



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

Issued by the Department of Transportation
on the 22nd day of December, 1998

Served December 23, 1998

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

DECLARATORY ORDER

The Cities of Dallas and Fort Worth agreed in 1968 to create Dallas-Fort Worth International Airport (“DFW”) as the metropolitan area’s primary airport. The two cities agreed to phase out service at their local airports, which included Love Field, owned and operated by the City of Dallas, and cause the airlines serving the area to use DFW for all interstate flights. The cities’ goal of prohibiting all interstate service at Love Field conflicted with Southwest Airlines’ plans to use the airport for interstate service. Congress therefore enacted a federal statute authorizing a limited amount of interstate service at Love Field. Section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980) (“the Wright Amendment”). Last year Congress amended the Wright Amendment to authorize additional interstate service at Love Field. 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”).

In response to Congress’ enactment of the Shelby Amendment, Fort Worth filed a suit in the Texas state courts seeking to compel Dallas to block any airline from operating the additional types of service authorized by that statute. Fort Worth’s filing led to additional litigation in the state and federal courts, including a declaratory judgment suit filed by Dallas against this Department and Fort Worth. In general, Fort Worth, joined by American Airlines and the

DFW Board, contend that, under the cities' 1968 agreement, Dallas may allow airlines to operate only those Love Field services permitted by the Wright Amendment. Dallas, Continental Express, Southwest Airlines, and Legend Airlines (a proposed new entrant that plans to operate longhaul service from Love Field with aircraft reconfigured to hold no more than 56 seats) contend that the federal law overrides the cities' agreement and that Dallas must allow airlines to operate the additional services authorized by the Shelby Amendment.

The litigation led most of the parties to ask the Department to intervene in some manner in the dispute. The Department began this proceeding to issue an interpretation of the meaning of the relevant federal statutes in light of the parties' requests and the importance of the issues. Order 98-8-29 (August 25, 1998). This Department, including the Federal Aviation Administration ("FAA"), is responsible for administering the relevant statutes. See, e.g., Cramer v. Skinner, 931 F.2d 1020, 1024 (5th Cir. 1991), cert. denied, 502 U.S. 907. The Department's issuance of an order addressing issues involving Love Field is not without precedent. The Department held a similar proceeding in 1985 in order to resolve other disputes over the interpretation of the Wright Amendment. Order 98-8-29 at 1, 3, citing Love Field Amendment Proceeding, Order 85-12-81 (December 31, 1985). The Court of Appeals affirmed the Department's interpretation of the Wright Amendment. Continental Air Lines v. DOT, 843 F.2d 1444 (D.C. Cir. 1988).

The Department has received comments and reply comments from all of the parties in the litigation, as well as several airport parties, the unions representing the pilots at American and Southwest, the Love Field Citizens Action Committee, and Delta Air Lines. In general, the parties in the litigation have taken the same position in their pleadings as they have in court. Fort Worth, American, and the DFW Board also urge the Department to dismiss this proceeding, while Dallas, Southwest, Continental Express, and Legend assert that the Department should issue a ruling on the federal law issues.

After considering all of the parties' arguments, the Department has concluded that it has the authority and responsibility to issue rulings on the federal law issues presented by the dispute over additional airline service at Love Field. The Department finds that the restrictions on Love Field service sought by Fort Worth, American Airlines, and the DFW Board are contrary to federal law and that the Wright and Shelby Amendments largely permit (i) unrestricted longhaul service with aircraft containing a passenger capacity of 56 passengers or less and (ii) flights with larger aircraft to cities in Kansas, Mississippi, and Alabama, as

explained in this order. The Department is simultaneously issuing a separate order that addresses the parties' various procedural motions in this proceeding.

The Department's decision that Dallas may not block airlines from operating services authorized by the Shelby Amendment reflects Congress' intent in enacting the Wright and Shelby Amendments and follows earlier decisions by the courts and federal agencies interpreting the relevant federal statutes. This decision is also consistent with the FAA's recent preliminary determination in an administrative proceeding that a Colorado airport may not prevent an airline from operating scheduled service when the airport allowed comparable flight operations by other firms. Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority, FAA Docket Nos. 16-98-05 et al., Director's Determination (issued August 21, 1998).

The Department is not holding that Dallas has no authority to limit the level of operations at Love Field. Airport operators may not regulate airline routes, as Fort Worth seeks to do, but airport owners have authority to regulate most aspects of airport operations. The Department's interpretation here does not place in question the legitimate management rights of airport owners. The Department is also basing its decision on current circumstances. No one has tried to show in this proceeding that the additional services authorized by the Shelby Amendment could jeopardize DFW's role as the area's principal airport.

FACTUAL AND LEGAL BACKGROUND

The Cities' Agreement to Build DFW and Phase-Out Service at the Local Airports

The restrictions on Love Field service initially grew out of the two cities' settlement of a long-standing dispute over the Dallas-Fort Worth area's airline operations. For many years Dallas and Fort Worth operated separate airports (Love Field was the Dallas airport) and fought over which airport should be the metropolitan area's principal airport. The two cities resolved the dispute in the 1960s by agreeing to build DFW to replace their local airports and to end virtually all airline service at Love Field and Fort Worth's local airports. The cities' agreement resulted in large part from the threat by the Civil Aeronautics Board ("the Board") that it might consolidate all of the area's service at one of the local airports if the cities did not settle their dispute. See City of Dallas, Texas v. Southwest Airlines, 371 F.Supp. 1015, 1019-1021 (N.D. Tex. 1973), aff'd on different grounds, 494 F.2d 773 (5th Cir. 1974).

Before the cities settled their dispute, Fort Worth's major airport was Greater Southwest International Airport, which was demolished as a result of DFW's construction. Fort Worth has another airport, Meacham Field, still useable by airlines. Love Field was the Dallas airport used by the scheduled airlines.

Each airline then serving Love Field under certificate authority granted by the Board agreed to operate all of its interstate service at DFW. See City of Dallas, Texas, supra, 371 F. Supp. at 1020-1021. Southwest, however, was operating intrastate flights under state authority and refused to move. Its refusal led to years of litigation, as described below.

The Wright Amendment has allowed Southwest to provide interstate service from Love Field and points in the four states bordering Texas. Despite Southwest's continuing use of Love Field for interstate service, DFW became the area's primary airport, as the cities desired, and has grown from 11.3 million enplaned passengers in 1979 to 60.5 million enplaned passengers in 1997. Continental Express Reply at 2.

Dallas and Fort Worth currently own DFW, which is managed by the DFW Board. The DFW Board is a local governmental body created and authorized under state law to be the owner and operator of DFW.

The Terms of the Bond Ordinance

As part of their agreement, the two cities jointly passed a bond ordinance, the 1968 Regional Airport Concurrent Bond Ordinance ("the Bond Ordinance"). Whether the Bond Ordinance limits Love Field service, and whether Dallas may enforce any such limitations, lie at the heart of the parties' current dispute. Exhibit 8 to the DFW Board's comments is a copy of the Bond Ordinance. The key provision is section 9.5, which obligated each city to move scheduled interstate services to DFW as far as "legally permissible." Section 9.5A sets forth the cities' obligation to transfer interstate airline services to DFW:

It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA, and Meacham Field, own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport [DFW]. It is further acknowledged that and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this

Ordinance, shall take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.

This section gives the DFW Board some authority to waive this restriction:

From time to time hereafter, the [DFW Board] may review the effect and application of such covenant, and by concurring action of not less than eight (8) of its members, the Board may reasonably limit its scope and effect and may waive its application in specific instances if it shall first determine that such action is necessary (1) in the interest of public safety; (2) in the interest of prudent and efficient operations at [DFW]; or (3) in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole.

The DFW Board may not grant such a waiver if doing so would substantially reduce DFW's revenues as defined in the agreement.

Related obligations are contained in Section 9.5B of the Bond Ordinance, which reads in part as follows:

In addition to the covenant of the Cities contained in [paragraph 9.5A], the Cities further agree that they will through every legal and reasonable means promote the optimum development of the lands and facilities comprising the Regional Airport at the earliest practicable date, thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the [DFW Board] will undertake with regard to the Regional Airport, Love Field, GSIA, Meacham Field or Redbird, any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and facilities at the earliest practicable date; and none of the airports of the Cities shall be put to or developed for any use which by the nature thereof the optimum use and development of the Regional Airport, including its air and land space, at the earliest practicable date will be impaired, diminished, reduced or destroyed.

The Bond Ordinance's definition of "Certificated Air Carrier Services" includes (i) scheduled interstate services operated under certificate authority granted by the Board or any successor agency, (ii) scheduled services operated by foreign airlines under authority granted by the Board or any successor agency, and (iii) scheduled intrastate services operated under authority granted by the Texas Aeronautics Commission or any successor agency. The definition excludes services provided by "air taxis" under exemption authority granted by the Board or the Texas agency. Section 2.1G.

The Bond Ordinance by its terms does not prohibit all interstate service at Love Field. It conditions the cities' obligation to transfer services to DFW by requiring them to take that action "as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action)." As explained below, in the first round of litigation over Southwest's use of Love Field, the district court read the Bond Ordinance as requiring the phase-out of interstate service only insofar as permitted by law. City of Dallas, supra, 371 F. Supp. at 1019, 1035.

Southwest's Efforts to Use Love Field

After DFW opened, Dallas kept Love Field open for limited uses. When Southwest refused to move to DFW, Dallas, Fort Worth, and several competing airlines repeatedly tried to compel Southwest to stop using Love Field, primarily through litigation.

Dallas and others filed a suit in federal district court to force Southwest to move out of Love Field to DFW. In that case the district court held on several grounds that Dallas could not block Southwest from using Love Field. City of Dallas, Texas v. Southwest Airlines, supra, 371 F.Supp. at 1015. Among other things, the city's efforts to stop Southwest's service violated its obligation under federal law not to discriminate among airport users. 371 F. Supp. at 1028-1030. While the Bond Ordinance prohibited intrastate flights by airlines like Southwest operating under state authority, it allowed airlines operating under federal certificate authority to operate intrastate flights and allowed non-certificated commuter airlines to operate at Love Field. 371 F. Supp. at 1027-1028, 1031. The court additionally held that Dallas could not block Southwest from using Love Field when the Texas Aeronautics Commission had specifically authorized Southwest to operate intrastate flights from Love Field. 371 F.Supp. at 1032-1034. The court concluded that it did not need to invalidate the Bond Ordinance provision requiring the phase-out of most scheduled service at Love Field, since that provision specifically obligated

Dallas to take such action only to the extent that it was legally permissible. Dallas could not legally force Southwest to move to DFW. 371 F. Supp. at 1034-1035.

On appeal the Fifth Circuit affirmed the district court's holding that Dallas could not block Southwest from using Love Field when the Texas agency had specifically authorized Southwest to use that airport. City of Dallas, Texas v. Southwest Airlines, *supra*, 494 F.2d 773. The Fifth Circuit did not address the other grounds relied upon by the district court.

A second round of litigation resulted from Dallas' adoption of an ordinance imposing a \$200 fine for each take-off and landing by a commercial airline at Love Field. The district court enjoined Dallas from enforcing this ordinance. See Southwest Airlines v. Texas International Airlines, 396 F. Supp. 678, 680, 682 (N.D. Tex. 1975).

Several airlines that used DFW and competed with Southwest created a third round of litigation. After the Fifth Circuit held that Southwest was entitled to use Love Field, these airlines asked a state court to end Southwest's use of the airport. Their action caused the district court to enter an injunction barring any litigation that sought to overturn the court's decision that Southwest had the right to operate at Love Field. Southwest Airlines v. Texas International Airlines, 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir. 1977).

The district court later entered a permanent injunction, which, as described below, is the basis of Southwest's motion asking the court to enforce the injunction against Fort Worth (Exhibit 7 in Dallas' comments is a copy of the injunction). Southwest claimed that Fort Worth violated the injunction by suing Dallas and asking the state court to grant relief that would limit Southwest's Love Field flights.

The Enactment of the Wright Amendment

When the two cities built DFW, airline routes, rates, and services were extensively regulated by the Board. Southwest avoided Board regulation by operating as an intrastate airline. After Congress deregulated the airline industry in 1978, Southwest wished to begin interstate service. It applied for federal authority to serve the Love Field-New Orleans route under the so-called "automatic entry" provision in the deregulation act. Dallas, Fort Worth, and others opposed Southwest's application. The Board granted the application since it had no power to deny it. Southwest Airlines Automatic Market Entry, 83 CAB 644 (1979).

This Board decision led to Congress' enactment of the Wright Amendment limiting interstate passenger service at Love Field. Section 29 of the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980) (the amendment has never been codified).

Congressman Jim Wright of Fort Worth offered an amendment to a bill deregulating international air transportation. His amendment, adopted by the House, would have prohibited all interstate service at Love Field (other than commuter airline operations), as demanded by Dallas and Fort Worth. See H.R. Rep. No. 96-716, 96th Cong., 1st Sess. (1979), at 24; exhibit 19 to the DFW Board's comments is a copy of the conference committee report. The Senate, however, refused to ban interstate service at Love Field. The conference committee created the Wright Amendment, which allowed a limited amount of interstate service at Love Field. See H.R. Rep. No. 96-716 at 24-26.

The Wright Amendment reads as follows:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field,

Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

The amendment thus prohibited interstate scheduled passenger service at Love Field, subject to four exceptions. The three exceptions created by subsections (a) and (b) allowed (i) unrestricted service using aircraft seating no more than 56 passengers (we will refer to this exception as the "commuter aircraft exemption"), (ii) ten charter flights per month, and (iii) the interstate services that existed on November 1, 1979. Subsection (c) additionally allowed airlines to operate Love Field flights to or from points in Texas, New Mexico, Oklahoma, Arkansas, and Louisiana ("the Love Field service area") but barred the sale of through transportation between the endpoint of such a Love Field flight and any point outside the Love Field service area. Thus, if a traveller wished to fly from Love Field to a point outside the Love Field service area, the traveller could transfer at the endpoint of a Love Field flight to another flight going to the point outside the Love Field service area, but the traveller had to buy a separate ticket for each flight and could not check his or her luggage through from Love Field to the final destination. See Cramer v. Skinner, 931 F.2d 1020, 1023 (5th Cir. 1991), cert. denied, 112 S.Ct. 298.¹

The conference committee report stated that this amendment "provides a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years" and that the settlement "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 96-716 at 24. The report further stated, "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively, apply to the authority to serve Love Field on interstate flights authorized by the amendment." H.R. Rep. No. 96-716 at 26.

