

70824

Order 2000-1-18

Served: January 20, 2000



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

Issued by the Department of Transportation
on the 20th day of January, 2000

| | | |
|---------------------------|---|--------------------------|
| _____ | : | |
| LOVE FIELD SERVICE | : | Docket OST-98-4363 - 127 |
| INTERPRETATION PROCEEDING | : | |
| _____ | : | |
| _____ | : | |
| APPLICATION OF | : | |
| OZARK AIR LINES, INC. | : | Docket OST-99-5288 - 13 |
| _____ | : | |

ORDER ON MOTIONS FOR STAY

Congress has enacted legislation specifying what types of scheduled passenger service may and may not be operated from Love Field, a commercial airport owned and operated by the City of Dallas. Congress has also prohibited state and local governments from regulating interstate airline routes, rates, and services, except insofar as they are exercising their proprietary rights as airport owners. In the Love Field Service Interpretation Proceeding ("the Interpretation Proceeding") we issued orders interpreting these statutory provisions. Orders 98-12-27 (December 22, 1998) and 99-4-13 (April 13, 1999). We held, among other things, that an airline could operate service from Love Field to any point in the United States as long as it used aircraft with no more than 56 seats and a gross aircraft weight of no more than 300,000 pounds. Order 98-12-27 at 47-50. We thus held that the statutes will allow one of the parties in our proceeding, Legend Airlines, a start-up airline, to carry out its plan to offer longhaul service from Love Field with large jet aircraft reconfigured to hold no more than 56 seats.

Ozark Air Lines later applied for certificate authority under 49 U.S.C. 41102 so that it could provide service between the Dallas-Fort Worth area and Columbia, Missouri. When we granted Ozark's application, we ruled that Ozark was entitled to use Love Field for its flights to Columbia if it used aircraft that met the

maximum seat and weight limits set by federal statute. Order 99-8-27 (August 31, 1999) at 2-3. All other airlines certificated by us may operate longhaul service at Love Field subject to these restrictions. Order 98-7-6 (July 8, 1998).

American Airlines, the City of Fort Worth, and other parties have sought judicial review of our decision in the Interpretation Proceeding, American Airlines et al. v. Department of Transportation, 5th Cir. No. 99-60008 (argued September 8, 1999). Fort Worth is seeking review of our Ozark order insofar as it states that Ozark is entitled to fly from Love Field to Missouri. City of Fort Worth v. Department of Transportation, 5th Cir. No. 99-60730 (filed October 26, 1999).

Dallas has refused to give Ozark access to Love Field facilities on terms allowing Ozark to operate flights between Love Field and Columbia, Missouri. Ozark therefore filed a complaint with the Federal Aviation Administration ("FAA") that asked the FAA to compel Dallas to allow Ozark to operate its proposed service. Ozark Airlines v. City of Dallas, Texas, FAA Docket 16-99-17 (docketed November 8, 1999). Ozark cited our decision in the Interpretation Proceeding in arguing that federal law, including the contract grant assurances, forbids Dallas from blocking Ozark's flights.

Ozark's efforts to enforce its statutory rights in its FAA proceeding have caused American and Fort Worth to ask us to stay our decisions in the Interpretation Proceeding and in the Ozark certification proceeding pending judicial review.

We have determined to deny their stay requests. American and Fort Worth have failed to satisfy the standards required to obtain a stay of an agency decision, as explained below. In particular, American and Fort Worth have made no showing that the enforcement of our orders would injure them. In addition, granting a stay would deny the public the benefit of increased service at Love Field and frustrate Congress' decision to authorize unrestricted service at Love Field if operated by smaller aircraft.

Background

The Statutory Provisions

The rights of Ozark, Legend, and other airlines to provide service at Love Field are created by the two federal statutes specifically governing Love Field service

and the statute prohibiting state and local governments from regulating airline routes, rates, and services, subject to the proprietary rights of airport owners.¹

When Congress enacted the Airline Deregulation Act of 1978 in order to phase out most economic regulation of the domestic airline industry, it included a preemption provision to ensure that the state and local governments would not attempt to nullify Congress' decision to deregulate by imposing their own regulations. Morales v. Trans World Airlines, 504 U.S. 374, 378 (1992). The preemption provision prohibits state and local governments from regulating an airline's routes, rates, or services and creates only a limited exception allowing airport owners to exercise their proprietary rights. 49 U.S.C. 41713(b)(1) and (3). These provisions restrict Dallas' authority to oversee airline operations at Love Field. Order 98-12-27 at 26-42.

Congress also enacted specific statutes governing the use of Love Field due to a longstanding controversy over the use of the airport for interstate scheduled passenger service. In 1968 the cities of Dallas and Fort Worth signed an agreement requiring them to move all interstate flights from Love Field and Fort Worth's own local airports to a new airport, Dallas-Fort Worth International ("DFW") when DFW opened, to the extent legally permissible. Order 98-12-27 at 3-6.

