

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

LOVE FIELD SERVICE)
INTERPRETATION PROCEEDING)

DOCKET OST-98-4363

**REPLY OF LEGEND AIRLINES, INC. TO CITY OF FORT WORTH'S
PETITION FOR RECONSIDERATION OF ORDER 98-12-27, PETITION FOR
RECONSIDERATION OF ORDER 98-12-28, AND PETITION OF
DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD FOR
RECONSIDERATION OF
DECLARATORY ORDER 98-12-27**

From the day that American Airlines (“American”), the City of Fort Worth (“Fort Worth”) and the Dallas/Fort Worth International Airport Board (“DFW”) learned that the Wright Amendment may be amended to clarify Legend Airlines’ (“Legend”) authority to utilize any size aircraft with 56 seats at Love Field, those parties have worked together to delay any competitive entry to the Dallas/Fort Worth area. The campaign against Legend and any competition in the Dallas/Fort Worth market was launched in October, 1996 when Bob Crandall stated:

If the Wright Amendment is ever changed, we’ll sue everybody in America to close Love Field.

[*Dallas Business Journal*, October 4-10, 1996]

Mr. Crandall (followed by Mr. Carty) and his team at American, along with paid consultants and surrogates, have followed through on that threat by suing, misleading, fabricating, scaring, and delaying. After all, every day without new competition allows American to increase fares and maintain a monopoly hold in the DFW market.

The latest attempts to delay airline deregulation in Texas are being led by the City of Fort Worth. The City's legal efforts are under the direction of Dee Kelly, a 15-year member of the Board of Directors of AMR Corp., American's parent company.

In an attempt to create an inaccurate portrayal of the Love Field Interpretation Proceeding and once again attack Departmental officials, Fort Worth and DFW have filed another series of petitions in this docket: Fort Worth's Petitions for Reconsideration of the Declaratory and Procedural Orders, and DFW's Petition for Reconsideration of the Declaratory Record. In the interest of preserving a factual chronology and account of this proceeding, Legend hereby submits this response to dispel the flagrant mischaracterizations presented by these parties.

The Department of Transportation Process Allowed All Parties Ample Opportunity to Submit Data

In their new attempts to delay, Fort Worth and DFW argue that the Department of Transportation ("the Department") failed to inform the parties that they would have to submit evidence in the administrative proceeding. Fort Worth further complains that the parties initially had "only two weeks in which to submit their comments, hardly enough time to prepare and tender evidence on the many matters before the Department." (Fort Worth's Petition to Reconsider, January 12, 1999, p. 2). These complaints are totally

without merit. Moreover, they demonstrate Fort Worth's inability to differentiate between fact and fiction.

The Department instituted the Love Field Interpretation Proceeding on August 25, 1998 with comments due on September 8, 1998. Fort Worth, DFW, and American immediately moved to extend the two-week comment period. The Department extended the filing deadline until September 22, 1998 (with reply comments due on October 2, 1998). Due to the extension, the parties had at least a month in which to submit initial comments. However, Fort Worth, in an effort to obscure the facts, repeatedly refers to a "two week" comment period in its Petition.

Although the comment and reply period was scheduled to end on October 2, 1998, the Department did not conclude the proceeding until December 23, 1998 -- providing the parties with a total comment period of four months. During this four-month period, Fort Worth and DFW took full advantage of the lengthy proceeding to file additional motions, requests, and supplemental information. Not including these latest petitions, DFW has made five filings to this docket while Fort Worth exceeded all other parties by making 14 filings. No filings were rejected by the Department no matter when they were filed.

Evidence on DFW Viability Remains Irrelevant to Interpreting Federal Law

As to the complaint that they did not know they should have submitted facts to support their argument, Fort Worth and DFW again proffer a baseless claim to delay a ruling on federal law. Those parties apparently believe that they are still in state court, where facts and law were not important.

First and foremost, the five issues before the Department were decided upon legal interpretation, and did necessitate factual submissions. As the Department explained in its Order, it was considering issues of federal law:

The Department's authority to issue a ruling interpreting the federal laws applicable to Love Field is firmly established. The relevant statutes are statutes that we are responsible for administering and enforcing. . . . The dispute over Love Field service, moreover, raises substantial federal issues that this Department should address, in particular, the ability of a local airport owner to restrict service at a second airport to improve the competitive position of the first airport. The Administrative Procedure Act authorizes the Department to issue declaratory orders such as this.

[Order on Procedural Motions, p. 6.]