¹ The courts upheld the Constitutionality of the restrictions on Love Field service in Cramer and in State of Kansas v. United States, 16 F.3d 436 (D.C. Cir. 1994).

As noted, the Bond Ordinance had prohibited all scheduled interstate service from Love Field except air taxi service, to the extent legally permissible. The Wright Amendment, on the other hand, allowed airlines to operate some interstate service. Dallas and Fort Worth, however, never amended the Bond Ordinance to reflect these changes. Thus the Bond Ordinance by its terms, as construed by Fort Worth, prohibits interstate services which may be operated (and which Southwest has been operating) under the Wright Amendment. See Dallas Reply at 12. In addition, another airline – Muse – operated a significant amount of interstate service at Love Field under the Wright Amendment. Analysis of the Impact of Changes to the Wright Amendment, Interdepartmental Task Force on the Wright Amendment (July 1992), at 9.

Southwest has used the Wright Amendment's authorization for unrestricted short-haul service to greatly expand its interstate service at Love Field consistently with the statutory restrictions.

The Department's Earlier Order Interpreting the Wright Amendment

In 1985 the Department issued an order interpreting the Wright Amendment due to an earlier controversy over Love Field service. Continental then proposed to begin operating flights between Love Field and Houston with large aircraft (not aircraft with a passenger capacity of 56 passengers or less). DFW, Dallas, Fort Worth, and Southwest opposed Continental's plans, primarily because the Wright Amendment allegedly barred Continental from serving Love Field since it interlined with other airlines elsewhere in its system. Several of these parties asked us to block Continental's proposed service. See Order 85-7-65 (July 26, 1985).

This dispute led the Department to issue an order interpreting the statutory restrictions. Order 85-12-81 (December 31, 1985), aff'd, Continental Air Lines v. Department of Transportation, 843 F.2d 1444 (D.C. Cir. 1988). The Department held that an airline that interlined elsewhere on its system could operate interstate flights from Love Field as long as it did not provide interline or through service from Love Field to points outside the Love Field service area, that any airline could operate Love Field flights under the commuter aircraft exemption as long as it used aircraft with a passenger capacity of 56 passengers or less, and that no airline could advertise the availability of service from Love Field to points beyond the Love Field service area.

Despite the Department's decision, Dallas refused to lease any facilities to Continental for its Houston flights. Continental then filed a state court suit against Dallas, which argued that Continental's proposed service would violate the Bond Ordinance and Continental's use agreement with DFW, which required compliance with the Bond Ordinance. Fort Worth and the DFW Board supported Dallas. The Texas Court of Appeals held that Continental's agreement with DFW allowed it to operate the Love Field-Houston service, since the service would be intrastate and therefore permitted by the agreement. City of Dallas v. Continental Airlines, 735 S.W. 2d 496 (Tex. Ct. App. 1987). The court agreed with the Department's conclusion that Continental's proposed service would be intrastate service. Continental, however, never began operating the Houston-Love Field service.

The Department's Love Field Study

In the early 1990s members of Congress from Kansas and other states outside the Love Field service area sought a repeal or loosening of the Wright Amendment. The Texas Congressional delegation opposed their efforts. As a result of this Congressional debate, the Department prepared a report on the likely effects of changing the restrictions on Love Field service. Analysis of the Impact of Changes to the Wright Amendment, Interdepartmental Task Force on the Wright Amendment (July 1992) ("Love Field Study"). The study analyzed the impact of two possible changes: (i) a repeal of the Wright Amendment and (ii) a modification allowing nonstop flights of up to 650 miles and through service to any beyond destination.

The study concluded that expanding Love Field service would greatly benefit the Dallas-Fort Worth metropolitan area, Love Field Study, Executive Summary at 1; that allowing additional service at Love Field "will have little if any impact on Dallas-Fort Worth Airport's growth" and that "[t]he 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 . . .," id. at 10, 31; and that "[u]nder all possible scenarios, Dallas-Fort Worth Airport will continue to grow and remain the area's dominant airport," Love Field Study, Executive Summary at 1.

The Department submitted the report to Congress but made no recommendation on whether the Wright Amendment should be repealed or modified. Congress took no action.

Proposals to Use Reconfigured Aircraft.

In 1996 Dalfort Aviation, Legend's parent, developed a plan to use reconfigured large aircraft (B-737's, B-727's, or DC-9's) to operate longhaul service at Love Field under the commuter aircraft exemption. Dalfort planned to remove all but 56 seats from its large aircraft and then operate flights from Love Field to points outside the Love Field service area. Dalfort argued that its proposed operations would be lawful under the commuter aircraft exemption. Dalfort requested a legal opinion from the Department on whether its proposed operations were permitted by the Wright Amendment.

On September 19, 1996, the Department's General Counsel, Nancy E. McFadden, issued an opinion that held that the commuter aircraft exemption applied only to

aircraft originally designed to hold no more than 56 seats. Since Dalfort intended to use larger aircraft reconfigured to come within the 56-passenger capacity limit, Dalfort's proposal would be unlawful.²

Dalfort sought judicial review of the opinion. Astraea Aviation, d/b/a Dalfort Aviation v. U.S. Department of Transportation, 5th Cir. No. 96-60802 (filed November 18, 1996). The Shelby Amendment made the case moot before it was decided. As noted below, the parties' stipulation to dismiss the case stated that Legend could operate longhaul flights permitted by the Shelby Amendment; exhibit 12 to Dallas' comments is a copy of the stipulation.

The Shelby Amendment.

Congress addressed the General Counsel's opinion by enacting the Shelby Amendment, 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 amendment originated in the Senate Appropriations Committee, whose Chairman is Senator Richard Shelby.

As revised by the conference committee, the Shelby Amendment authorized increased Love Field service in two ways. First, it modified the commuter aircraft exemption so that it expressly exempts service operated by any aircraft reconfigured to hold no more than 56 seats, unless the aircraft's gross aircraft weight exceeded 300,000 pounds. Secondly, the amendment added three states - - Kansas, Mississippi, and Alabama -- to the Love Field service area (the states within which unrestricted service with large aircraft may be operated from Love Field).

The Shelby Amendment reads as follows:

- (a) IN GENERAL – For purposes of the exception set forth in section 29(a)(2) the term “passenger capacity of 56 passengers or less” includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.

² The General Counsel's conclusion was consistent with a May 16, 1994, ruling by Rosalind A. Knapp, the Department's Deputy General Counsel, on a similar proposal made by Centennial Express. Centennial Express planned to use reconfigured large aircraft to operate service between Denver's Centennial Airport and Love Field.

- (b) INCLUSION OF CERTAIN STATES IN EXEMPTION – The first sentence of section 29(c) of [the Wright Amendment] is amended by inserting “Kansas, Alabama, Mississippi,” before “and Texas”.
- (c) SAFETY ASSURANCE – The Administrator of the Federal Aviation Administration shall monitor the safety of flight operations in the Dallas-Fort Worth metropolitan area and take such actions as may be necessary to ensure safe aviation operations. If the Administrator must restrict aviation operations in the Dallas-Fort Worth area to ensure safety, the Administrator shall notify the House and Senate Committees on Appropriations as soon as possible that an unsafe airspace management situation existed requiring the restrictions.

The Shelby Amendment has already resulted in new service at Love Field, for Southwest is offering through service from Love Field to Jackson, Mississippi, and Birmingham, Alabama. The Wright Amendment had prohibited such service. Southwest alleges that these new services have enabled travellers to obtain much lower fares -- the lowest unrestricted one-way fares in the Dallas-Jackson and Dallas-Birmingham markets fell from \$324 and \$480, respectively, to \$149 and \$189, respectively, when Southwest began through service. Southwest Comments at 16.

In addition, Legend, a start-up airline, and Continental Express have planned to begin new interstate service. Legend wishes to operate longhaul service from Love Field with large aircraft reconfigured to hold no more than 56 seats. Continental Express planned to operate Love Field-Cleveland flights with regional jets having no more than 56 seats, but the state court has temporarily enjoined that service (as explained below, the Wright Amendment would have allowed Continental Express to operate these Cleveland flights).

Both Continental Express and American have begun operating intrastate flights at Love Field – Continental Express to Houston, a hub for its affiliate, Continental Airlines, and American to Austin. American operates fourteen daily roundtrip flights to Austin. Continental Express Comments at 1; Legend Comments at 46-47. The DFW use agreements and the Bond Ordinance do not prohibit intrastate service at Love Field and thus allow these American and Continental Express flights.

Other Statutes

Other federal statutes applicable to all airports also govern Dallas' operation of Love Field. A key statutory section, 49 U.S.C. 41713(b), preempts state and local government regulation of airline routes, fares, and services. See, e.g., American Airlines v. Wolens, 513 U.S. 219 (1995). However, this section contains an exception allowing a local government that owns an airport to exercise its proprietary powers as the airport's owner. 49 U.S.C. 41713(b)(3). Congress enacted this provision as section 4 of the Airline Deregulation Act of 1978, P.L. No. 95-504, 92 Stat. 1705 (1978).

As discussed below, the applicability here of the preemption provision with its exception allowing airport owners to exercise their proprietary powers is a key issue in the Love Field dispute. Fort Worth and the parties agreeing with Fort Worth claim that the restrictions sought by them may be implemented by Dallas in its capacity as Love Field's owner; Dallas and the parties opposing Fort Worth contend that Dallas may not impose such restrictions.

Dallas has also obligated itself to comply with the grant assurances required when airports accept FAA Airport Improvement Program grant funds, for Dallas has obtained federal grants for Love Field. Dallas Comments at 2, 15. Those assurances, imposed under 49 U.S.C. 47107, require among other things that the airport be available for public use on reasonable terms and conditions and bar the airport from unjustly discriminating against any user. 49 U.S.C. 47107(a)(1).

The Current Litigation

State Court Litigation. The Shelby Amendment is at the core of the current litigation over Love Field service. Before the President signed the appropriations bill containing the Shelby Amendment, Fort Worth filed a state court suit against Dallas, Legend, and others to block additional service at Love Field. City of Fort Worth, Texas v. City of Dallas, Texas, et al., Tarrant County District Ct. No. 48-171109-97 (filed October 10, 1997). American Airlines and the DFW Board supported Fort Worth's position in this case.

On July 9, 1998, the state court enjoined Continental Express from operating Love Field- Cleveland flights pending the court's final decision. The DFW Board argued that Continental Express' Cleveland flights should be enjoined since Continental Express' parent corporation, Continental, had signed a use agreement that barred it from operating interstate service at Love Field.

On October 15 the state court granted the summary judgment motions filed by Fort Worth, American, and the DFW Board against Dallas, Continental Express, and Legend. The court found that Dallas was obligated by the Bond Ordinance (as amended by the Wright Amendment) to bar airlines from operating services authorized by the Shelby Amendment and that federal law did not override the cities' agreement restricting Love Field service. See Fort Worth Report on Status of "Fort Worth Action." The court did not issue an opinion explaining the basis for this decision.

Continental Express initially appealed the grant of the temporary injunction but withdrew the appeal after the trial court's summary judgment decision. Continental Express and Legend have publicly stated that they will appeal that decision.

Federal Court Litigation. After Fort Worth sued Dallas in state court, Dallas filed a federal court suit against this Department and Fort Worth to obtain a declaratory judgment that Dallas may not bar airlines from operating service authorized by the Shelby Amendment. City of Dallas, Texas v. Department of Transportation et al., N.D. Tex. No. 3-97CV-2734-T (filed November 6, 1997). To protect plans to begin flights from Love Field to Houston and Cleveland, Continental Airlines and Continental Express filed their own suit, Continental Airlines and Continental Express v. City of Dallas and City of Fort Worth, N.D. Tex. No. 398CV1187-R (filed May 19, 1998). The federal court has consolidated these suits. It had set January 1999 as the deadline for filing summary judgment motions but recently vacated that schedule.

The earlier federal court litigation between Southwest, the two cities, and other parties over Southwest's right to use Love Field had resulted in the issuance of an injunction barring efforts to interfere with the court's decision that Southwest was entitled to continue using Love Field. Southwest Airlines and Texas Aeronautical Comm'n v. Texas International Airlines et al., Order Granting Permanent Injunction (February 23, 1982), N.D. Tex. No. CA 3-75-0340-C. On March 27, 1998, Southwest moved to reopen that proceeding to ensure its ability to operate additional service from Love Field. The district court denied Southwest's request for an order enforcing its rights after Fort Worth represented that it had no intention of interfering with Southwest's operations. See Southwest Comments at 17-18.

Related Administrative Proceedings

Administrative Complaint. On November 17, Legend filed a complaint with the FAA against Fort Worth, the DFW Board, and American that charges them with violating federal law. Legend asked the FAA to terminate all aviation grants for Fort Worth.

The FAA dismissed the complaint on December 7. The FAA concluded that Legend's request to enforce the grant restrictions applicable to Love Field was misdirected, since Legend filed the complaint against Fort Worth and the DFW Board, not Dallas. In addition, the FAA stated that it would not investigate complaints about a violation of the statutory preemption provision, 49 U.S.C. 41713, unless the complaint alleged conduct that would also be an unreasonable or unjustly discriminatory restriction on aircraft access by an airport operator under its Airport Improvement Program grant assurances.

Legend's Certificate Application. Legend has filed an application for certificate authority under 49 U.S.C. 41102 so that it may begin airline operations. Docket OST-98-3667. Fort Worth is opposing Legend's application in part by arguing that Legend's proposed service – longhaul flights from Love Field operated with reconfigured large aircraft – would violate the Wright Amendment. Fort Worth Answer at 13-17, Docket OST-98-3667. Fort Worth urged the Department to delay ruling on Legend's application until the state court had decided whether Legend's proposed service would be lawful. *Id.* at 21-22. American filed an answer concurring with Fort Worth's position.

The Department has issued a show-cause order tentatively finding that Legend meets the statutory requirements for obtaining certificate authority. Order 98-10-15 (October 16, 1998). The Department stated that it would consider in this proceeding the arguments about Legend's ability to carry out its service proposal, if the Department did not grant Fort Worth's motion to dismiss. *Id.* at 4-5.