Dallas kept Love Field open after DFW's completion. Southwest used Love Field for its intrastate flights when it began operations. Southwest's right to use Love Field was assured only after several years of litigation. Order 98-12-27 at 6-7.

Southwest later wished to begin serving interstate routes from Love Field. The controversy over Southwest's plans led to the enactment of the first federal statute regulating 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"). That statute authorized airlines to operate flights between Love Field and points within Texas and the four states bordering on Texas with any type of equipment, but airlines using large aircraft could not offer nonstop, direct, or through scheduled passenger service from Love Field to points outside those five states. The Wright Amendment additionally authorized airlines to operate flights to any point from Love Field if they used aircraft designed to hold

¹ Our final order in the Interpretation Proceeding set forth in detail the background of the longstanding dispute over Love Field service and the origins of the federal statutes governing Love Field service. Order 98-12-27 at 3-14.

no more than 56 seats (we will refer to this provision as the "commuter aircraft exemption").

By allowing Southwest and other airlines to operate some interstate service from Love Field, Congress overrode the cities' alleged agreement to bar all interstate service at Love Field. Order 98-12-27 at 9, 44-45. Nonetheless, no one then argued that Dallas could block an airline from operating the services authorized by the Wright Amendment, and Southwest has since greatly expanded its interstate operations from Love Field. Order 98-12-27 at 9-10, 46.

Congress recently amended the Wright Amendment to authorize additional Love Field service. 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"). The Shelby Amendment expanded the area within which nonstop, direct, and through service operated with large aircraft could be offered from Love Field by adding Kansas, Mississippi, and Alabama to the five-state area created by the Wright Amendment. The amendment also clarified the commuter aircraft exemption by allowing the use of any aircraft designed or reconfigured to hold no more than 56 seats, as long as the aircraft's maximum gross weight did not exceed 300,000 pounds.

Legend has planned to use Congress' authorization for the use of reconfigured large aircraft under the commuter aircraft exemption by operating longhaul service from Love Field with such aircraft. Congress enacted the Shelby Amendment to clarify the exemption after the Department's General Counsel had issued an opinion stating that Legend's parent corporation, Dalfort Aviation, could not use reconfigured large aircraft under the commuter aircraft exemption. Order 98-12-27 at 12.

In contrast to its position when the Wright Amendment was enacted, Fort Worth immediately opposed any implementation of the Shelby Amendment. Fort Worth has argued that its 1968 agreement with Dallas obligates Dallas to bar airlines from serving any point from Love Field outside Texas and the four states bordering on Texas. Fort Worth thus wishes to block airlines from operating any of the services authorized by the Shelby Amendment and the long-haul services permitted by the Wright Amendment's commuter aircraft exemption. Fort Worth filed a state court suit against Dallas to obtain a declaratory judgment endorsing its position. City of Fort Worth, Texas v. City of Dallas, Texas, Tarrant County District Ct. N. 48-171109-97 (filed October 10, 1997). While the lawsuit eventually included a number of parties, neither we nor Southwest have been a party in the state court case. Order 99-4-14 at 2 (April 14, 1999).

After we began the Interpretation Proceeding, the state trial court issued its decision. The court held that federal law allows airlines to serve only points in Texas and the four states bordering on Texas from Love Field and that Dallas is allowed to restrict airline routes at Love Field in order to implement its 1968 agreement with Fort Worth. The court did not issue an injunction requiring Dallas to comply with its decision. That court had earlier enjoined Continental Express from operating flights with 56-seat aircraft between Love Field and Cleveland. See Order 98-12-27 at 14-15.

Dallas and Continental Express, among others, have appealed the trial court's decision. After the case was briefed and argued, the Texas Court of Appeals issued an order staying further proceedings until the Fifth Circuit completes its review of our decision on the federal law questions. Legend Airlines et al. v. City of Fort Worth, Texas, et al., Tex. Ct. App. 02-99-00098-CV (November 2, 1999 order).

Legend wishes to begin service late next month. American and Fort Worth asked the Texas Court of Appeals to issue an order blocking Legend from operating its proposed services. The Texas appellate court issued an order denying the requests but stating that it could reexamine the issue if any party acted in a manner contrary to the trial court's declaratory judgment. The court thereafter denied Fort Worth's request for en banc review of the denial of the injunction request.

The Interpretation Proceeding

The importance of the federal law questions underlying the Love Field dispute and our responsibility for administering and enforcing the relevant federal statutes caused us to hold the Interpretation Proceeding. We began that proceeding in order to issue an interpretation of the relevant federal statutes as applicable to the dispute over Love Field service. Order 98-8-29 (August 29, 1998).