Second, the Department, as the decision maker, is quite capable of reviewing the facts on DFW's current and projected operations. DFW's and American's growth and viability is before the Department in various proceedings in which DFW lauds its first-rate facility and projects continued growth and success in an effort to get more routes and service for American and other airlines.

The Department and the rest of the country are aware of DFW's and American's well-publicized continued growth, including:

- *“D/FW anticipates Japan Airlines flights, Oks \$22 million project”*

The Dallas/Fort Worth International Airport board authorized a \$22 million expansion of D/FW's international terminal Monday to make room for expected new Japan Airlines passenger flights from Asia.

The project will add space to gate lounge, customs and ticketing areas in Terminal B so the airline's wide-bodied jets can land at the same time as other

large planes, said airport executive director Jeff Fegan. (*The Dallas Morning News*, December 15, 1998.)¹

- “*D/FW celebrates its 25th year. World’s 2nd busiest airport on track for the No. 1 spot.*” The world’s second busiest airport kicked off its second quarter-century of operation yesterday, poised to become the world’s busiest -- thanks to a planned eighth runway and additional terminals, Executive Director Jeff Fegan said. (*Star-Telegram*, January 14, 1999.)
- As reported in the *Dallas Morning News*, American Airlines will receive a Texas state grant for over \$260,000 to train 365 employees, 40 of whom are mechanics being trained to accommodate expansion of DFW. (January 13, 1999).²

In addition, American continues to expand, having completed its purchase of Reno Airlines, is in the process of buying Business Express, and is expanding its international alliances through OneWorld and other agreements.

Third, Fort Worth and DFW had every opportunity (four months) to submit all relevant data. Fort Worth managed to bombard the docket with frivolous motions and allegations throughout the proceeding. Perhaps with all the time spent on agency bias allegations, Fort Worth was inattentive to other issues. Moreover, Fort Worth’s partner, DFW, included in its thousands of pages of exhibits comments on DFW’s future. DFW

¹ Considering the dire predictions of American, Fort Worth, and DFW as to the future of DFW and American, the Department should reconsider all international authorities given to American.

² If DFW is to become a “second-rate hub” and American is not planning to grow, why did they accept this grant? Would their statements to the state agree with their public statements as to the survival of DFW?

briefly mentions that it would be impacted by Love Field service in footnote 70 to its September 22, 1998 comments:

The Airport Board has submitted along with these comments correct photocopies of the transcript of the testimony of the witnesses who testified at the recent temporary injunction hearing concerning the effect on DFW Airport if Love Field is opened to interstate traffic, and requests that they be included in the record of these proceedings.

DFW offered no other explanation of this issue nor did Fort Worth or American.

In response, the Department in its final Order stated:

The DFW Board submitted hundreds of pages of the transcript from the state court's proceedings but specifically cited none of the testimony in support of its case. The DFW Board should have cited any specific testimony that it wished the Department to consider. The courts have held in similar cases that a party must identify the material supporting its case when it files lengthy evidentiary pleadings in an administrative proceeding. *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1519-1520 (D.C. Cir. 1997); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997).

Apparently DFW, Fort Worth and American made a conscious decision not to address this issue in any detail. On September 22, 1998, Legend's comments included several pages that focused on the topic of DFW's future success and growth with simultaneous expansion of Love Field operations. Fort Worth never responded or commented on that issue. Legend quoted testimony of DFW expert witnesses who claimed that DFW would become a second-tier hub if Love Field operations expanded, and submitted DFW's own statements from other Department proceedings which directly contradicted its claims of destabilization and destruction. And still, no comment from Fort Worth.

In light of these developments, are the parties (including American) suggesting that, if they had known that it was relevant, they would have submitted data to show that DFW and American will be destroyed by the opening of Love Field to Legend and its proposed 12 daily roundtrips. Are we going to hear Don Carty repeat his baseless claim that:

With fewer local customers, in the long term DFW will not compete with hubs like O'Hare, Atlanta, and Denver. **DFW will become a second-tier hub.**

[July 6, 1998 letter to employees]

American has been making these public comments for over one year and has yet to set forth facts in support.

If American, DFW, and Fort Worth had submitted true facts on the strength of DFW and American, it would show a growing and thriving airport and carrier. The current and projected numbers of passengers and aircraft operations at DFW are particularly significant considering the growth in those numbers since the imposition of the Wright Amendment. Based upon the 1997 DFW Airport Business Activity Report, passenger activity at DFW has more than tripled (from 22 million in 1980) and operations have doubled (from 463,000 in 1980). Based upon that same DFW Airport report, those numbers are projected to grow as follows:

	<u>2005</u>	<u>2010</u>	<u>2015</u>
Passengers	77 million	88.4 million	101.8 million
Operations	1.12 million	1.24 million	1.38 million

With these DFW Airport projections, it is clear that DFW, if it has not already, will become the busiest airport in the United States in terms of total operations and may become the busiest airport in the country in terms of passengers.

