amendment” is vague, ambiguous and misstates the Shelby Amendment. Subject to that objection and subject to DFW’s contention that the Shelby Amendment does not “grant authority” to anyone to fly anywhere, DFW does not contend that Southwest is not flying consistent with the Shelby Amendment.

Response to Interrogatory No. 11:

It is DFW’s position that any interstate air service at Love Field must be conducted in accordance with and pursuant to the provisions of the 1968 Bond Ordinance and Agreement between the cities and the proprietary rights retained by the City of Dallas, and the authority delegated to the DFW Board consistent with Section 9.5A of the 1968 Bond Ordinance so as to promote the optimum use and development of DFW Airport.

It is only when there is a threat of new competition that these parties attack the Department and its employees. In this regard, comments made by counsel for Fort Worth concerning the Department's General Counsel and questions and requests for documents contained in the Request for Disclosure are evidence of a total disregard for Congressional action, federal issues, the Department and its employees. These are interesting assertions made by a representative of a community and an airline that simultaneously seeks approval from the Department of Transportation for alliances between American and numerous domestic and international carriers, as well as approval for additional international route awards.

In astonishing misstatements of law, American, DFW and Fort Worth have advised the Tarrant County court that the Wright and Shelby Amendments are merely advisory and that local parties can decide whether to adhere to or ignore federal standards. In fact, Fort Worth attorney Dee Kelly<sup>6</sup> argued:

Now, is there any doubt, Your Honor, that what Continental proposes here today competes with D/FW? And the only excuse they are giving you is the Wright and Shelby Amendments.... There's simply no legal impediment to Dallas exercising its proprietary rights, proprietary powers to maintain the existing four state perimeter rule... And even Ms. -- Mrs. -- what's her name from the Department of Transportation, we sent this egregious letter to you, after we rested and before they started, and it admits the definition of proprietary powers has not yet been defined.<sup>7</sup>

In asking the court to enjoin interstate flights at Love Field, Kelly made numerous claims that had already been rejected by the Department, including--

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<sup>6</sup> Kelly's appearance as counsel for Fort Worth, although he has long represented American Airlines and is a member of AMR's Board of Directors, well illustrates the incestuous and symbiotic relationship of the American and Fort Worth parties. In addition, Kelly's law firm represents the DFW Board (which is a so-called defendant in this case) and his law firm has rendered legal advice in connection with the DFW bonds and Alliance Airport.

<sup>7</sup> Counsel for American and DFW should be required to state whether they agree with these statements by counsel for Fort Worth and a member of American's Board of Directors.

1. “If you add departures from Love Field, you diminish airspace for DFW departures.”
2. “Adding flights to Cleveland could generate a competitive long-haul interstate response and would constitute competition with DFW.”
3. “Continental is trying to fragment and destabilize DFW by adding interstate service beyond the perimeter rule.”
4. “DFW has twice the operations as Houston’s International.”

Counsel for both DFW and Fort Worth have attacked the Department’s prior rulings *on* this issue. They apparently believe that a June 30, 1998 letter from the General Counsel to Continental Express, Inc. was fictitious or issued for some other purpose. The following demonstrates some of those comments:

From transcript of *Fort Worth v. Dallas, et al.* (No. 48-171109-97):

MR. KERR: The Airport Board adopts that objection and would add it’s not only the creation of evidence [referring to Ms. McFadden’s letter] or the creation of -- well, the creation of evidence. It’s also the creation or the attempt to create a legal opinion. There is no foundation that there’s been any investigation to support whatever legal opinions may be expressed into evidence that’s been created.

MR. JOHNSON: There is absolutely nothing to get over the problem of trustworthiness. The letter [referring to Ms. McFadden’s letter] itself -- the reply letter that they are relying upon sets forth opinions that are expert opinions without any qualification of the person expressing those opinions.

There is no proper foundation for those opinions, and there was no opportunity to cross examine with regard to those opinions, which I know the -- the goose rule is flying around the room, but in this instance, this person was not even identified as a witness.

At a July 1, 1998 hearing on *Fort Worth v. Dallas, et al.* (No. 48-I 71109-97), counsel for Fort Worth asked the following questions to David Siegel, President of Continental Express, Inc.:

Q: Have you ever before in your entire career gotten a turnaround from the Department of Transportation in less than 24 hours?

A: I can't recall.

Q: And you sent this letter over these issues Monday; is that right?

A: If I can back up. Last week, as we're going through preparation for this trial, there were a lot of self-professed experts talking about these issues. In the past, I have consulted with the Department for their advice, viewing them as the expert on aviation matters. And I asked my counsel, can we ask the Department what their view is of these issues?

Q: (by Mr. Wilson) Do you know whether or not old O'Melveny & Meyers actually drafted this letter with your in-house counsel, your in-house counsel who actually works at Continental Airlines?

A: I ask the business questions and asked for assistance in drafting the letter.