Among the issues examined by us was whether the commuter airline exemption allowed airlines to operate longhaul service from Love Field with aircraft that met the 56-seat and maximum weight limits created by the Wright and Shelby Amendments. We ruled that the literal terms of the Wright Amendment permitted such service, since they imposed no geographical or equipment-type restriction on flights operated under the commuter aircraft exemption. Order 98-12-27 at 47-48, 49-50. We concluded that the Shelby Amendment reaffirmed that

result -- it clarified the exemption to allow airlines to use any aircraft except widebody aircraft as long as the aircraft holds no more than 56 seats, even if the aircraft before being reconfigured could hold 100 or more seats. The Shelby Amendment thus permits the use of reconfigured B-727, B-737, and B-757 aircraft, whose operating ranges exceed two thousand miles. Order 98-12-27 at 50.

Dallas' rights as Love Field's proprietor do not allow it to keep airlines from operating the services authorized by the Wright and Shelby Amendments. Order 98-12-27 at 24-42. And, even assuming that Dallas could otherwise regulate airline routes under its proprietary powers, a conclusion we reject, Congress had preempted Dallas' authority to do so, since the Wright and Shelby Amendments were intended to prescribe which services could and could not be operated from Love Field. Congress' enactment of the Wright and Shelby Amendments represented an affirmative authorization of the services permitted by them and thus completely preempts Dallas' authority to impose such limitations. Order 98-12-27 at 44-45.²

As noted above, Fort Worth, American Airlines, and other parties are seeking review of our orders in the Interpretation Proceeding. The Court expedited the case as we requested and held the argument on September 8.

The Ozark Certification Proceeding and Ozark's Complaint

In a separate proceeding, we granted Ozark's application for certificate authority allowing it to operate as an airline. Ozark planned to operate flights between the Dallas-Fort Worth area and Columbia, Missouri, with 32-seat Dornier aircraft and was considering using Love Field for these flights. Fort Worth, relying on the state trial court decision, contended that Ozark's proposed service would be unlawful if the airline used Love Field. We rejected Fort Worth's arguments. Order 99-8-27 (August 31, 1999).³

Fort Worth filed a petition for review of our decision granting Ozark's application, City of Fort Worth v. Department of Transportation, 5th Cir. No. 99-

² Orders 98-1-27 and 99-4-13 also addressed several other statutory interpretation questions which are not relevant to the stay requests made by American and Fort Worth. We additionally ruled on several procedural and jurisdictional issues presented by the parties. Orders 98-12-28 (December 22, 1998) and 99-4-14 (April 14, 1999).

³ To begin operations Ozark will also need certificate authority from the FAA. It has applied for that authority but has not yet obtained it.

60730 (filed October 26, 1999). Fort Worth has not sought a stay pending judicial review.

To enable itself to begin operations, Ozark asked to lease Love Field facilities for its proposed Love Field-Columbia service. Dallas insisted that the lease require Ozark to comply with the terms of the state court decision, which held that airlines could not operate flights between Love Field and any point outside Texas and the four states bordering on Texas. The lease would thus bar Ozark from serving Columbia, Missouri, from Love Field.

Ozark filed a complaint against Dallas with the FAA under 14 C.F.R. Part 16, the FAA's administrative complaint procedures for airport matters. Ozark Airlines v. City of Dallas, Texas, FAA Docket 16-99-17 (docketed November 8, 1999). Ozark's complaint alleges that Dallas' proposed lease violates the Wright and Shelby Amendments, which allow airlines to serve any point from Love Field as long as they use aircraft having no more than 56 seats, and contends that Dallas may not regulate airline operations, as we held in the Interpretation Proceeding. The complaint also alleges that Dallas' actions violate 49 U.S.C. 47107(a) and (e) by allowing other airlines to provide service under the Wright and Shelby Amendments but acting unreasonably and with unjust discrimination in denying Ozark similar access.

The Parties' Pleadings

American and Fort Worth have jointly asked us to stay our decision in the Interpretation Proceeding pending a final decision by the Fifth Circuit on review of our decision. Fort Worth has similarly asked us to stay our order on Ozark's certificate application pending the Court's decision insofar as we stated that the commuter aircraft exemption allowed Ozark to operate flights between Love Field and Columbia. They have also asked us to stay any action on the complaint filed by Ozark with the FAA. American and Fort Worth claim that the Fifth Circuit has exclusive jurisdiction over our orders under 49 U.S.C. 46110(c).

Allegedly any enforcement of our orders would interfere with the Fifth Circuit's jurisdiction and with the rights of American and Fort Worth to judicial review.⁴ American and Fort Worth stated that they will seek a stay from the Court if we deny their requests.

Legend filed answers in both dockets that oppose the stay requests by American and Fort Worth. Continental Express filed an answer objecting to the request for a stay of our decision in the Interpretation Proceeding. Legend and Continental Express noted that we have established standards for obtaining a stay, that those standards include a requirement that the movant show that a stay is needed to prevent irreparable injury, and that American and Fort Worth made no attempt to satisfy those standards in their stay requests.

American and Fort Worth filed a reply which contended that they are entitled to a stay under the established standards for obtaining a stay. They asserted, among other things, that the state court had found that additional Love Field service would cause irreparable injury and that we should accept that determination.