Amendment of U.S. Airlines' Certificate Authority. The Department included in every U.S. airline's domestic certificate a condition barring that airline from operating Love Field service, except as permitted by the Wright Amendment. The Department recently amended that condition to reflect the changes made by the Shelby Amendment. Order 98-7-6 (July 8, 1998). As explained there, the certificate amendments were a ministerial action that did not require a decision on other issues, such as those raised in the pending lawsuits. *Id.* at 6.

FAA Enforcement Proceeding. The FAA has begun an enforcement proceeding against an airport that imposed operating restrictions analogous to the ones that Fort Worth wishes to impose on Love Field. The FAA has issued a Director's Determination, a preliminary decision, holding that the Arapahoe County Public Airport Authority, the owner of Centennial Airport, an airport located near Denver, violated its obligations under federal law by denying access to Centennial Express Airlines, a scheduled airline, when the airport allows charter airlines operating similar equipment to use the airport. Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority, FAA Docket Nos. 16-98-05 et al., Director's Determination (issued August 21, 1998) ("Centennial Decision") (exhibit 17 in the DFW Board's comments is a copy of this FAA decision). The FAA held, among other things, that the airport's desire to have scheduled airlines use Denver International Airport was not a legitimate reason for blocking Centennial Express from using Centennial Airport. Centennial Decision at 24, 25. After the Director's Determination was issued, an FAA hearing officer held a hearing in the case as provided by 14 C.F.R. Part 16.

THE DEPARTMENT'S INSTITUTION OF THIS PROCEEDING

The dispute over new service at Love Field led to the institution of this proceeding. Several of the parties in the Texas litigation asked the Department to take steps to help resolve the dispute. Fort Worth asked the Department to mediate the dispute. Dallas and Legend urged the Department to intervene in the state court proceeding, although they suggested that the Department should issue a declaratory ruling if it was unwilling to intervene in the state court proceeding. American, on the other hand, asked the Department to let the Texas courts resolve the dispute.

The Department also received letters from Senator Trent Lott, the Majority Leader of the United States Senate, and Congressman Bud Shuster, the Chairman of the Committee on Transportation and Infrastructure of the United States House of Representatives, asking the Department to take action to assert the federal interests involved in the dispute. After the Department began this proceeding, it received letters supporting Fort Worth's position from Senator Kay Bailey Hutchison and Congresswoman Kay Granger.

As the agency primarily responsible for the administration of the relevant statutory provisions, the Department decided to issue a ruling on the federal law questions that are the principal issues underlying the litigation. The Department

had taken similar action in 1985 to resolve an earlier dispute over the interpretation of the Wright Amendment. Love Field Amendment Proceeding, Order 85-12-81 (December 31, 1985). The Department therefore asked the parties for their views on the federal law issues at issue in the dispute. Order 98-8-29 (August 25, 1998). The Department stated that it would rule on the following federal law issues raised by the Love Field dispute; one issue was added by Order 98-9-5 (September 3, 1998):

- (1) Whether the statutory preemption provision, 49 U.S.C. 41713(b), prohibits one airport owner by contract with a second airport owner from maintaining a commitment by the latter to limit airport operations at its own airport, and whether such a restriction falls within the proprietary powers exception in 49 U.S.C. 41713(b)(3);
- (2) Whether the Wright and Shelby Amendments preempt the City of Dallas' ability to restrict service at Love Field except as consistent with the terms of those amendments;
- (3) Whether the Shelby Amendment authorizes carriers using jet aircraft with a passenger capacity of 56 seats or less to engage in longhaul service from Love Field to any city in the United States;
- (4) Whether a major carrier may bind itself through its use agreements with the DFW Airport Board that it will not exercise the authority granted by its certificate to operate flights from Love Field that are consistent with the Wright and Shelby Amendments; and
- (5) Whether 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.

The Department stated that it intended to issue a ruling so that the courts could consider its interpretation. Order 98-8-29 at 5.³

³ We later granted in part the requests by Fort Worth, American, and the DFW Board for more time for filing comments. Order 98-9-5 at 4.

THE PARTIES' COMMENTS

Parties Opposing Expanded Service

In their pleadings Fort Worth, American, and the DFW Board (collectively “the Fort Worth parties”) argue that federal law allows Dallas as Love Field’s proprietor to restrict service at that airport and that the Wright and Shelby Amendments do not preempt Dallas’ ability to limit the scope of Love Field service, since the two amendments were intended only to limit the Department’s authority to authorize service, not the cities’ authority to restrict service authorized by the two statutes. These parties assert that Dallas is therefore obligated by the Bond Ordinance to bar airlines from operating the services authorized by the Shelby Amendment. Fort Worth and the DFW Board contend that the exception for aircraft with a passenger capacity of 56 passengers or less does not allow the operation of longhaul service with regional jets or reconfigured large aircraft and that the DFW Board may enforce its use agreement to bar an airline from operating interstate service at Love Field.⁴ While American believes that the Bond Ordinance is enforceable against Dallas, American contends that a decision by the Department to the contrary would compel the Department to hold that the DFW Board may not block airlines from operating interstate service from Love Field.

Fort Worth, American, and the DFW Board additionally have made various procedural requests, such as their request for a dismissal of this proceeding. The Department is addressing these procedural issues in its companion order.

The Love Field Citizens Action Committee asserts that no decision may be issued without the preparation of an environmental impact analysis.

The Allied Pilots Association, which represents American’s pilots, contends that we must consider safety issues before allowing more service at Love Field.

⁴ 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).

Parties Supporting Expanded Service

Dallas, Southwest, Continental Express, and Legend (collectively “the Dallas parties”) contend that the Department may and should issue a decision on the federal law issues. These parties assert that Dallas may not bar airlines from operating the Love Field services authorized by the Wright and Shelby Amendments.

Dallas states that it is committed to maintaining DFW as the area’s primary airport but that it needs a clear and final decision on its ability, if any, to restrict Love Field service. Dallas agrees with the DFW Board that it may enforce the provision in the DFW use agreements requiring airlines to comply with the Bond Ordinance’s restrictions on using other airports in the Dallas-Fort Worth area.

Continental Express argues that it may operate longhaul service with aircraft with a passenger capacity of 56 passengers or less and that the DFW Board may not enforce the use agreements’ prohibition against operating interstate service at other area airports.

Southwest takes no position on the scope of the exception for aircraft with a passenger capacity of 56 passengers or less, except that Southwest contends that an airline may not offer through service to points outside the Love Field service area, whether its Love Field flights use aircraft with a passenger capacity of 56 passengers or less. Southwest also thinks that the DFW Board may enforce an airline’s commitment not to use another airport for interstate service.

The Southwest Airlines Pilots Association argues that expanded service at Love Field will create no safety problems.

Legend asks the Department to act quickly, since the on-going litigation over the Shelby Amendment is injuring Legend’s ability to compete with American and other airlines in Dallas-Fort Worth area markets. Legend agrees with Continental Express that the Shelby Amendment authorizes longhaul service with jet aircraft that meet the 56-passenger capacity requirement. Legend takes no position on whether the DFW use agreement is enforceable.

Other Parties

Two airport trade associations, the Airports Council International -- North America and the American Association of Airport Executives (“the airport trade

associations”), are concerned about preserving the ability of airport proprietors to reasonably allocate services between different airports and ask the Department to follow a case-by-case approach in determining whether such an allocation is lawful. The airport trade associations also contend that airlines may waive rights by contract.

The City and County of San Francisco supports the airport trade associations’ position.

The Greater Orlando Aviation Authority asserts that airlines may waive their rights by contract; if the Department disagrees, it should not make that ruling retroactive.

Delta asks that the decision be limited to the specific facts of Love Field and avoid any broader rulings, since the resolution of preemption questions depends greatly on the factual circumstances.

INTRODUCTION TO OUR DECISION

Summary of Decision

As explained in the companion order, the Department has determined, given its responsibility to administer the federal statutes relevant to the Love Field dispute, that it should publish a decision interpreting the relevant federal statutes. The Department is therefore denying Fort Worth’s request to dismiss this proceeding, as discussed in the companion order ruling on the procedural issues raised in this proceeding.

In the light of the federal preemption of the regulation of airline routes by state and local governments, Dallas’ proprietary powers as Love Field’s owner do not allow it to impose the type of restrictions on Love Field service sought by Fort Worth, the DFW Board, and American. While an airport owner may impose limits on certain types of service operated at an airport, those limits must be reasonable, non-discriminatory, and necessary to carry out a legitimate goal, such as limiting noise or congestion. The Fort Worth parties have not shown that the restrictions they seek would meet this standard.

In addition, the Wright and Shelby Amendments preempt any agreement between the cities restricting service at Love Field. Congress intended to allow airlines to operate the interstate services authorized by those statutes, despite the cities’ wish to eliminate interstate service at Love Field. Congress made that

decision under its authority to regulate interstate commerce, which authorizes it to regulate airline and airport operations.

Both the Wright and Shelby Amendments allow any airline to operate longhaul service with aircraft meeting the maximum 56-seat capacity standard, whether the airline may be deemed a commuter airline and whether the aircraft is a jet.

The DFW use agreements cannot block an airline from offering interstate service at Love Field. Like Fort Worth and Dallas, DFW has no authority to restrict an airline's use of Love Field. The Department disagrees with the DFW Board's contention that its agreements constitute an enforceable waiver by the airlines of any rights to use Love Field -- insofar as the use agreements bar an airline from operating at an airport competing with DFW, the agreements are unenforceable.

Finally, the Department finds that Continental Express may offer through service to points outside the Love Field service area over Houston, if its flights from Love Field to Houston use aircraft with a passenger capacity of 56 passengers or less.

The Department's conclusion that Dallas may not currently restrict service at Love Field to protect DFW from competition is fully consistent with the FAA's findings in its Centennial Decision. The Department has based this decision, however, on the facts of the Love Field dispute, for proprietary rights issues must be resolved case-by-case. The Department disagrees with the state court's decision on these issues, but the lack of any opinion explaining that court's analysis has prevented the Department from taking the court's rationale into account.

Before addressing the federal law issues set forth in the orders instituting this proceeding, the Department will discuss the safety and environmental issues raised by two parties.

SAFETY AND ENVIRONMENTAL ISSUES

The Safety of Dallas-Fort Worth Area Airline Operations

The Allied Pilots Association, the bargaining representative for American's pilots, suggests that we should defer deciding this proceeding until we have analyzed air traffic procedures for the Dallas-Fort Worth area and determined whether they should be changed. The Allied Pilots Association alleges that

additional flights at Love Field will affect the risk analysis previously undertaken by the FAA.

The Southwest Pilots Association, on the other hand, contends that Love Field is one of the nation's safest airports and that allowing additional service at Love Field will not reduce the safety of airline operations in the Dallas-Fort Worth area. They state, "We do not believe any legitimate safety issues exist, however, with respect to current or reasonably foreseeable levels of operations at Love Field or DFW."

The Department's decision interpreting the federal statutes governing Love Field and preemption will not affect safety. The FAA will maintain the safety of aircraft operations in the Dallas-Fort Worth area. As the Love Field Study stated, "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" Love Field Study at 66. See also Love Field Study, Executive Summary at 1. Patrick V. Murphy, the Deputy Assistant Secretary for Aviation and International Affairs, similarly testified 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 safety of airline operations in the Dallas-Fort Worth area is primarily affected by the total number of operations in the area, not by the number of flights using a particular airport.⁵

Moreover, the Shelby Amendment directs the FAA to monitor safety, and the conference committee report on the bill directed the FAA to review and report on air traffic procedures if operations at either DFW or Love Field increase by twenty-five percent or more. H.R. Rep. No. 105-313, 105th Cong., 1st Sess. (1997) at 45. Congress thus decided to authorize additional services at Love Field without first requiring a study of the possible impact on safety.

National Environmental Policy Act Issues

In its comments the Love Field Citizens Action Committee, which represents Love Field area residents dissatisfied with the noise and other environmental

⁵ Under the position taken by Fort Worth and its allies, Southwest and other airlines may already add flights at Love Field within the limits set by the Wright Amendment. In fact American has begun operating fourteen daily roundtrip flights between Love Field and Austin.

problems allegedly created by that airport, asserts that we may not issue a ruling in this proceeding without first preparing an environmental impact statement under the National Environmental Policy Act.

The Department finds that no environmental impact statement is necessary in this proceeding. The Department is interpreting existing statutory requirements. It is not taking discretionary action on its own that would affect the level of operations at Love Field. Congress has enacted legislation specifying what services may and may not be operated at the airport. As a result, there would be no point in preparing an environmental impact statement, as the Department explained when it amended the certificate authority of U.S. airlines to reflect the changes made by the Shelby Amendment. Order 98-7-6 (July 8, 1998) at 6-7. The courts have held that non-discretionary acts are exempt from the requirement to prepare an environmental impact statement, for the primary purpose of a statement is to assist agency decisionmaking. *See, e.g., Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508 (4th Cir. 1992); *Atlanta Coalition on Transportation Crisis v. Atlanta Regional Comm'n*, 599 F.2d 1333 (5th Cir. 1979).

In addition, the Love Field Study contained a detailed analysis of the likely environmental impact of additional Love Field service. The Love Field Study concluded that any environmental effects would be outweighed by the public's ability to obtain more service and lower fares if airlines had a greater ability to serve Love Field. *See* Order 98-10-15 at 5, n. 12.⁶

INTRODUCTION TO THE FEDERAL STATUTORY ISSUES

The Department will now address the five legal issues on which it stated that it would issue an interpretation. As a preliminary matter, however, the Department wishes to emphasize the limited nature of its decision. Insofar as the airport proprietary rights issue is concerned, we are determining whether an airport has the power to restrict airline services in a way which is essentially the same as route regulation when there is no showing that the restrictions are

⁶ The Love Field Citizens Action Committee filed a report showing that severe traffic congestion would result if Love Field airline and general aviation operations increase from the current level of 225,000 per year to 400,000 per year. Love Field Citizens Action Committee October 9, 1998 pleading. As Legend points out, the report assumes that, if general aviation operations do not increase, Love Field airline operations will almost triple, which is highly unlikely. Legend Response to Love Field Citizens Action Committee Comments.

needed to carry out a permissible airport goal.⁷ The limited scope of this decision is thus consistent with the requests by the airport trade associations, San Francisco, and Delta that the Department bear in mind that preemption and proprietary right questions are usually fact-specific and that it should avoid issuing an unnecessarily broad decision that could interfere with the legitimate needs of airports and airport operating practices.