Q: You know, don't you, that O'Melveny & Meyers worked on this letter, don't you?

A: I'm not certain if they did.

Q: And you know that Nancy E. McFadden, who is the general counsel of the DOT, formerly worked at O'Melveny & Meyers, don't you?

A: I'm not certain of that.

Q: And O'Melveny & Meyers is one of Continental Airlines' law firms, isn't it, sir?

A: That I believe to be correct.

Q: And you wouldn't recognize Nancy McFadden's signature on a bet, would you?

A: I've seen it before. I'm not sure I could prove it up.

Q: Have you ever gotten any other DOT -- purported DOT answers out of the offices of a Long Beach law firm?

A: I have had DOT answers from their office on many occasions.

In an expected ruling, the state court judge ruled that the General Counsel's letter would not be made part of the record. Now that all parties have been given an opportunity to provide comments to the Department, American, DFW and Fort Worth want to stop that procedure. Apparently, American, DFW and Fort Worth don't want the Department to address any airline or airport issues.

As if the comments in the state court litigation questioning the conduct of the General Counsel in issuing the Continental Express letter weren't bad enough, the City of Fort Worth actually returns to and amplifies the issue in its Motion for Disclosure. The utter disrespect Fort Worth has for the Department is evidenced through the numerous demeaning requests for disclosure, which include:

- All documents referring to, concerning, or reflecting communications, discussions, or conversations on or before July 3, 1998, between any employee of the Department and any person representing Continental Airlines, Continental Express, Inc. (including without limitation anyone affiliated with the law firm of O'Melveny & Meyers) or Legend Airlines, Inc.

- All drafts of the McFadden letter that were shown to anyone not employed by the Department.
- Documents showing Ms. McFadden's itinerary during the period June 29 through July 1, 1998.

The real motive for these "parties" is set forth in Fort Worth's Motion for Additional Time in which it cites a state court hearing is set for October 1, 1998 to decide Motions for Summary Judgment. The objective is to stall all other actions so that the American/DFW/Fort Worth parties will have obtained a summary judgment against all parties currently operating at Love Field or those -- including Legend -- that plan to do so in the future. They plan to do to Legend what they were not able to do to Southwest -- prevent it from ever being a competitor. They will protect American's profits and growth at all costs, even if it requires inventing novel and absurd rules of law.

The Fort Worth/DFW/American parties have attacked every finding made by FAA or the Department concerning operations at Love Field. They have claimed that any operations -- apparently other than American's announced 14 roundtrips per day from Love Field to Austin or Southwest's hundreds of operations each day -- will impact the air traffic control system, create congestion, and will destroy DFW although the Department has consistently held that no such impacts will result. None of these are issues that should be decided by a state court. Control over interstate commerce has not been placed in the hands of those attempting to destroy airline competition or in a state court in Fort Worth.

Not only are Fort Worth, DFW and American asking the state court to block any operation under the Shelby Amendment, but they have asked the court to prevent Continental's

operations under the Wright Amendment. At the same time, they are apparently willing to grant Southwest an exemption under the Shelby Amendment to operate through service to Jackson and Birmingham -- service that American, Fort Worth and DFW have repeatedly stated is not allowed under the Wright Amendment. Therefore, their position that they and the Fort Worth state court will decide which flights are allowed under federal law -- ***and that the Department has no role in such decisions.*** That claim is totally without merit and is inconsistent with the Airline Deregulation Act, the Department of Transportation Act, and various court decisions,

The basis for that position is apparently the 1968 Regional Concurrent Bond Ordinance which requires closure of Love Field. Even if that position was accurate, closure of a commercial airport with hundreds of daily commercial and general aviation flights is an action that involves both the FAA and the Department. As to the agreements that control operations at Love Field -- **an airport within its jurisdiction that it alone controls and operates** -- the City of Dallas stated in response to request for deposition in the *City of Fort Worth v. City of Dallas, et al;* in the 48th District Court of Tarrant County, Texas:

Dallas is not aware of any “agreement” between the Cities and other interested parties independent of the political compromise reflected in terms of the Wright Amendment itself.

**Specific Responses to the Motions:**

**City of Fort Worth’s Motion to Dismiss Proceeding**

This is not a motion to dismiss, it is a motion to destroy and predate. The issues before the Department in this proceeding, the Wright Amendment and the Shelby Amendment, are federal issues clearly within the statutory authority of the Department. Such issues are decided

and have always been decided by the Department -- no matter how forcefully DFW/Fort Worth/American argue dubious legal theories to the contrary. Legend Airlines respectfully requests the Motion to Dismiss Proceeding be denied.