Dallas has filed no response to the stay motions. However, Dallas has asked the FAA to either dismiss Ozark's complaint under Part 16 or defer acting on it until the Fifth Circuit has issued its decision or until the United States has obtained an order releasing Dallas from compliance with the state court decision.

Ozark filed a response to Fort Worth's motion to stay our determination that Ozark was entitled to serve Missouri from Love Field. Ozark asserts that its complaint against Dallas seeks to enforce the Wright Amendment, not our declaratory order. In addition, Ozark alleges that a stay would cause it substantial injury.

Legend filed a reply to the response filed by American and Fort Worth. Legend again contends that American and Fort Worth have failed to satisfy the requirements for obtaining a stay. Legend further states that the state trial court

⁴ Our order on reconsideration in the Interpretation Proceeding barred the parties from filing any additional pleadings. Order 99-4-13 at 17. American and Fort Worth have not asked for leave to file their stay request. We will nonetheless accept it, because Rule 18 of the Federal Rules of Appellate Procedure requires parties to ask the agency for a stay of its decision before seeking a stay from the reviewing court and because American and Fort Worth do not seek to reargue the issues resolved in our earlier orders in that proceeding.

did not order Legend to take any action and that that decision in any event was stayed as to Dallas when the city appealed the decision.

Decision

We have determined to deny the stay requests. In ruling on stay requests we apply the standards used by the courts. The moving party must show (i) that it is likely to prevail on the merits, (ii) that it is likely to suffer irreparable harm if a stay is not granted, (iii) that a stay will not substantially harm other parties, and (iv) that a stay will not be contrary to the public interest. See, e.g., Application of Valujet Airlines, Order 96-9-36 (September 26, 1996) at 22; Joint Application of American Airlines and Trans World Airlines, Order 91-5-3 (May 3, 1991) at 4-5; Application of Discovery Airways, Order 90-2-23 (February 13, 1990). Taylor Diving & Salvage v. U.S. Dept. of Labor, 537 F.2d 819 (5th Cir. 1976); Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572-573 (5th Cir. 1974).

American and Fort Worth initially made no effort to satisfy these requirements. They did not even allege that a stay would be necessary to prevent irreparable injury, that a stay would not harm others, and that a stay would be consistent with the public interest. In their reply they claim that a stay should be granted under the standards traditionally used for ruling on requests for a stay of agency action, but they have fallen far short of meeting the requirements for obtaining a stay pending review, as discussed below.

The Fifth Circuit case involves a number of statutory, procedural, and jurisdictional issues whose resolution in an opinion may require significantly more time. We do not know when the Court will act, and we are unwilling to delay acting when doing so may deny the public the benefits of new airline service for some period of time.⁵

⁵ On January 4 Ozark announced that it would begin its flights to the Dallas-Fort Worth area by using DFW and that it had entered into a code-sharing agreement with American that would provide connecting traffic for its flights to Columbia, Missouri. Ozark has not withdrawn its complaint with the FAA or filed a pleading changing its position in this proceeding. Even if Ozark were no longer interested in serving Love Field, the stay requested by American and Fort Worth could prevent us from enforcing the statutory rights of Legend and other airlines to provide Love Field service within the limits imposed by the Wright and Shelby Amendments. We are therefore ruling on the stay requests despite Ozark's possible change in plans.

Lack of Irreparable Injury

Irreparable injury is the essential predicate for a request for a stay of agency action pending review. 5 U.S.C. 705. In general, moreover, "The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Sampson v. Murray, 415 U.S. 61, 88 (1974), quoted in Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). In their initial motions Fort Worth and American nonetheless neither alleged nor showed that either would suffer any injury, irreparable or otherwise, from the enforcement of our order. Their reply alleges that enforcement would cause irreparable injury but fails to substantiate that claim.

First, American and Fort Worth base their injury claim on a mischaracterization of the effect of our decision. They assert that we intend "to force Love Field open to unrestricted interstate passenger service." Reply at 3. The contrary is the case – as we have repeatedly stated, the Wright and Shelby Amendments substantially restrict longhaul service at Love Field. Order 98-12-27 at 37-38. American and Fort Worth have thus failed to show irreparable injury, since their injury claim rests on results that will not happen unless Congress amends the Wright and Shelby Amendments.

Furthermore, Ozark's proposed service – the basis of the enforcement complaint and the stay requests from American and Fort Worth -- could not conceivably injure them. Ozark planned to fly two daily roundtrips between Love Field and Columbia, Missouri, with 32-seat aircraft, December 1999 Official Airline Guide, and so could carry no more than 128 passengers a day.

As a result, Ozark's service could not significantly injure American's competitive position in Dallas-Fort Worth/Missouri markets. American does not even serve Columbia, Missouri. Any injury incurred by American could not satisfy the requirements for obtaining a stay, since the "injury must be both certain and great," Wisconsin Gas Co., 758 F.2d at 674. Furthermore, any injury suffered by American would be the result of greater competition. Traffic and revenue losses resulting from new competition do not constitute irreparable injury and thus will rarely justify the grant of a stay. Central & Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 308-309 (D.C. Cir. 1985). Cf. May Trucking Co. v. United States, 593 F.2d 1349, 1356 (D.C. Cir. 1979). After all, any loss of passengers by American would mean that some travellers preferred to use Ozark's service. Travellers would benefit if American responded to Ozark's service by cutting fares or adding service in its DFW-Missouri markets. Cf.