This decision reflects their concerns. The Department recognizes that airport operators have legitimate management needs that are not preempted by federal law. The Department does not intend to undermine their ability to exercise those rights. Here the Department is concerned only with the question of whether Dallas has the authority as Love Field's owner to essentially regulate airline routes. The Department is basing its interpretation of the federal statutes on the specific circumstances of Love Field. While this interpretation of the statutory preemption and proprietary powers provisions in some respects may have wider applicability, the Department is largely following existing law on those issues. Critical to this decision is the lack of any showing that there is a legitimate need (a need recognizable as proper by judicial and administrative interpretations of federal law) for stopping airlines from operating the Love Field services authorized by the Shelby Amendment.

This decision does not undermine the authority of earlier decisions allowing an airport proprietor to impose reasonable and non-discriminatory restrictions on the use of an airport when those restrictions are demonstrably necessary to achieve a rational goal. See, e.g., Western Air Lines v. Port Authority of New York & New Jersey, 658 F. Supp. 952 (S.D.N.Y. 1986), aff'd, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006. Indeed, in beginning this proceeding the Department stated that it would not consider whether Dallas may take other action to limit the scale of operations at Love Field to alleviate Fort Worth's concerns over the increased scope of service authorized by the Shelby Amendment. Order 98-8-29 at 4-5. The Department has no intention of taking

⁷ The Department is also not considering whether the Love Field restrictions sought by Fort Worth would violate the grant assurances given the FAA by Dallas in order to obtain federal grants for Love Field. The order instituting this proceeding did not ask the parties to address that issue. The prohibition against discrimination would be violated, however, if Southwest were allowed to provide services that other airlines could not. City of Dallas, Texas v. Southwest Airlines, supra, 371 F. Supp. at 1028-1030. In addition, the reasoning in the FAA's Centennial Airport decision suggests that restrictions of the type sought by Fort Worth would violate an airport's obligations under its grant assurances, although the FAA stated that it was not deciding the Love Field issues. Centennial Decision at 30, n. 7.

away an airport's ability to reasonably manage its operations. In that regard, the FAA has taken enforcement action against the Arapahoe County Public Airport Authority for excluding scheduled carrier operations at Centennial for which no additional airport operating authority is required by the airport. However, the FAA would not compel the airport to apply for an airport operating certificate that would be needed for scheduled service operated with aircraft with more than thirty seats. Centennial Decision at 19.

American argues that a decision allowing more service at Love Field and thereby invalidating the Bond Ordinance's restrictions will frustrate efforts by other cities to create regional airports, efforts which assertedly require restrictions on airline service at existing airports. American Comments at 31; American Reply at 17-19. American's concerns are misplaced. Airport owners may be able to restrict service at one airport when necessary to ensure the survival of a second airport. Cf. City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982). The Department is not deciding here whether the Bond Ordinance's restrictions on Love Field service were valid when the cities originally built DFW to replace their local airports. The Department is interpreting the applicable federal statutes in this proceeding in light of the current situation, thirty years after the Bond Ordinance's adoption, when no one has cited evidence suggesting that expanded Love Field service along the lines permitted by the Shelby Amendment will undermine DFW's viability or end that airport's role as the area's primary airport.

ISSUE ONE: THE SCOPE OF DALLAS' PROPRIETARY RIGHTS

The principal basis of the dispute over expanded Love Field service is Fort Worth's claim that Dallas has obligated itself to restrict service at that airport. Dallas' commitments to Fort Worth allegedly require Dallas to block airlines from operating the additional services authorized by the Shelby Amendment. Fort Worth bases this claim on the Bond Ordinance, which, as described above, obligated the two cities to transfer all interstate airline service from their local airports to DFW to the extent legally permissible.

American and the DFW Board support Fort Worth's claim that Dallas' commitments to Fort Worth require it to restrict Love Field service. The Dallas parties disagree. They contend that Dallas does not have the authority under federal law to restrict Love Field service as sought by Fort Worth.

As a matter of federal law, Fort Worth may enforce its contract claims against Dallas only if federal law allows Dallas as Love Field's owner to impose the kind

of restrictions sought by Fort Worth. The statute defining an airport owner's authority to limit service is 49 U.S.C. 41713(b), which bars state and local governments from regulating airline routes, rates, and services, but allows airport owners to exercise their proprietary rights. As explained below, an airport owner's proprietary powers allow it to restrict airline operations only when the restrictions are reasonable, nondiscriminatory, and designed to achieve a legitimate goal. The airport owner, moreover, must show that the restrictions are both necessary and tailored to achieve a legitimate goal.

Dallas' rights as Love Field's proprietor do not allow it to bar airlines from operating the services authorized by the Shelby Amendment. The Department is here considering only one issue, whether Dallas as Love Field's owner may

determine which routes may be served from its airport and by which types of equipment. The discussion of this issue begins by explaining the standard for determining whether an airport owner's regulation is within the owner's proprietary powers. The order then analyzes whether the restrictions sought by Fort Worth would be prohibited but for Dallas' proprietary rights and whether the restrictions could be adopted under Dallas' proprietary powers. No party cited record evidence indicating that the additional Love Field operations authorized by the Shelby Amendment could threaten DFW's viability or displace DFW as the area's dominant airport.

The Statutory Provisions on Preemption and Proprietary Rights

The preemption provision, 49 U.S.C. 41713(b), including the exception for the exercise of the proprietary rights of airport owners, reads as follows:

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide transportation under this subpart.

....

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

Congress enacted this provision when it deregulated the domestic airline business in 1978. Congress did so "[t]o ensure that the States would not undo federal deregulation with regulation of their own," Morales v. Trans World Airlines, 504 U.S. 374, 378 (1992), quoted in American Airlines v. Wolens, 513 U.S. 219, 222 (1995). As part of deregulation, Congress eliminated the Board's power to determine which routes could be operated by an airline. Section 1601(a)(1)(c) of the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705 (1978), terminating section 401(e)(1) of the Federal Aviation Act, then codified as 49 U.S.C. 1371(e)(1). Congress had determined that the public would benefit if each airline was able to choose which markets it would serve in response to market demands. Allowing state and local governments to regulate routes would frustrate Congress' policy.

The Scope of the Proprietary Rights of Airport Owners

A restriction imposed by an airport proprietor must be “reasonable, nonarbitrary, and non-discriminatory” and “avoid even the appearance of irrational or arbitrary action.” National Helicopter Corp. v. City of New York, 137 F.3d 81, 89 (2nd Cir. 1998). The Department’s own policy statement, originally adopted by the Board, similarly states that an airport owner’s conduct is not preempted as an exercise of its proprietary powers “when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective in a manner that does not conflict with the provisions and policies [of the aviation provisions of Title 49].” 14 C.F.R. 399.110(f). See also Centennial Decision at 28, citing British Airways Board v. Port Authority of New York, 558 F.2d 75 (2d Cir. 1977).

The principal example for airport owners’ exercise of their proprietary powers is their need to restrict operations in order to limit their liability for noise. Western Air Lines v. Port Authority, *supra*, 658 F. Supp. at 956. However, court decisions have allowed airport owners to restrict service for reasons other than limiting noise, as explained below.⁸

In the leading case, Western Air Lines v. Port Authority, a district court upheld a perimeter rule adopted by the Port Authority of New York and New Jersey for LaGuardia in a decision affirmed by the Second Circuit. The Port Authority adopted the rule to force airlines to use JFK, another Port Authority airport, for all nonstop longhaul flights. The perimeter rule restricted nonstop flights at La Guardia to a maximum distance of 1500 miles (with a grandfather exception for Denver flights).

While the district court held that airport owners could regulate subjects other than noise, such as congestion, 658 F. Supp. at 956-957, the court stated the

⁸ The courts have long held that a state or local government may not restrict airport operations on noise grounds unless that government is the airport’s proprietor. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); San Diego Unified Port District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000. Fort Worth is not Love Field’s proprietor. It contends, however, that Dallas obligated itself to restrict service at Love Field in order to carry out the cities’ joint goal of establishing DFW as the area’s dominant airport and that it has the right to enforce Dallas’ obligations. This order assumes that Dallas’ agreement with Fort Worth does give the latter the right to enforce Dallas’ contract obligations, to the extent they are consistent with federal law.

proprietor's power was limited to "the issuance of reasonable, nonarbitrary and nondiscriminatory rules that advance the local interest." 658 F. Supp. at 958. The district court concluded that the perimeter rule met this standard because Port Authority studies had demonstrated its need for the rule. La Guardia was operating at or near the limits of its capacity in certain areas, which had already created delays and congestion. The Port Authority believed that allowing longer flights (and thus more leisure traffic) at LaGuardia would increase delays and congestion. The district court thus upheld the rule on the ground that it was reasonably designed to alleviate demonstrated problems at LaGuardia by shifting longhaul traffic to JFK and was therefore a legitimate exercise of the proprietary powers of the operator of a multi-airport system. 658 F. Supp. at 959-960.⁹

On appeal the Second Circuit essentially adopted the district court's analysis as its own. The Second Circuit stated, ". . . we agree with [the district court's] conclusion that the rule, at least when enacted by a multi-airport proprietor such as the Authority, falls within the proprietary power of airport operators exempted from preemption [by the statute]." 817 F.2d at 226.¹⁰

The Fifth Circuit also upheld a perimeter rule adopted by the FAA for Washington National Airport (now Ronald Reagan Washington National Airport). City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982). The Court held that the FAA's rule barring longhaul service at National was a rational means of encouraging airlines to move flights to the then little-used facilities at Dulles International Airport. As the court pointed out, since the perimeter rule had been adopted by the FAA, a federal agency, the decision did not involve an interpretation of the statutory preemption provision. 679 F.2d at 1194. The Court stated, however, that the FAA's position as the airports' proprietor gave it

⁹ An earlier district court decision, Aircraft Owners & Operators Ass'n v. Port Authority, 305 F. Supp. 93 (E.D.N.Y. 1969), is consistent with Western Air Lines. That decision upheld peak hour fees imposed by the Port Authority on general aviation to reduce demonstrated congestion problems.

¹⁰ When Delta, which had acquired Western, asked the Supreme Court for certiorari, the United States filed a brief opposing Delta's petition; exhibit 9 to American's comments is a copy of this brief. The brief stated that an airport's proprietary powers included the power to take reasonable steps to prevent congestion and that, "[i]n a multiple-airport context, imposing restrictions that reduce congestion at a busy airport in order to encourage use of a less crowded airport may be a reasonable way to relieve congestion." United States Brief at 6.

the authority to adopt the perimeter rule. 679 F.2d at 1196.¹¹ The Fifth Circuit observed, “Already empty for much of the day with a [perimeter] rule, Dulles might, if we invalidate the perimeter, cease to exist.” 679 F.2d at 1191. The Court also relied on evidence that National Airport was plagued with problems such as “overcrowded parking lots and aircraft aprons, insufficient counterspace, traffic congestion, too little baggage claim area, [and] harsh environmental effects on the airport’s neighbors.” 670 F.2d at 1193.

On the other hand, in Pacific Southwest Airlines v. County of Orange, No. CV 81-3248 (C.D. Calif. Nov. 30, 1981), a district court held in an unpublished decision that the airport proprietor, which operated only one airport, could not impose a perimeter rule. The Fifth Circuit reasoned in City of Houston that this result was correct, because federal law did not allow the proprietor of a single airport to impose a perimeter rule. 679 F.2d at 1194.

The Second Circuit recently held that New York City as the proprietor of a Manhattan heliport could impose restrictions on helicopter operations there in order to reduce noise but could not regulate helicopter flight paths. National Helicopter Corp. v. City of New York, 137 F.3d 81 (2nd Cir. 1998). The Court, moreover, construed its earlier decisions as allowing an airport proprietor to impose restrictions only in order to address noise and other environmental problems. 137 F.3d at 88.¹²

In sum, the courts have allowed airports to impose restrictions on airline operations but have required such restrictions to be justified by proof that the restrictions were necessary to carry out a legitimate airport goal. No court has held or suggested that one airport may adopt a perimeter rule to protect a different airport from competition or that a proprietor’s rights include the right to limit competition between airports operated by different proprietors.

The Board and FAA have similarly interpreted the scope of an airport proprietor’s rights. When the Board granted Southwest’s application for Love Field-New Orleans authority, the Board summarily rejected the argument by the

¹¹ The FAA’s preliminary decision in the Centennial Airport case stated, however, that the Fifth Circuit decision does not provide useful guidance for determining the scope of the proprietary rights of a local or state government acting as an airport owner. Centennial Decision at 30, n. 8.

¹² The city had not received federal funds for the heliport and therefore was not subject to grant restrictions.

Dallas/Fort Worth Parties and American that Dallas' proprietary rights allowed it to block Southwest's service. Southwest Airlines Automatic Market Entry, 83 CAB 644 (1979). The Board stated that the airport proprietary rights provision was not intended to give airport operators "veto power over Board decisions." At that time the Board intended to address the proprietary rights issue in detail in another Love Field proceeding and so discussed the issues only briefly in the order in the first proceeding. 83 CAB at 651-652. The Board, however, never issued a final decision in the second proceeding due to the Wright Amendment's enactment; this statement in the Southwest case appears to be its only ruling on the extent of Dallas' rights as a proprietor. Nonetheless, the Board's language, while curt, clearly held that Dallas could not use its proprietary powers to bar an airline from operating a route at Love Field.

More recently, the FAA Director's Determination concluded that the Arapahoe County Public Airport Authority had violated the preemption provision, 49 U.S.C. 41713, as well as other federal laws, by refusing to allow Centennial Express to operate scheduled service at Centennial Airport when other carriers were allowed to operate non-scheduled services at that airport with similar equipment. The FAA determined that the airport operator had thereby violated the preemption provision. The FAA reasoned that the airport authority's ban on scheduled service at Centennial Airport was a form of route regulation prohibited by the preemption provision: "[The airport authority's] unilateral ban on scheduled service also represents a regulation of air carrier routes, because the effect of the ban is to prohibit regular operations over any route involving the Centennial Airport." Centennial Decision at 29. As the FAA noted, "[T]his unilateral ban on scheduled service creates an inherent conflict with Federal law, which permits an air carrier holding authority to provide scheduled passenger service to provide that service to any airport in the United States." Ibid. The ban on scheduled service at Centennial Airport was not a permissible use of the airport authority's proprietary powers, since the authority had not provided an adequate justification for the ban. Centennial Decision at 30-31.