Also based upon the DFW Airport data, in 1997, total daily departures from DFW to select cities, included:

<u>Market</u>	<u>Passengers</u>	<u>Departures per day</u>
Atlanta	1390	35
New York area	1707	35
Chicago	1375	36
Houston	822	52
Los Angeles	623	23
Denver	903	28

It is impossible to imagine a scenario in which the operations by Legend or Continental Express could have any impact on these overwhelming numbers.

Perhaps that is why Fort Worth and DFW decided against submission of additional “supporting” data and arguments. There just aren’t any.

Quite simply, these parties elected not to address this issue. As a result of their failure to comment on this issue in the extended time frame, especially since it was raised by Legend and DFW, Fort Worth and DFW have waived their right to raise this issue. Whatever the case may be, there is absolutely no validity to the claims of either Fort Worth or DFW that they were not provided sufficient time, opportunity, or notice to present their case. Legend requests that the Department disregard DFW’s and Fort Worth’s requests to submit unnecessary and irrelevant “evidence” after conclusion of the proceeding.

Objection to the Request for Hearing

Fort Worth requests a hearing before the Department, yet it continues to demonstrate that it has no intention of honoring or deferring to any Department decision. Just two days after making the hearing request, Fort Worth again attacked the Department, the process utilized in this proceeding, and its officials when it submitted the following statements in the Texas State Court proceeding:

The DOT has no special skill in interpreting legal questions such as preemption and proprietary rights. (at page 4)

. . . there is no need for any special expertise of the DOT on the issue of perimeter rules under the ADA. If, in fact, the DOT thought it had some special expertise, it would have expressed its opinion years ago when the courts first addressed the question of perimeter rules. (at page 5)

Simply stated, the DOT does not have any expertise or competence which exceeds that of the judiciary with respect to the issues of proprietary powers and preemption. The notion that the DOT could somehow enlighten this Court on matters of statutory construction is far-fetched, at best. (at page 10)

(From “Fort Worth’s Response to Continental’s Motion for New Trial,” January 14, 1999.)³

The Department, which has been considering Love Field issues for 25 years and every new route or service to begin at DFW, had more than a full record of all the issues presented in this proceeding. Moreover, it is inconceivable that Fort Worth has anything else to say that it has not already said in its 16 and counting submissions to this proceeding. Legend respectfully requests that the Department deny the request for a hearing.

³ Considering Mr. Kelly’s relationship with AMR and DFW, there is little doubt that these comments also reflect the views of American and DFW.

Objection to Fort Worth's Request for Disclosure

Fort Worth pursues arguments without merit on *ex parte* communications to invent scandal and to attack Legend, Continental Express, and the Department when they themselves fall victim to their own arguments. It is ludicrous that Fort Worth argues Departmental impropriety when its counsel, DFW, and American have yet to acknowledge the “*ex parte*” communications they have had with the Department.

As Legend has stated in other filings, the communications between the parties and the Department is not evidence of bias, prejudice, or any other impropriety. Instead, it shows a Department fulfilling its responsibility to oversee multiple proceedings and issues involving federal law, interstate commerce, preemption and airline competition.

The Department should deny the frivolous petition for reconsideration for disclosure of alleged *ex parte* communications. However, in the event the Department would comply with Fort Worth's request, Legend renews its request for disclosure of meetings, conversations, and correspondence with American's counsel, lobbyists, senior management (including Don Carty and Bob Crandall), and DFW's counsel, lobbyists, and representatives.

Conclusion

The Love Field Interpretation Proceeding spanned four months and allowed all parties ample time to submit any and all documents supporting their respective positions. Neither Fort Worth nor DFW has raised a legitimate argument in their petitions which would warrant reconsideration. Rather, they have demonstrated their intent to continue a relentless assault on the Department and this proceeding and to spend whatever is necessary to protect American's stranglehold over the Dallas-Fort Worth market. The

few leaders of this cabal have decided to put their own profit ahead of the overwhelming public interest in increased competition.

These parties' attempts to undermine the Department's decision should not be tolerated and their request should be readily and unequivocally denied.

Respectfully submitted,

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