Application of Discovery Airways, Order 90-2-23 at 6. Furthermore, the Wright Amendment allowed competitive services at Love Field by authorizing some types of interstate service, and Congress enacted the Shelby Amendment to expand the scope of airline services authorized at Love Field that would compete with airline services at DFW.

American has not shown that it would suffer irreparable injury if Legend or other airlines used the commuter aircraft exemption to begin longhaul service at Love Field. Any revenue losses incurred by American would be the result of competition and reflect traveller preferences for the new services. Given the continuing restrictions on longhaul service at Love Field, the growth of American's hub while Southwest was expanding its operations at Love Field under the aegis of the Wright Amendment, and American's position as the second-largest U.S. airline and the large scale of its DFW operations, losses resulting from the services authorized by the Wright and Shelby Amendments would not threaten the airline's overall operations or its hub at DFW. Order 99-4-13 at 15-16.

Fort Worth similarly has failed to show that it would suffer irreparable injury if Ozark or other airlines operate longhaul flights under the commuter aircraft exemption. We assume that Fort Worth wishes to ensure DFW's viability and role as the area's principal airport. Fort Worth has made no showing that the small number of passengers carried by Ozark would affect these interests. DFW would remain the area's primary airport even if other airlines operated longhaul service at Love Field within the limits imposed by the statutes. The Wright and Shelby Amendments continue to impose substantial restrictions on longhaul service at Love Field, and the airport also has relatively few gates available. Order 98-12-27 at 37-38; Order 99-4-13 at 15-16.

In belatedly claiming that the enforcement of our order will cause irreparable injury, American and Fort Worth rely on the state court's conclusion that Continental Express' proposed Love Field-Cleveland service should be enjoined. American and Fort Worth do not say what findings were made by the judge, do not describe the nature of the alleged injury, and do not even allege that they would suffer that injury. We cannot blindly accept the state court's conclusion, and American and Fort Worth have presented no evidence showing that they will be injured, much less irreparably injured. Cf. Belcher v. Birmingham Trust Nat'l Bank, 395 F.2d 685, 686 (5th Cir. 1968).

American and Fort Worth generally cite the mass of testimony from the state court hearing that the DFW Board submitted earlier, but they do not cite any

specific testimony to support their injury claim. We have already rejected the DFW Board's claims that the modest amount of additional Love Field service permitted by the commuter aircraft exemption and the Shelby Amendment would substantially harm DFW or American's hub operation there. As we pointed out, the DFW Board itself estimated that unrestricted longhaul regional jet service at Love Field would reduce the number of flights at DFW by less than four percent. Order 99-4-13 at 15. Such a small reduction in the number of DFW flights could not conceivably injure Fort Worth or American to any serious extent, and they have not shown that it would. American and Fort Worth neither attempt to explain why such a small decrease in flights requires a stay nor offer a different estimate of the impact of regional jet operations at Love Field.

Although American and Fort Worth assert that they will ask the Fifth Circuit for a stay if we deny their requests, such a request would not meet the requirements set by the courts for obtaining a stay. In Wisconsin Gas Co., the District of Columbia Circuit held that the stay request at issue there should never have been filed, because it failed to show any likelihood that the alleged irreparable injury would occur. The Court stated, "The fact that petitioners have not attempted to provide any substantiation [of their allegations of irreparable injury] is a clear abuse of this court's time and resources." 758 F.2d at 675. Accord, Reynolds Metals Co. v. FERC, 777 F.2d 760, 763 (D.C. Cir. 1985). Here American and Fort Worth have cited no evidence supporting their irreparable injury claims and have not even alleged that additional Love Field service would injure them.⁶

However, even if the enforcement of our order could injure American and Fort Worth, we would deny their stay requests since a stay would harm others and be contrary to the public interest.

A Stay Would Harm the Public Interest

A stay would clearly harm the public interest. We have already stated that "any continuing uncertainty over the validity of our decision could delay the beginning of additional service at Love Field" and that any delay "will hurt the public and interfere with Congress' expectation that the Shelby Amendment would lead to new services at Love Field." Order 99-4-13 at 7. That remains

⁶ Our statute provides that the Court may not consider points that were not raised before us. 49 U.S.C. 46110(c). American and Fort Worth thus could not properly supplement any motion filed with the Court with material not presented to us. Any motion for judicial stay filed by them accordingly would rely on irreparable injury claims less substantial than those criticized by the District of Columbia Circuit in Wisconsin Gas and Reynolds Metals.

true. Ozark's flights, for example, would give Dallas-Fort Worth area residents new service. Any new flights operated at Love Field should benefit the public by offering travelers new services and by encouraging airlines operating from DFW to improve their service and fares as a result of the new competition. The fares charged in the Dallas-Jackson/Birmingham markets fell dramatically when Southwest began offering through service from Love Field to Jackson and Birmingham. Order 98-12-27 at 13.