The FAA declared, moreover, that "[p]otential economic harm to another airport would never justify an access restriction under the grant assurance that requires Centennial Airport to be accessible to all categories of aeronautical users on reasonable terms, except possibly in the limited circumstances of a single operator of a multiple airport system" Centennial Decision at 25.¹³

¹³ The FAA issued its preliminary determination after the Colorado Supreme Court held that the airport's conduct was lawful. Arapahoe County Public Airport Authority v. Centennial Express Airlines, 956 P.2d 587 (Colo. 1998). The Colorado court, however, recognized that its

Finally, the Department held that the Massachusetts Port Authority violated the statutory preemption provision, among other provisions, by adopting a fee structure at Boston's Logan International Airport that was unreasonable. Investigation into Massport's Landing Fees, FAA Docket 13-88-2 (December 22, 1988), Opinion at 11, a decision affirmed by the First Circuit in New England Legal Foundation v. Massachusetts Port Authority, *supra*. The Department noted, among other things, that Massport had designed the fees to impose unjustified additional costs on smaller aircraft to discourage them from using Logan. As such, Massport's imposition of the fees did not constitute a valid exercise of its rights as an airport proprietor, Opinion at 9:

[To raise fees] during times when there is no shortage of runway capacity penalizes smaller aircraft users when they are not imposing congestion-related costs on other users. This action by Massport, which unreasonably regulates and manages the type and frequency of access to the airport by air traffic, exceeds its authority as an airport proprietor and intrudes into areas that have been federally preempted.

The Nature and Purpose of the Restrictions Sought by Fort Worth

The question then is whether the restrictions sought by Fort Worth satisfy the standard for a valid airport restriction on airline services, that is, whether those restrictions would be reasonable, non-discriminatory, and necessary for achieving a legitimate goal.

Fort Worth seeks to prohibit all service with large aircraft between Love Field and points outside the Love Field service area created by the Wright Amendment (that is, Texas and the four states bordering on Texas). Those restrictions are equivalent to route regulation. In the initial Southwest litigation, both the district court and the Fifth Circuit observed that Dallas' decision to prohibit Southwest from operating scheduled service at Love Field constituted route regulation. City of Dallas, *supra*, 494 F.2d at 777; 371 F. Supp. at 1024-1025. Section 9.5A of the Bond Ordinance, moreover, gives the DFW Board the power to waive the restriction against using another area airport for interstate service on the basis of an overriding public need for decentralized interstate

reasoning would not authorize Dallas to restrict service at Love Field, for the court pointed out that Centennial Airport, unlike Love Field, was attempting to bar a type of airline operation (scheduled service) that had never existed at that airport. 956 P.2d at 596, n. 12.

airline services. In other words, the DFW Board would determine whether public demands justify new airline service at other airports, a determination exactly like the kind of route decisions made by the Board before deregulation, when the Board sometimes specified the airport that must be used for a service.¹⁴ Such action by the DFW Board would be an attempt to undo federal deregulation by imposing its own regulation.

Fort Worth's demands may also frustrate airline plans to develop a specific type of service. For example, as the district court pointed out in the initial Southwest litigation, Dallas' efforts to block Southwest from using Love Field amounted to service regulation, since a short-haul airline like Southwest was necessarily dependent on using a close-in airport to attract passengers. City of Dallas, supra, 371 F. Supp. at 1031-1032.

Unless authorized by the proprietary rights exception for airport owners, Fort Worth's demands are plainly inconsistent with the statutory preemption provision. Congress amended our governing statute to end all regulatory authority to determine what domestic routes an airline may fly; the statute provides that our grant of domestic operating authority authorizes an airline to operate anywhere in the nation. Section 1601(a)(1)(c) of the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705 (1978), terminating section 401(e)(1) of the Federal Aviation Act, then codified as 49 U.S.C. 1371(e)(1). Fort Worth wishes to deny airlines the ability to choose which Dallas-Fort Worth routes they will serve through Love Field, even when the Shelby Amendment would allow service on the routes.

Dallas would clearly violate the preemption provision by imposing the restrictions on Love Field service sought by Fort Worth, unless Dallas' proprietary rights allow it to limit service in that manner.

Dallas' Ability as the Airport's Proprietor to Restrict Love Field Service

¹⁴ The Department has recognized that different airports in a metropolitan area can be separate markets, so that service to one airport does not necessarily meet the needs of the market at an alternative airport. The Department therefore granted slot exemptions for low-fare airlines at Chicago's O'Hare International Airport and New York's LaGuardia Airport on the ground that the airport-to-airport routes at issue constituted separate markets justifying slot awards, even though comparable service existed at Chicago's Midway Airport and other New York City airports. See, e.g., Orders 98-4-21 (April 21, 1998) at 13-14 and 98-4-22 (April 21, 1998) at 18-19.

Applying the principles established by the judicial and agency decisions discussed above, the Department concludes that Dallas' rights as Love Field's owner do not allow it to restrict Love Field service as sought by Fort Worth. As shown, these decisions demonstrate that an airport owner's ability to restrict the type of service operated at its facilities is limited in that any such restrictions must be non-discriminatory, reasonable, and based on a showing that they are necessary to achieve legitimate airport goals. The Fort Worth parties have made no showing that the restrictions they wish to impose on Love Field service meet this standard.

First, Fort Worth is not trying to limit the environmental impact of increased service at Love Field (nor could it, since the airport is not located in Fort Worth). Fort Worth instead seeks to impose limits on Love Field service in order to protect the competitive position of DFW. See, e.g., Fort Worth's Third Amended Petition, City of Fort Worth, Texas v. City of Dallas, Texas, et al., at 16-18; exhibit 16 to American's Comments is a copy of Fort Worth's petition.

Neither the courts, the Board, nor this Department or any element of this Department have stated that a local government may impose restrictions at its own airport or a neighboring airport in order to limit competition for another airport preferred by that government. Such restrictions would be contrary to the very essence of deregulation, which is intended to promote competition. Fort Worth seeks to restrict Love Field service in order to avoid the competition inherent in a deregulated industry.

The closest analogies to the type of restrictions sought by Fort Worth are the National Airport and LaGuardia perimeter rules. When the courts upheld those rules in Western Air Lines and City of Houston, they did so on the ground that the airport owner had shown that the rules were necessary to achieve legitimate goals of the owner – the prevention of congestion and delays. The Fifth Circuit additionally relied on evidence showing that the lack of a perimeter rule could force the FAA to close Dulles. Here, in contrast, Fort Worth seeks to restrict service at Love Field only in order to reduce competition for DFW, as shown by Fort Worth's complaint in the state court (the Third Amended Petition cited above) and has neither claimed nor shown that additional Love Field service would make DFW unviable. The goal of reducing competition for one airport cannot justify imposing restrictions on a second airport, when the goal is merely to prevent some service from being diverted to the second airport and to increase revenues at the first airport.

In addition, even if Dallas could restrict Love Field service to protect DFW's revenues, the restrictions sought by Fort Worth would not be a rational means of achieving that goal. Any restrictions imposed by an airport proprietor on airline service must be reasonably necessary to carry out a legitimate goal and be nonarbitrary and non-discriminatory.

The restrictions sought by Fort Worth do not meet that standard. The city seeks, for example, to prohibit all large aircraft service to service to points outside Texas and the four states bordering on Texas (the Love Field service area established by the Wright Amendment) – nonstop flights, one-stop flights, through service, and interline service. Its proposed restrictions would create such anomalous results as allowing unrestricted service with large aircraft to cities such as Albuquerque and New Orleans, while prohibiting nonstop, through, and interline service to cities such as St. Louis and Birmingham. In contrast, the perimeter rules upheld in Western Air Lines and City of Houston barred only nonstop flights – the rules allowed stopping flights, through service, and interline service. Fort Worth has not justified its proposed restrictions on service to points outside the Love Field service area created by the Wright Amendment. Similarly, Fort Worth has provided no justification for allowing unrestricted service with aircraft with a passenger capacity of 56 passengers or less while imposing severe restrictions on service operated with larger aircraft. Fort Worth has presented no rational connection between those specific restrictions and Fort Worth's desire to protect DFW, and no showing that the specific restrictions are reasonably necessary to achieve Fort Worth's goals.

While the restrictions sought by Fort Worth are largely the restrictions imposed by the Wright Amendment, that fact cannot validate the cities' adoption of those restrictions.¹⁵ Congress has wide latitude in carrying out its powers to regulate interstate commerce. A state or local government, in contrast, may restrict service at an airport only by showing that the restrictions are necessary to carry out a legitimate goal, are not arbitrary or discriminatory, and are reasonable. See, e.g., National Helicopter Corp., *supra*, 137 F.3d at 89; British Airways Board v. Port Authority of New York & New Jersey, 564 F.2d 1002, 1011 (2nd Cir. 1977).

The Fort Worth parties, citing Western Air Lines and City of Houston, essentially assume that the courts will approve almost any airport perimeter

¹⁵ As explained below, the Wright Amendment's commuter aircraft exemption allows longhaul Love Field service with regional jets, notwithstanding Fort Worth's claims to the contrary.

rule, for those parties have made no effort to show that the Bond Ordinance's restrictions are currently needed. That assumption is erroneous. The courts have upheld perimeter rules when the airport owner demonstrated that the rule was needed to alleviate congestion and environmental problems (or, in the case of National, in part to keep the airport owner from having to close its other airport).

Nothing in the plain language of the statute supports Fort Worth's position that Dallas' proprietary rights would allow Dallas to block services authorized by the Wright and Shelby Amendments. While the Fort Worth parties attempt to rely on the Wright Amendment's conference committee report, the report does not support their position. The report stated, "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively, apply to the authority to serve Love Field on interstate flights authorized by the amendment." H.R. Rep. No. 96-716 at 26. Fort Worth and its supporters focus on the report's statement that the statute preserved Dallas' proprietary powers and ignore the statement that Dallas remained subject to the statutory preemption provision. The report clearly states that Dallas must comply with the statutory preemption provision. And, as shown, Dallas' proprietary rights did not allow it to regulate service at Love Field. Fort Worth's position would have permitted Dallas to override the Wright Amendment by declaring that any airport proprietor has the right to ignore a Congressional enactment.

Fort Worth additionally cites a 1980 House committee report that stated that the committee believed that an airport could deny access to an airline (or deny additional facilities to an incumbent airline) when another airport in the metropolitan area was capable of providing adequate facilities for the airlines. Fort Worth Comments at 25, citing H.R. Rep. No. 96-887, 96th Cong., 2d Sess. (1980), part 2 at 15-16. The committee's statement is contrary to judicial and agency decisions on the scope of an airport owner's proprietary rights. The committee, moreover, was stating its view of the existing law, not the purpose of new legislation. As such, its statement is not persuasive authority. See, e.g., Ohio Public Employees Retirement System v. Betts, 492 U.S. 158, 167-168 (1989).

The Department's conclusion that Dallas may not regulate Love Field service as demanded by Fort Worth in no way means that airport owners may not use their proprietary powers for legitimate purposes. However, as to airport restrictions that would otherwise violate the statutory preemption provision, the courts have stated that "airport proprietors have an 'extremely limited role' in the system of aviation regulation." Western Air Lines v. Port Authority of New York and

New Jersey, 658 F. Supp. 952, 955 (S.D.N.Y. 1986), aff'd, 817 F.2d 222 (2nd Cir. 1987), quoting British Airways Board, supra, 564 F.2d at 1010.

The Fort Worth parties have made no effort to show that barring airlines from operating the services authorized by the Shelby Amendment is now necessary to carry out a permissible goal for an airport proprietor. To the extent that they argue that the restrictions are reasonable, they base their claims on the validity of the cities' original agreement, made thirty years ago. They also construe the Fifth Circuit's decision in City of Houston as authorizing Dallas to impose additional restrictions on Love Field service beyond those imposed by federal statute to ensure DFW's role as the area's principal airport, even though the Shelby Amendment has only modestly expanded the types of service already allowed by the Wright Amendment. Neither theory is persuasive, as discussed next.

DFW's Viability

Dallas' proprietary rights arguably would it allow to restrict service if necessary to protect the viability of DFW. However, the Wright and Shelby Amendments currently impose significant restrictions on the airlines' use of Love Field. The Fort Worth parties have cited no evidence showing that the additional Love Field services authorized by the Shelby Amendment would in any way threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport.¹⁶ The Dallas parties, on the other hand, have presented evidence and reasoning demonstrating that no significant harm to DFW is likely.¹⁷

¹⁶ The Department is addressing the proprietary rights issue in terms of the Love Field dispute, which is how the parties presented their arguments. American wrongly asserts that the Department framed this issue as an abstract issue without reference to the particular facts of Love Field. American Comments at 3-5, 12. The Department stated that it intended to consider the federal law issues in an effort to help resolve the Love Field dispute. Order 98-8-29 at 4-5. It did not intend to establish a national policy applicable to all airport situations rather than just Love Field. The parties' comments, including American's comments, demonstrate the parties' expectation that the Department would decide whether Dallas' proprietary rights allowed it to restrict Love Field service as demanded by Fort Worth. Their comments present in detail their factual and legal arguments on this issue. See, e.g., American Comments at 12-30. In addition, the airport trade associations and Delta urge the Department to limit its ruling on the first issue to the specific facts of Love Field. ACI/AAAE Comments at 6-7; Delta Reply at 1-2.

¹⁷ Although some parties have suggested that allowing additional Love Field service could undermine the rights of DFW's bondholders, no party has argued that additional Love Field service would actually injure the bondholders' interests. No representative of the bondholders has filed comments in this proceeding.

First, DFW has been very successful, and its success is a tribute to the cities' willingness to work together to create that airport. The Wright and Shelby Amendments, moreover, continue to impose substantial restrictions on Love Field service. An airline operating large aircraft may not operate nonstop or stopping flights from Love Field to any point outside the eight-state Love Field service area and may not offer through service or interline service from Love Field to any such point. While airlines may provide longhaul service with aircraft with a passenger capacity of 56 passengers or less, using aircraft with a small number of seats for longhaul markets is usually less efficient. Legend Reply at 15. Indeed, Southwest for a number of years has been the only airline willing to operate service with large aircraft at Love Field subject to the restrictions imposed by the Wright Amendment.

