



Order 98-9-5

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

**Issued by the Department of Transportation
on the 3rd of September, 1998**

Served September 3, 1998

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

PROCEDURAL ORDER

We began this proceeding by Order 98-8-29 (August 25, 1998) to state our interpretation on federal law issues underlying a dispute over airline proposals to offer expanded service at Dallas' Love Field. The federal law issues involve statutes that this Department is responsible for administering and enforcing. As we noted, we previously issued an order interpreting the statutory restrictions on Love Field service in order to resolve other disputes on the meaning of those restrictions. Love Field Amendment Proceeding, Order 85-12-81 (December 31, 1985), aff'd, Continental Air Lines v. DOT, 843 F.2d 1444 (D.C. Cir. 1988). We made the parties' comments and reply comments due on September 8 and September 15, respectively.

The City of Fort Worth, the Dallas-Fort Worth International Airport Board ("DFW Board"), and American Airlines have filed motions to dismiss or modify the scope of the proceeding and to extend the comment period.

The Parties' Pleadings

In its motions, filed on August 31, 1998, the City of Fort Worth asks us to dismiss the proceeding, for more time for filing comments and reply comments (thirty and fifteen days, respectively), and for disclosure of certain matters relating to the June 30 letter sent by Nancy E. McFadden, the Department's General Counsel, to Continental Express on certain Love Field issues.

On September 1 the DFW Board filed a petition requesting us to modify the scope of the proceeding by deleting the fourth issue - whether an airline through

its use agreement with the DFW Board may obligate itself not to operate Love Field flights permitted by the Wright and Shelby Amendments – and by adding a new issue – whether Continental may hold out service to points beyond Houston for Love Field travellers. While the DFW Board suggests that we should not rule on the federal law issues involved in the Love Field dispute, it has not asked us to dismiss the proceeding.

American's motion, filed on September 2, asks us to extend the comment period by sixty days and the reply comment period by three weeks. American also asks for a clarification of the nature of this proceeding – whether it is intended to be an adjudication or a rulemaking -- and for a statement of the Department's authority to issue the proposed rulings.

Southwest and Legend Airlines have filed responses opposing the motions for additional time. Southwest states that it does not oppose an extension of up to ten days but that any longer extension would be unnecessary and unwarranted. Southwest states that it believes that the dispute over Love Field service involves important federal law issues that we should address. Legend opposes any extension. It asserts that the extension requests are designed to delay our decision and that the parties do not need additional time. Like Southwest, Legend states that the dispute involves important questions of federal law on which we should rule.

The Love Field Citizens Action Committee, on the other hand, asks for an extension until at least September 22 for preparing its comments.

Finally, Continental Express filed a response opposing all of the motions. It notes, among other things, that any delay in the resolution of the dispute will further delay its institution of flights between Love Field and Cleveland. It additionally opposes the DFW Board's request to change the issues and alleges, among other things, that the DFW Board has mischaracterized the nature of Continental Express' Love Field-Houston service.

Our Decision

We have decided that the parties should respond to the Fort Worth motions for dismissal and disclosure in their comments and reply comments. Any party that believes we should not – or may not – issue the rulings contemplated by Order 98-8-29 should present its arguments on that point in its comments. We will consider all such arguments before issuing any final order in this proceeding.

We will not grant Fort Worth's motion for disclosure at this time. Disclosure of the type of information sought by Fort Worth would be an extraordinary step in this kind of proceeding. The General Counsel's letter cited by Fort Worth's motion responded to a request by Continental Express for the Department's

position on four issues that appeared relevant to the state court litigation. Two of the issues were whether additional service at Love Field would decrease safety or threaten the viability of DFW. The General Counsel set forth the Department's earlier findings on those two issues. The other two issues were legal questions: whether Dallas could restrict service at Love Field to carry out its agreement with Fort Worth and whether the Wright and Shelby Amendments allow airlines to operate longhaul service at Love Field with regional jets. Her letter stated that the Department had not specifically addressed those issues and expressed no opinion on them. Thus, at this time we see no basis for granting Fort Worth's request for disclosure regarding the letter's preparation. We will consider Fort Worth's position on this matter further, however, in our final order. If we determine that disclosure or other additional procedures are required, we will take appropriate action.