New services at Love Field, moreover, should benefit Fort Worth residents, as the community apparently recognizes. Legend has submitted polling data indicating that residents of Tarrant County, which includes Fort Worth, support expanded Love Field service by a two-to-one margin. Legend Comments at 69-70.

When Congress enacted the Wright Amendment and then the Shelby Amendment, Congress determined that certain types of Love Field service should be authorized – longhaul service operated with 56-seat aircraft and service to any point within Texas, the states bordering on Texas, Kansas, Mississippi, and Alabama operated with any kind of aircraft. Congress' decision necessarily reflects a judgment that authorizing these types of service will benefit the public and is in the public interest. American and Fort Worth seek to overturn this Congressional judgment and thereby deny the public access to the services that Congress chose to authorize. They completely fail to demonstrate that such a step would be in the public interest. They seek instead to advance only their own parochial view of the public interest, which Congress has overridden.

American and Fort Worth nonetheless claim that the public interest would be served by "orderly judicial process," that "the status quo at Love Field has served the Dallas-Fort Worth metropolitan area for twenty years," and that the public interest would not be served by attempts to upset the status quo before the Fifth Circuit issues its decision. American & Fort Worth Reply at 5.

Congress, not this Department, changed the status quo by enacting the Shelby Amendment (and the Wright Amendment itself, as shown in our orders, allowed longhaul service with 56-seat aircraft meeting the requirements of the commuter aircraft exemption). Congress clearly determined that the status quo did not serve the public interest. Neither we nor a reviewing court may overturn that Congressional judgment despite the preference of American and Fort Worth for restrictions allowing less competition and a smaller choice of airline services for Dallas-Fort Worth area residents.

Furthermore, Congress' deregulation of the airline industry reflected its determination that the public would receive the best possible airline service if market forces rather than regulatory agencies determined the routes served by individual airlines. Congress accordingly adopted a statement of public policy that directs us to consider in the public interest "placing maximum reliance on competitive market forces and on actual and potential competition . . . to provide the needed air transportation system . . ." 49 U.S.C. 40101(a)(6). Congress also prohibited state and local governments from regulating airline routes. 49 U.S.C. 41713. American and Fort Worth ignore these Congressional public interest determinations by contending that Fort Worth should be allowed to decide which routes may or may not be served from Love Field.⁷

American and Fort Worth additionally err by claiming that additional service at Love Field is unnecessary for increasing competition, since any airline can use DFW. American & Fort Worth Reply at 5. Congress determined when it deregulated the airline industry that airlines should be free to choose which routes to serve and that state and local governments should not dictate where airlines could operate. Order 98-12-27 at 33. The Wright and Shelby Amendments show that Congress does not wish to compel all interstate flights to use DFW. Congress, not an individual city or airline, determined that expanding Love Field service was necessary and beneficial and thus in the public interest. If Legend, Continental Express, Ozark, or any other certificated airline believes flights will be more profitable and attractive to travellers if flown from Love Field, they are entitled to provide that service (subject to the restrictions imposed by the Wright and Shelby Amendments). And, as noted above, many Dallas-Fort Worth area residents would prefer more Love Field service. Moreover, when Fort Worth and others attempted to compel Southwest to use DFW instead of Love Field, the district court pointed out that Southwest's planned short-haul service depended on its use of a close-in airport to attract passengers. City of Dallas, Texas v. Southwest Airlines, 371 F. Supp. 1015, 1031-1032 (N.D. Tex. 1973), aff'd on different grounds, 494 F.2d 773 (5th Cir. 1974).

Finally, we cannot agree with the claim by American and Fort Worth that an orderly judicial process would be undermined if our order is enforced.

⁷ As Legend points out, while Fort Worth has contended that airlines may not operate any of the nonstop and stopping services authorized by the Shelby Amendment, Fort Worth has not objected to Southwest's initiation of through service from Love Field to Jackson, Mississippi, and Birmingham, Alabama, under the Shelby Amendment. Legend Response to Reply at 2.

Enforcement will in no way interfere with the Court's ability to review our decisions.

A Stay Would Harm Others

American and Fort Worth wish to keep us and the FAA from enforcing the Wright and Shelby Amendments and the statutory preemption provision if Dallas refuses to allow Ozark or any other airline to obtain facilities at Love Field allowing it to serve points outside Texas and the four states bordering on Texas to the extent authorized by the Wright and Shelby Amendments. Thus the stay that they seek would injure other parties – it would prevent Ozark from beginning its proposed service, which would harm both Ozark and the travelers interested in using Ozark's flights.