Secondly, while Southwest has greatly increased the scale of its operations at Love Field since it began operations, that has not kept DFW from growing. DFW's passenger enplanements have risen from 11.3 million in 1979 to 60.5 million in 1997. While DFW had 60.5 million enplaned passengers in 1997, Love Field had only 3.4 million. Continental Express Reply at 2.

In 1997 Southwest operated an average of 270 daily flights at Love Field. The services proposed by Legend, Continental Express, and others will increase that number by ninety flights per day; even so, that level of service will be a small fraction of the 2,800 flights operated each day at DFW. Legend Comments at 47, 63. Even if other airlines add interstate flights, Love Field cannot overtake DFW as the area's primary airport. In addition to the statutory restrictions, Love Field has a relatively small number of available gates. Love Field Study at 51-54.¹⁸

Moreover, the court decisions on the scope of airport proprietary rights, especially the perimeter rule cases, insist that airports imposing such restrictions must demonstrate a need for the restrictions. The pleadings filed by the Dallas parties pointed out the importance of a showing of need as an essential condition

¹⁸ Other metropolitan areas have multiple airports and still have a dominant airport comparable to DFW, even though service at the secondary airports is not legally restricted. For example, O'Hare is the dominant airport at Chicago, Bush Intercontinental at Houston, Los Angeles International at Los Angeles, and San Francisco International in the San Francisco Bay Area. The secondary airports comparable to Love Field are Midway at Chicago; Hobby at Houston; Hollywood-Burbank, Ontario, and Long Beach in Los Angeles County; and Oakland and San Jose in the Bay Area.

to an affirmance of an airport perimeter rule. See, e.g., Dallas Comments at 23-26; Legend Comments at 89-90. Notwithstanding their arguments, and the courts' express reliance on such a showing, none of the parties seeking restrictions on Love Field service made any effort to show that current conditions require a prohibition against the operation of the services authorized by the Shelby Amendment.

Equity and Estoppel

Some of the parties opposing additional Love Field service contend that allowing more service at Love Field now would unfairly reverse the cities' expectations that all interstate service would be operated from DFW and injure those parties who allegedly relied on the support of the Civil Aeronautics Board and other federal agencies for the cities' original plan to replace the local airports with DFW. See, e.g., Fort Worth Comments at 4-7. They allege in particular that the two cities agreed to build DFW and close their local airports to airline service largely as a result of the Board's pressure. The DFW Board sums up its position with the phrase, "a deal is a deal." DFW Comments at 3.¹⁹

Any agreement between the cities on airport operations was always subject to federal statutory law, as recognized by the Bond Ordinance's terms. The DFW Board's estoppel argument misconstrues the two cities' original agreement to move all interstate service to DFW. The Bond Ordinance only required the two cities to end all interstate service at their local airports to the extent "legally permissible." When the U.S. district court initially held that Southwest was entitled to use Love Field, the court reasoned that the Bond Ordinance by its terms did not prohibit all airline service at Love Field. City of Dallas, supra, 371 F. Supp. at 1019, 1035.

Even without the "legally permissible" qualification in the Bond Ordinance, the cities knew that the operation of DFW and each city's local airports would be subject to regulation by Congress and executive branch agencies. The cities could reasonably expect that regulatory policies would change over the years as the airline business itself changed.

¹⁹ Fort Worth, however, has developed Alliance Airport as a major cargo airport. According to Legend, Fort Worth's development of Alliance is inconsistent with the Bond Ordinance, which requires all interstate scheduled service (both passenger and cargo) to be operated at DFW, to the extent legally permissible. Legend Comments at 42-43.

The cities, after all, adopted the Bond Ordinance thirty years ago. Since then the airline industry has been transformed. Congress deregulated the airline industry and took away the Civil Aeronautics Board's authority to determine which airline should fly which route. Now each airline can determine what routes it wants to fly and what kind of service it should offer. Southwest's success is the prime example of the benefits created by deregulation, for Southwest never would have developed into a major airline under the regulatory scheme in place in the 1960's. Moreover, airline traffic in the Dallas-Fort Worth area has quintupled. Continental Express Reply at 2.

In carrying out its authority to regulate interstate commerce, Congress can and does take into consideration changes in the airline industry. Airline services are uniquely subject to federal control. It is Congress that authorized the deregulation of airlines in the expectation that market forces would then drive airline decisions on what services to provide. Nevertheless, Congress has always had the authority to determine what airline services may or may not be operated at any airport. If Congress determines that the restrictions on Love Field should be liberalized, as it did in 1997, the Department is obligated to comply with that determination. In any event, nothing indicates that the Shelby Amendment could significantly weaken DFW's position as the Dallas-Fort Worth area's principal airport. Thus, the amendment will not frustrate the cities' original goal underlying their creation of DFW as the regional airport. Our interpretation of Congress' action accordingly cannot undermine the two cities' plan to maintain DFW as the area's principal airport.

Fort Worth's Contract and Takings Claims

Fort Worth makes a related claim, that a decision allowing the services authorized by the Shelby Amendment would assertedly violate its Constitutional rights by taking Fort Worth's property without compensation and by impairing its rights under its agreement with Dallas. Fort Worth Comments at 21-23.

Here the Department is merely interpreting statutes that Congress has already enacted, not creating new obligations and mandates on its own. Thus the question is whether Congress has violated Fort Worth's rights. Any question about Congress' authority to determine the scope of permissible service at Love Field has been dispelled twice by the federal courts. Cramer v. Skinner, *supra*; State of Kansas v. United States, *supra*. Fort Worth never asserted that the Wright Amendment violated its Constitutional rights, even though that statute authorized much more interstate service than is authorized by the Shelby

Amendment. We think that Congress' authorization of additional Love Field service under its power to regulate interstate commerce has not injured Fort Worth's Constitutional rights.

If Fort Worth's Takings Clause argument were read as an argument that Congress' regulation of airport operations has interfered with Fort Worth's ability to gain the maximum advantage from its partial ownership of DFW, the claims would have no merit. Congress frequently imposes regulations on the use of property that may diminish its value. Unless the regulation in question causes a substantial reduction in the value of the property and interferes with the owner's legitimate investment expectations, there is no taking. See, e.g.,

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-225 (1986); Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 643-646 (1993); Andrus v. Allard, 444 U.S. 51 (1979).²⁰

Furthermore, Congress may license firms to engage in interstate transportation even if that overrides exclusive rights created by state or local law. See, e.g., Gibbons v. Ogden, 22 U.S. 1 (1824). The Constitution also does not protect a firm from new competition later authorized by a state or federal government, unless the first firm had an express guarantee that no new competition would be created. Charles River Bridge v. Warren River Bridge, 36 U.S. 420, 551-553 (1837). As a result, even if the Shelby Amendment significantly reduces DFW's future revenues, Congress' enactment of that statute could not violate Fort Worth's Constitutional rights.

In any event, Fort Worth's contention that a statutory interpretation allowing more service at Love Field will violate its contract rights has no merit. First, the Bond Ordinance itself requires the cities to move interstate service to DFW only to the extent doing so is legally permissible. In the first round of the Southwest litigation, the district court, as shown, held that the Bond Ordinance means what it says. City of Dallas, supra, 371 F. Supp. at 1019, 1035. Dallas has stated that it never agreed to violate federal law by signing the Bond Ordinance. Dallas Reply at 10. Secondly, parties may not enforce contracts that are contrary to federal law, and they may not avoid federal requirements by characterizing their conduct as contractual in nature. See, e.g., City and County of San Francisco v. FAA, 942 F.2d 1391, 1399 (9th Cir. 1991). And Congress and federal agencies may adopt policies invalidating existing contracts between private parties. See, e.g., See Republic Airlines v. United Air Lines, 796 F.2d 526 (D.C. Cir. 1986).

Dallas' Status as an Airport Owner

The two court decisions upholding a perimeter rule – City of Houston and Western Air Lines – did so on the ground that the rule was a reasonable and necessary means for an airport proprietor to allocate airline operations between two or more airports controlled by that proprietor. As discussed, if Dallas were viewed as controlling Love Field and DFW, it could not impose restrictions of the kind sought by Fort Worth without a showing that they are necessary to achieve legitimate airport goals.

²⁰ As Dallas points out, Dallas owns Love Field, and the federal statutes, insofar as they restrict the use of any property, restrict the use of Love Field. Dallas Reply at 10-11.

While the Fort Worth parties believe that Dallas is the owner of a multi-airport system, given its ownership of Love Field and its majority of ownership of DFW, Dallas contends that it is not. The Department agrees with Dallas -- Dallas may not be viewed as the operator of a multi-airport system for purposes of those decisions.

The Department recognizes that Dallas is deemed the owner of seven elevenths of DFW and chooses seven of the eleven members of the DFW Board. See, e.g., American Comments at 13. Nonetheless, Dallas does not control DFW, as demonstrated most obviously by DFW's disagreement here and in the state court proceeding with Dallas' position on the interpretation of federal law. In addition, section 9.5B of the Bond Ordinance states that the DFW Board may only grant an airline a waiver allowing it to use a different airport for interstate service with the approval of eight of the eleven Board members. Fort Worth's representatives thus have a veto over the grant of any such waivers, and Dallas does not have the ability to allocate services between Love Field and DFW.²¹

One court held that a city may be deemed the airport's proprietor only when it has kept the power to regulate airport operations. The Court held that a city that has leased the management and operation of its airport to a private firm is no longer the proprietor for purposes of determining whether the city may regulate airport operations to reduce noise. Pirollo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983). Similarly, in the Centennial Decision the FAA ruled that an airport owner may not restrict service at one airport as part of an allocation of services between airports unless the owner controls both airports: "The owner must be in a position to assure that all classes of aeronautical needs can be fully accommodated within the system of airports under the sponsor's control and without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall aviation system capacity." Centennial Decision at 24 (emphasis added).

ISSUE TWO: PREEMPTION BY THE WRIGHT AND SHELBY AMENDMENTS

²¹ While Dallas controls other airports, like Redbird, Dallas' ability to restrict service at Love Field would depend on whether it controls DFW, the airport to be benefited by those restrictions, not on whether it controls another airport unaffected by the restrictions, for purposes of this discussion.

In addition to considering whether Dallas may restrict Love Field service under its rights as the airport's proprietor under 49 U.S.C. 41713, the Department stated that it would consider whether Congress' enactment of the Wright and Shelby Amendments by themselves preempted Dallas' ability to restrict services authorized by those statutes. On this issue the Fort Worth parties essentially contend that the Wright and Shelby Amendments govern only the conduct of the federal government (that is, this Department and the Board) and grant no affirmative right to any airline to operate interstate service at Love Field. The Dallas parties, on the other hand, contend that the two statutes override the cities' agreement to limit service and prohibit Dallas from barring service permitted by the Wright and Shelby Amendments.

The Department finds that the Wright and Shelby Amendments preempt the cities' ability to regulate service at Love Field.

Whether a federal statute or rule preempts state and local government regulation depends on the intent of Congress. As the Supreme Court has explained, "Preemption may be express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" FMC Corp. v. Holliday, 498 U.S. 52, 56-57 (1990) (citations omitted).

The Wright and Shelby Amendments, unlike the Federal Aviation Act provisions now codified in Title 49 of the U.S. Code, contain no express preemption provision (as discussed below, however, the conference committee report on the Wright Amendment mentioned the issue). The lack of such a provision, however, does not end the matter, for statutes without an express preemption provision may still preempt state and local regulation.

Congressional legislation will preempt state regulation if Congress' regulation of the area is so extensive that it has occupied the field or if there is a conflict between the state regulation and the achievement of the Congressional purpose. See, e.g., Jones v. Rath Packing Co., 430 U.S. 519, 525-526 (1977). The cities' ability to restrict Love Field service is preempted both because Congress has occupied the field and because allowing the cities to restrict service would frustrate Congress' policies.

The Wright Amendment prescribed in detail the interstate airline services that were and were not permissible at Love Field. The Shelby Amendment modified the zone of permissible interstate service by expanding the boundary of the Love Field service area and clarifying which types of aircraft could be operated under

the commuter aircraft exemption. Having chosen to prescribe what interstate service could be operated at Love Field, Congress surely did not intend that Dallas (which in 1980 opposed all interstate service) or other local bodies could override its decision. Given the detailed regulation of Love Field service set forth in the Wright Amendment, Congress preempted state and local regulation of that area by occupying the field. The same is true for the Shelby Amendment.

An analogous case involved the Supreme Court's decision that the City of Burbank, California, was preempted from regulating noise at Lockheed Air Terminal (now the Hollywood-Burbank Airport). City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). The Court held that the pervasive federal regulation of aircraft noise in particular and flights in general meant that Congress had occupied the field. The Court quoted Justice Jackson's concurring opinion in Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944):

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.

Burbank therefore could not impose a curfew on flights at the airport. 411 U.S. at 633-634.

The Court's reliance in the Burbank case on the pervasive federal regulation of aircraft operations supports our decision here that Congress has occupied the field, which similarly involves flight operations at an airport. In contrast to areas historically subject to state regulation, interstate airline operations have always been intensively and virtually exclusively regulated by the federal government.

In addition, any prohibition by Dallas of operations authorized by the Shelby Amendment would frustrate the Congressional purpose of allowing specified types of interstate service at Love Field. When Congress enacted the Wright Amendment, after all, it knew that Dallas and Fort Worth opposed any interstate service at Love Field. If, as contended by the Fort Worth parties, the Wright Amendment was intended only to limit what the Department and the Board could do and to impose no limit on the cities' ability to carry out the Bond Ordinance, there would have been no point in enacting the statute. Dallas would have used its alleged authority to end all interstate service at Love Field, regardless of what Congress legislated.

The conference committee report makes it clear that Congress intended by enacting the Wright Amendment to affirmatively authorize certain types of interstate service. The report stated that the amendment "provides a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years" and that the settlement "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 96-716 at 24. This statement clearly indicates that Congress was imposing a compromise, which was accepted by all of the parties despite their conflicting interests. Congress' purpose of establishing a compromise would have been frustrated if, as Fort Worth and its supporters argue, Dallas was to be allowed to restrict interstate service unilaterally beyond the limits of the Wright Amendment.