We will grant in part the DFW Board's request to modify the scope of the issues. We will not delete the issue involving the enforceability of DFW use agreements. We do not agree with the DFW Board at this time that its dispute with Continental and Continental Express over Continental Express' intent to operate flights between Love Field and Cleveland necessarily will be resolved on state law grounds. The DFW Board, after all, is subject to federal law, and federal law limits the kind of terms that may be imposed by airports on airlines as a condition to using an airport.

We will, however, grant the DFW Board's request to consider its contention that a major airline may not hold out through service to points beyond Houston for passengers originating at Love Field (except points within Texas and the states bordering on Texas). As noted by the DFW Board, our order in the Love Field Amendment Proceeding ruled on through service issues. The additional issue will be as follows: do the Wright and Shelby Amendments allow an airline to offer through service from Love Field to points outside the seven-state area within which unrestricted service is permitted, if the airline uses a city within the seven-state area as a connecting point and uses aircraft with no more than 56 seats for its flights between Love Field and the connecting point.

We will consider this issue despite Continental Express' opposition, for it is related to the other issues being considered and our ruling may potentially avoid further disputes.

With respect to American's request for clarification, we intend to issue a declaratory ruling in this proceeding, assuming that we do not agree with the arguments that doing so would be improper, as we did in the Love Field Amendment Proceeding. After reviewing the comments and reply comments, we will make a final decision on whether we may properly rule on the federal law issues while the state and federal court proceedings are pending. We note, however, that we adjudicated an airport fee dispute that was also the subject of

district court litigation in Investigation into Massport's Landing Fees, FAA Docket 13-88-2 (December 22, 1988). On review of our decision and the appeal from the district court's decision, the First Circuit held that the district court should not have decided the suit before it until after we issued our decision. New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989). The parties may address whether that Court of Appeals decision is relevant and should be followed here.

We will grant in part the requests by Fort Worth, the DFW Board, and American for more time for filing comments by extending the comment period by two weeks and the reply comment period by three days. We are granting these extensions due to their claims that preparing their comments will be difficult due to the various state court proceedings and our decision to add the issue requested by the DFW Board. On the other hand, as we explained in our order, there is good cause for us ruling on the federal law issues promptly, assuming that we do not agree with Fort Worth's request to dismiss this proceeding. Order 98-8-29 at 5. As stated in that order, the relative shortness of time should not deny any party an adequate opportunity to prepare comments and reply comments, since the federal law issues have already been extensively briefed in the state and federal court proceedings in Texas. In addition, Fort Worth and the DFW Board seek to extend the total comment period by forty-five days, which would unreasonably delay the issuance of any final order by us. American's requested extension would cause even more of an unreasonable delay.¹

Finally, the parties should respond to the Fort Worth motions for dismissal and disclosure in their comments, not by separate answers to the motions.

ACCORDINGLY:

1. We are deferring rulings on the motions by the City of Fort Worth for dismissal and disclosure;
2. Comments responding to Order 98-8-29 must be filed by September 22, 1998;
3. Reply comments must be filed by October 2, 1998; and
4. The parties should respond to the Fort Worth motions for dismissal and disclosure

¹ We note, moreover, that Fort Worth served its motions, including the motion asking for an extension of the comment period, by mail (the DFW Board and American, in contrast, served their motions by FAX). Fort Worth's service of its request for an extension was unreasonable – it may not fairly file a request to change the comment period only eight days before the deadline and then serve the other parties only by mail.

in the comments in response to Order 98-8-29.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

Dated: September 3, 1998

(SEAL)

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