A stay would keep us from enforcing our decision if Dallas refused to allow other airlines to operate Love Field services authorized by federal law. Given the likely impact that new Love Field service would have on the fares offered at DFW, a stay would injure travelers using DFW for flights that would otherwise compete with flights operated from Love Field. Since increased service and lower fares would benefit the entire metropolitan area, a stay would harm the Dallas-Fort Worth area as a whole. Order 98-12-27 at 11.

In arguing that a stay would not harm others, American and Fort Worth note that Continental Express is subject to an injunction barring it from operating Love Field-Cleveland flights. They also note that Legend is a party to the state court declaratory judgment proceeding.

The state court, however, did not enjoin Legend from beginning service, and Legend states that the appeals from the trial court decision automatically stayed that decision. In any event, Ozark and other airlines should be free to begin Love Field services of the types authorized by Congress. Legend has stated that a stay could cause it substantial harm and notes that it has spent tens of millions of dollars in preparing to begin service. Legend Opposition at 3. Airlines are entitled to begin the Love Field flights authorized by Congress. By undermining our ability to enforce Congress' decision, a stay would harm them.

Likelihood of Prevailing on Merits

We think it unlikely that Fort Worth and American will prevail on the merits on the review of our decisions interpreting the relevant federal statutes. In reviewing our decision, the courts should defer to our interpretation – the

Department is responsible for administering and enforcing the statutes at issue, and our interpretation is reasonable. See, e.g., Microcomputer Technology Institute v. Riley, 139 F.3d 1044 (5th Cir. 1998). The courts have stated that our interpretation of the federal airport statutes administered by us is entitled to deference. See, e.g., Northwest Airlines v. County of Kent, 510 U.S. 355 (1994); New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989); Continental Air Lines v. DOT, 843 F.2d 1444 (D.C. Cir. 1988). Our decision to issue statutory interpretations in the Interpretation Proceeding, moreover, is consistent with an earlier proceeding where we issued the same kind of order interpreting the Wright Amendment. Love Field Amendment Proceeding, Order 85-12-81 (December 31, 1985), aff'd, Continental Air Lines, supra.

Insofar as the meaning of the commuter aircraft exemption is concerned, our decision that an airline could serve any U.S. point from Love Field with aircraft meeting the maximum seat number and weight limits set by the Wright and Shelby Amendments is consistent with both the statutes' literal language and Congress' intent in enacting the Shelby Amendment. The statutes by their terms place no limits on the type of aircraft that may be used for flights operated under the commuter aircraft exemption or on the length of such flights. Order 98-12-27 at 47-48. Similarly, the history of the Wright and Shelby Amendments demonstrates Congress' intent to authorize airlines to operate the services permitted by those statutes and to preempt any ability Dallas might otherwise have to restrict those services. Order 98-12-27 at 42-47.

Furthermore, our decision that Dallas' proprietary powers do not allow it to determine which routes may or may not be operated from Love Field is consistent with the judicial decisions on the scope of an airport owner's proprietary rights and the more recent decisions on that issue issued by us and the FAA. As we explained, the Fifth Circuit and other courts have only upheld similar limits imposed on airline services by an airport owner when the owner has a substantial need to impose the restriction as part of its operation of a multi-airport system. City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982); 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; National Helicopter Corp. v. City of New York, 137 F.3d 81 (2nd Cir. 1998). See Order 98-12-27 at 28-30.

In an administrative proceeding we similarly held that an airport's proprietary powers did not allow the airport to adopt fees designed to divert traffic from one airport to another unless the fees were otherwise economically justified.

Investigation into Massport's Landing Fees, FAA Docket 13-88-2 (December 22, 1988), Opinion at 11, aff'd, New England Legal Foundation v. Massachusetts Port Authority, supra. Our interpretation of Dallas' proprietary rights is equally consistent with recent FAA decisions. 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), affirmed by the Associate Administrator for Airports (February 18, 1999 decision), petition for review pending, Arapahoe County Public Airport Authority v. FAA, 10th Cir. No. 99-9508 (filed March 10, 1999).

While an airport proprietor may only impose restrictions like a perimeter rule if they are essential to achieve airport goals within the purview of the proprietor's authority, none of the parties that wish Dallas to restrict the type of operations permitted at Love Field have shown that any such need exists. Order 98-12-27 at 33-38; Order 99-4-13 at 13-16. Furthermore, with respect to these issues Dallas is not a multi-airport proprietor, since it does not operate or control DFW. Order 98-12-27 at 41-42.

American and Fort Worth do not address the merits of our interpretation. They instead assert that we are unlikely to agree that they have a substantial likelihood of success on review. They suggest that we should defer taking any action to enforce our decision while the case is pending in the Fifth Circuit.

To obtain a stay pending review a party must show a likelihood of success on the merits. The failure of American and Fort Worth to make such a showing requires the denial of their motions.

Our Authority to Enforce Our Decision

In their motions American and Fort Worth claimed that the enforcement of our order would interfere with the Fifth Circuit's jurisdiction and deny them their right to obtain judicial review. These claims have no validity.