The conference committee report further stated that the Board "will act expeditiously" on any application for authority to operate the services authorized by the Wright Amendment. H.R. Rep. No. 96-716 at 25. That statement, too, shows that Congress had affirmatively determined that airlines should be able to operate the interstate services authorized by the statute, notwithstanding the cities' known opposition to any interstate service. The claim that Congress intended to limit only the Board's authority, not the cities' powers, is illogical – that interpretation would allow the cities to ban the very service that Congress told the Board to authorize.

Thus, even if other airports could use their proprietary powers to restrict service at one airport to protect the competitive position of a second airport, Congress has determined as to Love Field that Dallas' ability to restrict service has been preempted to the extent of the services authorized by the Wright and Shelby Amendments.

The Department recognizes, as the Fort Worth parties point out, that the Wright and Shelby Amendments largely take the form of restrictions on the Department's power (originally the Board's power) to grant certificate authority to airlines to serve Love Field. The Wright Amendment's focus on restricting the powers of the Board (and the Department) makes sense, since Congress had no need to enact provisions blocking the cities from restricting Love Field service. The Board had already held that the cities had no power to veto its grant of authority to an airline to operate a Love Field route. Southwest Airlines Automatic Market Entry, 83 CAB 644 (1979). That Board decision caused Congress to enact the legislation limiting the Board's powers to award route

authority, but Congress took no action to overturn the Board's decision that Dallas could not veto such awards.

As a result, the Wright Amendment (and necessarily the Shelby Amendment) must be read as a Congressional authorization for the operation of the specified types of interstate service at Love Field. Thus any restrictions imposed by Dallas that would frustrate that policy are necessarily preempted. Cf. Fidelity Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982); Jones v. Rath Packing Co., supra, 430 U.S. at 541-543.²²

The Department finds unpersuasive the suggestions by Fort Worth and American that the Wright Amendment only ratified an existing agreement by the cities to allow some interstate service and that the restrictions on interstate service at Love Field resulted from Dallas' exercise of its proprietary rights, not from Congress' exercise of its authority to regulate interstate commerce. Fort Worth Comments at 9; American Comments at 37. Airlines have complied with the Wright Amendment's restrictions because Congress imposed them. The cities, moreover, never amended the Bond Ordinance to reflect their alleged agreement with the Wright Amendment's terms. Legend Comments at 42; Dallas Reply at 12. Their failure to formally incorporate the Wright Amendment limits further demonstrates that they viewed the Wright Amendment as a Congressional determination that was binding on all parties, even though the cities' own agreement -- the Bond Ordinance -- has always barred services authorized by the Wright Amendment (except as qualified by the phrase "legally permissible").²³

The Fort Worth parties cite the conference committee report on the Wright Amendment in support of their claim that there is no preemption. See, e.g., Fort

²² We recognize that we are implying preemption here, despite the lack of an express preemption provision, while our interpretation below of the commuter aircraft exemption is based entirely on the statutory language and our earlier interpretation of the statute. On most questions of interpretation the courts rely on the statutory language. On preemption questions, in contrast, the courts often imply preemption when there is no express preemption provision. The courts are, of course, reluctant to do so as to areas traditionally regulated by the states. The question here involves the regulation of interstate commerce, where the states have always had a smaller and subordinate role.

²³ Even if the Wright Amendment had codified an agreement by the cities, the parties' rights and obligations would be fixed by the statute, not by the agreement. Cf. Vollmar v. CSX Transportation, Inc., 898 F.2d 413, 417 (6th Cir. 1990).

Worth Comments at 33. That report, as noted above, stated that the statute would not affect the cities' proprietary rights nor their obligation to comply with the preexisting preemption provision. H.R. Rep. No. 96-716 at 26. But the overall purpose of the statute was, as shown, to allow airlines to operate limited types of service at Love Field, a purpose that would be frustrated if the cities were deemed able to restrict Love Field service. In these circumstances, the report's statement is consistent with the Department's finding that the Wright Amendment was intended to preempt local restrictions on airline service.

Finally, as Dallas points out, the Senate's version of the Shelby Amendment expressly gave Dallas the right to veto service by reconfigured large aircraft; the conference committee removed that provision. Dallas Comments at 31. This suggests that Congress did not want to give Dallas any ability to block the additional service authorized by the amendment and that Congress believed that Dallas could not block the service unless Congress expressly gave it that authority.

ISSUE THREE: LONGHAUL SERVICE UNDER THE COMMUTER AIRCRAFT EXEMPTION

Legend and Continental Express plan to operate longhaul service from Love Field with jet aircraft, Continental Express with regional jets designed to hold no more than 56 passengers and Legend with large aircraft reconfigured to hold no more than 56 passengers. Both airlines thus seek to operate under the Wright Amendment's commuter aircraft exemption (an exemption modified by the Shelby Amendment), which allows service operated with aircraft having a passenger capacity of no more than 56 passengers.

The Department stated that it intended to address the airlines' ability to operate under the Wright and Shelby Amendments since some parties have argued that the statutes do not allow longhaul service to be operated with aircraft with a passenger capacity of 56 passengers or less. Those parties contend that Congress intended to allow only short-haul service at Love Field, even if an airline used aircraft with a passenger capacity of 56 passengers or less, and that an airline may not operate jet aircraft under the exemption for aircraft with a passenger capacity of 56 passengers or less. Fort Worth Comments at 41-42; DFW Board Comments at 37-38, 41.

After considering the arguments on this issue, the Department concludes that the Wright and Shelby Amendments authorize longhaul service with any aircraft with a capacity of no more than 56 passengers. The literal terms of both

amendments and the history and obvious purpose of the Shelby Amendment show that the statutes allow such service.

As explained above, subsection (c) of the Wright Amendment allowed an airline to provide nonstop or through scheduled passenger service with large aircraft from Love Field only to points within Texas and one of the states bordering on Texas. However, subsection (a) of the Love Field amendment exempted "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less" from the amendment's restrictions on interstate airline service. Unlike subsection (c), subsection (a) imposes no geographical limit on the services operated with the smaller aircraft. Subsection (a) of the Wright Amendment also contained no equipment type restriction, except for the seating capacity limitation.

The Department's 1985 order interpreting the Wright Amendment included a ruling on which airlines could use the commuter aircraft exemption. The Department ruled then, despite the "commuter airline" phrase in the Wright Amendment, that any airline, not just "commuter" airlines, could offer service under the commuter aircraft exemption with aircraft that satisfied the 56-seat limit. Order 85-12-81 at 13. It stated, "Since Congress specified the size of the commuter aircraft, and since such aircraft has a limited range consistent with other restrictions of the Amendment, we believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative." Order 85-12-81 at 13 (footnote omitted). The Court of Appeals affirmed this interpretation. Continental Air Lines v. Department of Transportation, 843 F.2d at 1454-1455.

The opinions given Centennial Express and Dalfort by, respectively, the Department's Deputy General Counsel and General Counsel suggested that the commuter aircraft exemption allowed operations with any aircraft designed to hold no more than 56 seats. Neither opinion indicated that the exemption allowed flights only with limited types of aircraft, although neither expressly held that regional jets were entitled to operate under the exemption. The opinions additionally suggested that there was no limit on the length of flights operated under the exemption. The Deputy General Counsel's letter to Centennial Express, for example, stated the airline could operate flights to Denver under the commuter aircraft exemption with aircraft meeting the 56-seat standard.

The General Counsel's opinion on Dalfort's proposal led Congress to clarify the law. The Shelby Amendment expressly makes the commuter aircraft exemption available to airlines using large aircraft (except widebody aircraft) reconfigured

to have a passenger capacity of 56 passengers or less. Congress, on the other hand, did not overturn the Department's 1985 interpretation that, notwithstanding the "commuter airline" phrase, any airline could use the exemption if it operated aircraft with a passenger capacity of 56 passengers or less.

As modified by the Shelby Amendment, the statute places no geographical limit on the length of service operated under the commuter aircraft exemption and prohibits only the use of aircraft with a gross weight of more than 300,000 pounds. Congress thereby has allowed any airline, including Legend and Continental Express, to operate longhaul service at Love Field with any aircraft, except widebody aircraft, that have a passenger capacity of 56 passengers or less.²⁴

The Fort Worth parties nonetheless contend that only short-haul service may be operated under the exemption and that only commuter airline flights using non-jet aircraft are qualified to operate under the exemption. The Department cannot agree with these contentions.

Congress initially created the commuter aircraft exemption for short-haul service, but the exemption never included a restriction on equipment type and, unlike subsection (c), never limited the length of service operated under the exemption. The Department cannot rewrite the exemption to add restrictions like that when Congress never chose to do so.

When Congress enacted the Wright Amendment, only turboprop aircraft had a passenger capacity of 56 passengers or less. Since they were relatively unattractive for travellers on long distance flights, airlines could market turboprop service only on short-haul routes. See 43 Fed. Reg. 39587, 39589-35890 (September 6, 1978). In recent years, aircraft manufacturers have developed regional jets, which typically have no more than 56 seats and offer attractive service on long flights. Even if this technological change has undermined Congress' expectation as to the impact of the Wright Amendment's commuter

²⁴ Rather than base this decision on the stipulation filed by the Government in dismissing Dalfort's petition for review in Astraea (exhibit 12 to Dallas' comments is a copy of the stipulation), the Department will show that the language of the Wright and Shelby Amendments and Congress' intent in enacting the Shelby Amendment clearly allow any airline to operate longhaul service with aircraft with a passenger capacity of 56 passengers or less of any equipment type (except widebody aircraft). The stipulation correctly stated that any airline could operate longhaul service under the commuter aircraft exemption as long as it used a type of aircraft allowed by the Shelby Amendment.

aircraft exemption, the Department could not rewrite the statute by including equipment type restrictions that Congress never included. That is shown by an analogous case involving a federal banking statute, Independent Insurance Agents v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993). As the Court stated there, “We decline appellants’ invitation to recast the statute to fit contemporary circumstances; when time and technology open up a loophole, it is up to Congress to decide whether it should be plugged, and how.” 997 F.2d at 961.

The Department also has no basis for reinterpreting the phrase “commuter airline” to make it a limiting condition on the exemption’s use. Thirteen years ago we held that any airline could use the exemption with aircraft with a passenger capacity of 56 passengers or less, and the Court affirmed that interpretation. The Shelby Amendment did not amend the statute to overturn that interpretation. Since Congress is presumed to know how a statute has been interpreted by the agency responsible for administering it when Congress amends the statute, Congress’ failure to overturn that interpretation constitutes a ratification of the interpretation. See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-275 (1973); Action on Smoking and Health v. CAB, 699 F.2d 1209, 1215 (D.C. Cir. 1983). See also Hilton v. South Carolina Public Railways Comm’n, 502 U.S. 197, 201-202 (1991), emphasizing the importance of following stare decisis in statutory interpretation cases.

Even a reinterpretation of the statute limiting the exemption’s use to commuter airlines would probably not block regional jet flights at Love Field. As Legend points out, commuter airlines like American Eagle are replacing their turboprop aircraft with regional jets. Legend Reply at 23.

More importantly, even if the Wright Amendment were unclear on these issues, the enactment of the Shelby Amendment shows that Congress no longer intends to limit the commuter aircraft exemption to short-haul service. By expressly allowing any aircraft (except aircraft with a gross aircraft weight of more than 300,000 pounds) to qualify for the exemption, subject only to the maximum 56-passenger capacity limitation, Congress no longer wishes to limit the exemption to short-haul service. After all, the 300,000 pound limitation covers jet aircraft such as B-727’s, B-737’s, B-757’s, some B-767’s, and DC-9’s that have operating ranges of at least two thousand miles. Congress surely did not view such aircraft as likely to be used only for short-haul service.

While the Shelby Amendment did not specifically address the use of regional jets, Congress’ decision to make flights operated with reconfigured large aircraft eligible for the commuter aircraft exemption, and the lack of any equipment type

language in the statute, compel the conclusion that regional jets meeting the 56-passenger capacity standard may also be used under that exemption.

ISSUE FOUR: ENFORCEABILITY OF DFW USE AGREEMENT RESTRICTIONS BARRING LOVE FIELD SERVICE

The DFW Board contends that its use agreements with airlines such as American and Continental bar those airlines from using any other airport in the metropolitan area for interstate service without the DFW Board's approval (an airline that signs a use agreement is called a signatory airline). The DFW Board additionally claims that it is entitled to enforce those agreements, even assuming that the airport may not unilaterally bar airlines from using competing airports, since the airlines waived their rights to use alternative airports. If the DFW Board's position is valid, only airlines that do not serve DFW, such as Southwest and Legend, and non-signatory airlines, airlines that serve DFW without signing a use agreement, would be able to operate interstate service at Love Field.²⁵

The parties take somewhat different positions on this issue than they do on whether Dallas may restrict service at Love Field. Fort Worth and Dallas support the DFW Board's position. Southwest briefly states its agreement with the DFW Board's position that airlines may contractually waive their rights to use Love Field. While American reaffirms its belief that the cities and the DFW Board may restrict service at Love Field and that the DFW use agreements are valid, it contends that, if we find that the cities and the DFW Board may not restrict service at Love Field, American has the right to operate interstate service at Love Field, even though American is a signatory airline. Legend takes no position on the issue. Continental Express argues that the use agreement is unenforceable because it violates the preemption provision (whether Continental's use agreement restricts Continental Express is a separate issue that we are not addressing here).

On the ground that Continental's use agreement prohibited that airline and affiliated airlines from operating interstate service at other airports in the metropolitan area, the state court's ruling on the summary judgment motions

²⁵ While these agreements have been in effect since DFW opened, no one has challenged the clause barring the use of alternative airports for interstate service, since no signatory airline tried to operate such service until this year (assuming that Continental Express is deemed a signatory airline). While Continental had planned to begin Love Field-Houston service in 1985, that service was intrastate service.

held that neither Continental nor Continental Express could operate interstate flights at Love Field; this ruling is consistent with the court's temporary injunction barring Continental Express's proposed flights from Love Field to Cleveland.