**Motions for Additional Time** (American, Fort Worth and DFW)

As is evidenced by the following, the benefits flowing from flights operated pursuant to the Shelby Amendment are enormous:

The renewed litigation over Love Field was commenced by Fort Worth in October, 1997, shortly after the United States Congress modified the so-called Wright Amendment to allow service between Love Field and points in Alabama, Mississippi, and Kansas. Following enactment of the new law by the Congress, Southwest introduced connecting service between Love Field and both Jackson, Mississippi and Birmingham, Alabama on November 11, 1997. With Southwest's new service, unrestricted fares in those markets were more than cut in half, dropping from \$324 to \$149 in the Dallas-Jackson market, and from \$480 to \$189 between Dallas and Birmingham.

"Our ability to serve markets from Love Field is not just an issue of local concern, it is a matter of national concern," Kelleher added. "For example, when Southwest added Jackson and Birmingham as destinations from Love Field, it also allowed us to offer service for the first time from Lubbock, Amarillo, and Midland-Odessa to Birmingham, and from Amarillo to Jackson." Service on those routes was not previously possible, because flights from Lubbock, Amarillo and Midland-Odessa stopped at Love Field.

*[Southwest Airlines News Release, March 27, 1998]*

Every day that goes by without all operations permitted by the Shelby Amendment costs consumers millions of dollars.

At the current time, a state court judge after hearing testimony about:

airline competition,  
investments at DFW Airport,  
possible ATC delays and congestion,  
profitability of airlines,

number of flights that may be moved to an airports,  
impacts on international routes,  
federal law, and  
Department interpretations

has blocked regularly scheduled airline service authorized by a 20-year old statute and consistent with the Department opinions and is prepared to block service that the Departments of Transportation and Justice has told the Fifth Circuit Court of Appeals is permitted under federal law. As a result, Continental Express has stated it is losing millions of dollars because it cannot operate and Legend may be blocked from operating after spending millions of dollars to modify facilities, acquire aircraft and complete the certification process.

It is time to restore federal control over interstate commerce. If not, jurisdictions -- local, county, school districts, and states will institute litigation to block airport activity in nearby or far-away cities. Moreover, if they can block airport access, they can block highway and rail usage. Such a result would be inconsistent with a federal interstate transportation system.

As a result, to delay a ruling on this Order would have significant impacts on the parties attempting to operate under federal law and provide competition and choices for Dallas-Fort Worth businesses and travelers who overwhelmingly support this service. Any delay would be tantamount to a delegation of the Department's responsibilities to a group that has spent the past 30 years attempting to control the market place and drive competitors out of business.

Therefore, the Department should deny the Motion for Additional Time.<sup>8</sup>

Based upon the comments of DFW and Fort Worth, it is clear that they will ignore and show complete disdain for any ruling issued by the Department, as will the state court.

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<sup>8</sup> Before tiling these motions, Fort Worth, DFW, and American should first ask the state judge to delay the state court actions. If "all" of American's lawyers are tied up in state courts, they should ask the Department to hold in abeyance American's request for its approval of the proposed alliance with British Airways (Docket OST-97-2058).

Therefore, the Department must be prepared to move quickly to implement its order and take appropriate actions against American, DFW, and Fort Worth if its Order is not honored.

**City of Fort Worth's Request for Disclosure by the Department**

The Request for Disclosure is an obvious attempt to embarrass and demean the Department and to tie up Department resources. If disclosure is appropriate, American, DFW and the City of Fort Worth should disclose a record of all its contacts within the Administration and with local civic and judicial parties. Therefore, Legend Airlines requests that this request for Disclosure be denied.

**Conclusion**

For the thirty years that the American/DFW/Fort Worth parties have fought to extinguish Love Field competition and strengthen their stranglehold over area travelers, "lack of resources" was never a problem. Their latest submission of frivolous motions to the Department in order to delay service by Continental Express and Legend Airlines while their state court proceeding provides them with additional relief from competition is an abuse of the Department and its employees. Love Field operations are governed by the Wright and Shelby Amendments. All parties understand that reality, although some wish the two acts were "optional." The Department has exercised its clear statutory authority to interpret federal issues affecting interstate commerce and impacting communities throughout the country. As Herb Kelleher stated, Love Field service "is a matter of national concern." The importance of the Love Field service proceeding cannot be derailed by parties intent on rebelling against federal authority and supremacy and their obvious attempts to circumvent the laws of the United States.

Respectfully submitted,



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SUBMITTED: September 2, 1998

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Response of Legend Airlines, Inc.  
To:

- . Petition for Reconsideration of Order 98-9-29 and Motion for Enlargement of Time of the Dallas-Fort Worth International Airport
- Motion of the City of Fort Worth, Texas to Dismiss Proceeding; Motion of the City of Fort Worth, Texas for Additional Time; and the Request of the City of Fort Worth, Texas for Disclosure by the Department
- Motion of American Airlines, Inc. for an Extension of Time and for Clarification of Order 98-S-29

on September 2, 1998 by pre-postaged first-class mail to each of the persons named on the attached service list.

  
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