Judicial review does not eliminate our authority to enforce our decision, which remains in effect unless stayed by the Court or us. Our governing statute states that a Department order "remains in effect under its own terms or until superseded." 49 U.S.C. 46105(a). Without a stay, we are fully entitled to require parties to comply with our decision. That we, like any other administrative agency, may enforce a decision pending review, unless it is stayed, is obvious from the structure of the statutes on judicial review.

Nothing in the judicial review statutes suggests that the filing of a petition for judicial review of an order automatically suspends the effectiveness of that order. The contrary is the case. Indeed, by specifically providing for a reviewing court's issuance of a stay of a Department order, 49 U.S.C. 46110(c), our governing statute demonstrates that such an order is effective and enforceable unless stayed by us or a reviewing court. If the filing of a review petition made our orders unenforceable until the reviewing court decided the case, there would be no need for the statute to authorize judicial stays. The Administrative Procedure Act, 5 U.S.C. 705, similarly suggests that the filing of a petition for judicial review does not stay an agency decision unless the agency or the reviewing court stays it. Furthermore, that statute expressly states that an agency has no obligation to stay its order pending review. The section reads as follows:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of agency action or to preserve status or rights pending conclusion of the review proceedings.

As a result, the Supreme Court has pointed out, "It is important to note that the institution of this type of action [a proceeding to review agency action] does not by itself stay the effective date of the challenged regulation." Abbott Laboratories v. Gardner, 387 U.S. 136, 155 (1967).

The Fifth Circuit's jurisdiction to review our order does not preclude us from enforcing that decision. The statute relied on by American and Fort Worth, 49 U.S.C. 46110(c), states that the reviewing court "has exclusive jurisdiction to affirm, amend, modify, or set aside any part" of an order under review. The statute does not bar us from taking any action on our decision. Among other things, it did not bar us from considering the reconsideration petitions filed by Fort Worth and the Dallas-Fort Worth International Airport Board ("the DFW Board") in the Interpretation Proceeding after other parties had filed petitions for judicial review. Order 99-4-13 at 9, n. 6. Here, again, if the statute had the effect claimed by American and Fort Worth, there would be no need for the statute to authorize the reviewing court to stay our decisions pending review.

Finally, there is no basis for the claim by American and Fort Worth that our enforcement of our order would interfere with their right to judicial review. Any

enforcement of our order pending review would in no way limit the Court's ability to grant relief if it concludes that our decision is erroneous in one or more respects.

The pendency of the Fifth Circuit review proceeding thus has not diminished our authority to enforce our decision, absent a stay.

Conclusion

As explained, we will deny the stay requests – by preventing the enforcement of the statutory rights of Ozark, Legend, and other airlines, a stay would be contrary to the public interest and Congressional policy and deny travelers the benefit of new service and new competition.

As noted, Ozark has filed a complaint with the FAA that alleges that Dallas is violating its obligations under its grant assurances and other federal law by refusing to give Ozark access to Love Field on terms which would allow Ozark to implement its proposed service, which we found is consistent with federal law. Given the importance of the issues raised by Ozark and this proceeding, we urge the FAA to act promptly on Ozark's complaint.

We recognize that Dallas is subject to conflicting declaratory judgments – our decision in the Interpretation Proceeding and the state trial court's judgment. Whatever Dallas does, it will violate one of these judgments. That result does not justify a stay of our order. We are charged with administering and enforcing the relevant statutes, and we have found that Ozark is entitled to use Love Field for its Columbia, Missouri, flights. The state court, moreover, has issued no injunction against Dallas. Indeed, Fort Worth may have deliberately chosen not to request injunctive relief against Dallas in order to ensure that its suit was heard in the trial court in Tarrant County. See Legend Reply Comments at 2-3. Legend additionally asserts that Dallas' appeal of the trial court decision automatically stayed it.

In any event, the federal government has an overriding interest in the operation of interstate airline operations and federally-assisted airports, and the statutes governing the dispute over additional Love Field service are federal statutes. In these circumstances, we think that Dallas should comply with federal law as interpreted by us, except to the extent that the federal courts reverse our interpretation. If the parties in the state court action ask that court to enforce its decision, we can then take appropriate action to prevent interference with Dallas' compliance with federal law.

The FAA will address in the Part 16 proceeding the specific arguments made by Dallas in support of its request that the FAA dismiss Ozark's complaint or defer acting on it.

ACCORDINGLY:

1. The Department of Transportation denies the motion for stay pending review on appeal filed by Fort Worth and American Airlines in the Love Field Service Interpretation Proceeding;
2. The Department of Transportation denies the motion for a stay of portions of Order 99-8-27 filed by Fort Worth in Application of Ozark Air Lines; and
3. Except to the extent granted, all other petitions, applications, motions, and other requests are denied.

By:

A. BRADLEY MIMS
Deputy Assistant Secretary for Aviation
And International Affairs

(SEAL)

An electronic version of this document is available on the World Wide Web at
<http://dms.dot.gov/>