The Department stated that it would consider whether a DFW use agreement would block an airline from exercising its certificate authority to operate flights from Love Field that are consistent with the Wright and Shelby Amendments. Whether the DFW Board can enforce the use agreements barring signatory airlines from operating interstate service at other airports depends on two federal law questions: whether the DFW Board may bar an airline from using a competing airport, and, if not, whether an airline may nonetheless waive its right to use other airports. The Department has determined to rule on these issues in the context of the Love Field dispute.

As an initial matter, the Department does not agree with the DFW Board's argument that the validity of the use agreement clause is a state contract law question. DFW Board Comments at 42. The clause's validity is necessarily a federal law question as well, because federal statutes, such as the preemption provision, bar airports from imposing some types of restrictions on airlines using an airport. A use agreement that violates federal law is invalid, assuming that an airline may waive its federal right to serve any airport.

As a matter of contract law, the use agreement by its terms does not prohibit signatory airlines from using other airports in the Dallas-Fort Worth area. The agreement does not expressly prohibit the airline party from operating interstate service at any other airport in the area. The agreement instead requires airlines to comply with the Bond Ordinance. Section 3.2 of the agreement states, "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth area to, from, and at the Airport, to the extent required by the terms of 1968 Regional Airport Concurrent Bond Ordinance" (DFW Board exhibit 23 is a copy of the relevant part of the use agreement). As discussed above, the Bond Ordinance required airlines to move their services to DFW only to the extent "legally permissible." Since Fort Worth and Dallas do not have the power to prohibit interstate service at Love Field, the cities' Bond Ordinance cannot stop airlines from using Love Field for interstate service.

If the Bond Ordinance or a DFW use agreement does prohibit a signatory airline's use of a competing airport, the prohibition would be invalid. The DFW Board may not restrict an airline from using a competing airport. The preemption provision, 49 U.S.C. 41713, prohibits state and local governments,

including airports operated by state and local governments, from regulating airline rates, routes, and services, except when the state or local government is exercising its legitimate powers as an airport proprietor. As discussed above, Dallas' proprietary powers do not allow it to restrict service at Love Field for DFW's benefit. For the same reasons, the DFW Board may not prohibit or limit an airline's use of a competing airport.²⁶ Since the cities may not impose regulations prohibiting interstate service at Love Field, the DFW Board may not impose such restrictions by contract. See, e.g., South-Central Development, Inc. v. Wunnicke, 467 U.S. 82, 97 (1984).

The DFW Board, supported by Fort Worth and Dallas, contends nonetheless that the DFW Board may enforce the restriction against the use of a competing airport because the signatory airlines have agreed to the restriction and waived any rights they had to use other airports. We cannot agree with that claim. We think that an airline may not make an enforceable waiver of its rights to serve whichever airport it wishes to serve in the Dallas-Fort Worth area.²⁷

The parties claiming that an airline may waive its right to serve a competing airport have unduly minimized the effect of such a waiver. The DFW Board, after all, essentially seeks to regulate airline service in the area by limiting the markets that airlines may serve. The DFW Board's goal is directly contrary to the policies established by Congress in enacting the Airline Deregulation Act of 1978. Congress did not eliminate the Board's authority to regulate airline routes in order to benefit individual airlines. Congress took that action in order to benefit the public – Congress determined that travellers would obtain the best mix of fares and service if airlines were free to respond to market demands. To give airlines the ability to respond to market forces, Congress ended the Board's authority to determine which airline should serve which route. The DFW Board's use agreement would recreate for that body the ability once held by the

²⁶ In addition, the use agreement appears to be unlawful because it discriminates against interstate commerce by prohibiting an airline from operating any interstate flights from another area airport while placing no limits on intrastate flights.

²⁷ The Department is ruling on the waiver issue in the context of the Love Field dispute and with respect to a contract clause that strikes at the heart of airline deregulation by giving the DFW Board the power to determine what routes may be operated by airlines serving the metropolitan area. The Department recognizes, as the airport trade associations point out, that airlines and other airport users often waive various rights and that waivers unlike the waiver at issue here may be necessary for an airport's efficient operation. Cf. 61 Fed. Reg. 31994, 31998 (June 21, 1996) (policy statement governing airport rates and charges). The ruling on the use agreement clause at issue here is not intended to place in doubt the validity of waivers obtained by airports for legitimate reasons.

Board to limit entry and exit in airline markets. In short, the DFW Board's use agreement would, for airlines in the Dallas-Fort Worth area markets, undo the principal feature of Congress' deregulation of the airline industry. The use agreement's bar against the use of a competing airport thus clearly violates public policy (and, as explained, the statutory preemption provision).

As a result, any airline's waiver of its right to determine which airport to serve would be unenforceable. As the Supreme Court has explained, Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704-705 (1945) (citations omitted),

[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.

See also Restatement, Second, Contracts, section 178.

Indeed, so strong in analogous areas is the policy of eliminating anticompetitive practices that a party to a contract that violates the antitrust laws may ordinarily sue the other party for treble damages for the injury caused the plaintiff by the unlawful provisions. See, e.g., Simpson v. Union Oil Co., 377 U.S. 13 (1964); Perma Life Mufflers v. International Parts, 392 U.S. 134 (1968). Under general contract law principles, moreover, a contract that acts as a restraint of trade may not be enforced against a party to the contract. Restatement, Second, Contracts, section 186.²⁸

In addition, the Department does not see how the public would benefit from allowing the DFW Board to enforce the use agreement clause. If the DFW Board could restrict the use by signatory airlines of other airports, it would frustrate Congress' policies of free entry and exit in airline markets and deny the public the benefit of additional competition and additional airline service options. The DFW Board has not shown that the clause is needed to obtain legitimate airport

²⁸ Similarly, when we readopted our rules on computer reservations systems ("CRSs") in 1992, we declined to give large travel agencies a waiver from the rules on travel agency CRS contracts, because the restrictions on contracts were primarily intended to promote competition in the CRS business, not to protect travel agencies. 57 Fed. Reg. 43780, 43828 (September 22, 1992).

goals. As shown, the DFW Board has no authority to restrict airline service at other airports in order to maximize DFW's revenues.

The DFW Board points out that airlines can gain access to DFW facilities without signing a use agreement and that a number of non-signatory airlines are serving the airport. However, signatory airlines pay lower fees for the use of DFW facilities. DFW Board Reply at 27. The DFW Board has not shown that the reduced fees charged signatory airlines require an airline commitment to use only DFW for interstate flights. The DFW Board has not shown a justification for the restriction, and airlines may not surrender their right under federal law to use other airports in the metropolitan area.

The parties supporting the enforceability of the DFW use agreements mistakenly rely upon language in American Airlines v. Wolens, 513 U.S. 219 (1995), in arguing that the agreements may be enforced by the DFW Board. Wolens held that the states were not preempted by 49 U.S.C. 41713(b) from enforcing contract obligations voluntarily accepted by a private party. The Court stated, 513 U.S. at 824:

We do not read [49 U.S.C. 41713(b)], however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. . . . The [Airline Deregulation Act] . . . was designed to promote 'maximum reliance on competitive market forces.' Market efficiency requires effective means to enforce private agreements. . . . As stated by the United States: 'The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.'

These statements cannot support a conclusion that the DFW Board can enforce a contract barring an airline from using a competing airport. First, the DFW Board is not a private party – it is a local government agency that seeks to enforce requirements allegedly created by the Bond Ordinance. The Bond Ordinance in turn is not a private contract – it is an agreement between two cities, Dallas and Fort Worth. Secondly, the reliance on the statements in Wolens is ironic. The Court held that the state courts should be able to enforce private contracts because doing so was essential to achieve Congress' goal of "maximum reliance on competitive market forces." The parties relying on this language here wish to frustrate competitive market forces by enforcing an agreement which assertedly denies airlines any ability to use an airport competing with DFW, whether or not there is a market for service at that airport.

The quoted statement in Wolens in any event is essentially irrelevant. That decision involved a different issue – whether a state court could apply its general contract law principles in enforcing a contract that did not violate federal law or policy. The case did not involve a party’s ability to enforce a contract clause that did violate federal law or policy.

ISSUE FIVE: RESTRICTIONS ON THROUGH SERVICE FROM LOVE FIELD

At the request of the DFW Board, the Department agreed to consider an issue generated by Continental Express’ flights with aircraft with a passenger capacity of 56 passengers or less between Love Field and Houston, a Continental hub. As noted above, subsection (c) of the Wright Amendment prohibits airlines from offering through service between Love Field and points outside the Love Field service area. After beginning its Love Field-Houston flights, Continental Express has been advertising through service between Love Field and points outside the Love Field service area that are served by Continental from its Houston hub (a copy of such an advertisement is at American Comments at 75).²⁹

The Department therefore stated that it would rule on whether an airline may offer through service from Love Field to points outside the Love Field service area, when the through service would involve the use of a flight with aircraft with a passenger capacity of 56 passengers or less from Love Field to another point in Texas from which the traveller would fly to his or her destination outside the Love Field service area.

The Department begins this analysis with the predicate that an airline may provide through service to points outside the Love Field service area on Love Field flights operated with aircraft with a passenger capacity of 56 passengers or less. As discussed above, the commuter aircraft exemption is created by

²⁹ Without the ability to offer through service, Continental Express and Continental could carry a passenger from Love Field to, for example, Lima, Peru, only by selling the passenger a separate ticket for each leg of the journey (that is, Love Field-Houston and Houston-Lima) and requiring the passenger to pick up any checked luggage in Houston and rechecking it for the Lima flight. In addition, Continental Express and Continental could not volunteer information about the availability of the Love Field-Lima service -- the traveller could only obtain information by first asking the airline whether such service was available. See Order 85-12-81 at 10-11.

subsection (a) of the Wright Amendment. That subsection, unlike subsection (c), the subsection governing flights with large aircraft, contains no prohibition against through service. Thus an airline operating under the commuter aircraft exemption may offer through service to points beyond the endpoint of the Love Field flight, since the statute by its terms does not prohibit it from doing so. Congress' decision to expressly prohibit through service in subsection (c) but not subsection (a) means that through service is allowed under the commuter aircraft exemption.³⁰

Continental Express' Houston flights, however, present a more difficult issue for which the Wright Amendment provides no clear answer. Subsection (a) of the Wright Amendment is limited to interstate flights. Thus the statute could be read to say that any intrastate flights, like the Love Field-Houston flights, would be covered by subsection (c) and hence would be subject to the prohibition against through service. In that case, Continental Express' offering of through service to points beyond Houston that are outside the Love Field service area would be unlawful.

Such a reading of the statute would be less reasonable than an interpretation allowing through service on flights within Texas. Congress enacted the Wright Amendment because of the controversy created by the Board's 1979 grant of Southwest's application for authority to operate an interstate route. Southwest was already operating a significant amount of intrastate service from Love Field. Congress intended to resolve the dispute over Love Field service by defining the categories of interstate service that could and could not be operated. Subsections (a) and (b) of the Wright Amendment thus prohibit all interstate service except services operated with commuter aircraft and a limited number of charter flights, which are exempt under subsection (a), and interstate services being operated on November 1, 1979, which are exempt under subsection (b). Subsection (c) creates another exception – the exception for flights operated with large aircraft between Love Field and points in Texas and the states bordering on Texas – but does not prohibit any kind of service. As a result, the only express prohibitions are those in subsections (a) and (b), which are limited to interstate service. The Wright Amendment accordingly does not restrict intrastate flights.

³⁰ Some parties opposing Continental Express' position on this issue claim that it was resolved by our earlier interpretation of the Wright Amendment, which stated that an airline could not offer through service on Love Field flights, Order 85-12-81 at 10-13. That language, however, clearly referred to Love Field flights operated with large aircraft subject to the restrictions of subsection (c).

Subsection (c) could be read as assuming that an airline that operated intrastate flights from Love Field could not offer through service to points outside the Love Field service area from the endpoint of the Love Field flight, whether the flight ended at another Texas city or at a city within one of the four states bordering on Texas. In our view, the prohibition against through service in that subparagraph forms one of the conditions under which Congress was willing to allow some interstate service with large aircraft at Love Field. Congress authorized such interstate service on the condition, among others, that the airline did not offer through service to points beyond the Love Field service area.

There is no reason, moreover, why Congress would have intended to prohibit through service on flights operated with aircraft with a passenger capacity of 56 passengers or less to points within Texas but not on flights operated with such aircraft to points outside Texas. Furthermore, the Shelby Amendment demonstrates that Congress is less interested in limiting Love Field to short-haul service, when the Love Field flight is operated with aircraft with a passenger capacity of 56 passengers or less. As shown above, the Shelby Amendment allows large aircraft to be used under the commuter aircraft exemption, if reconfigured to have a passenger capacity of 56 passengers or less. Congress' willingness to allow large aircraft to operate longhaul service under the commuter aircraft exemption suggests that a reading of the statute allowing through service over a connecting point in Texas would be consistent with Congress' intent.

Although Southwest claims that an interpretation allowing airlines operating Love Field flights with aircraft with a passenger capacity of 56 passengers or less to offer through service will discriminate against it, since it operates only large aircraft, that result stems from Southwest's operational decisions. Southwest has chosen to use only one type of aircraft, which is configured to hold more than 56 seats. Our interpretation will allow Southwest to offer through service from Love Field if it chooses to use smaller aircraft. Thus any discrimination stems from Southwest's own decisions, not from our interpretation of what Congress enacted. Cf. Order 85-12-81 at 10.

ACCORDINGLY:

1. The Department holds that (i) the City of Fort Worth may not enforce any commitment by the City of Dallas under the Bond Ordinance or other agreement to limit operations at Love Field authorized by federal law, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law; (ii) the ability of the City of Dallas to limit the type of

airline service operated at Love Field is preempted by the Wright and Shelby Amendments; (iii) any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds may operate service with any type of equipment and flights of any length from or to Love Field, notwithstanding any claim that such service violates any agreement between the Cities of Dallas and Fort Worth; (iv) the Dallas-Fort Worth International Airport Board may not enforce any contract provision that allegedly bars an airline from operating interstate airline service at another airport in the Dallas-Fort Worth metropolitan area; and (v) any airline may offer through service between Love Field and any other point to passengers using a flight between Love Field and another point within Texas operated under subsection (a) of the Wright Amendment, as amended by the Shelby Amendment;

2. The Department grants the motions by the City of Fort Worth and Legend Airlines to supplement the record; and

3. The Department grants the motions for leave to file surreplies and other unauthorized documents.

By:

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(SEAL)

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