Order 98-12-28

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

ORDER ON PROCEDURAL MOTIONS

The Department began this proceeding to issue interpretations on several federal law issues raised by the current dispute over whether airlines may operate the additional services at Dallas' Love Field authorized by legislation enacted by Congress in 1997, 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"). Order 98-8-29 (August 25, 1998). This Department, including the Federal Aviation Administration ("FAA"), is responsible for administering the relevant statutes. The Department undertook a similar proceeding to interpret the statutory restrictions on Love Field service imposed by Section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980) ("the Wright Amendment"). Love Field Amendment Proceeding, Order 85-12-81 (December 31, 1985), aff'd, Continental Air Lines v. DOT, 843 F.2d 1444 (D.C. Cir. 1988).

The Department is simultaneously issuing an order that addresses those legal issues. The parties' pleadings, however, raised a number of procedural issues that are addressed in this order. This order denies the requests by Fort Worth, American Airlines, and the DFW Board for the dismissal of this proceeding. The Department also finds that Fort Worth's allegations of bias and ex parte contacts by Department officials and staff members have no factual basis.

FACTUAL AND LEGAL BACKGROUND

The companion order sets forth in detail the factual and legal background to the current dispute over additional Love Field service. This order provides the background information relevant to the parties' procedural requests.

State Court Litigation

The current dispute between the parties has resulted in litigation in both the federal and state courts in Texas. Fort Worth initiated the state court proceeding by filing a 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 have intervened in that case to support Fort Worth's position. Fort Worth argues that Dallas is required by their agreement, set forth in their 1968 Regional Airport Concurrent Bond Ordinance ("the Bond Ordinance"), to bar airlines from operating any service not authorized by the Wright Amendment. Dallas, Continental Express, and Legend have contended that airlines may operate the additional services authorized by the Shelby Amendment and that Fort Worth has no right to compel Dallas to deny airlines the ability to use Love Field for such services.

On July 9, 1998, the state court enjoined Continental Express from operating Love Field-Cleveland flights pending the court's final decision.

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 permitted by the Shelby Amendment and that federal law did not override the cities' agreement restricting Love Field service.

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

As explained in more detail below, the state court litigation (and the related federal court litigation described below) caused most of the parties in the dispute – Fort Worth, American, Dallas, Legend, and Continental Express – to

meet with Department officials, including FAA officials, to discuss the dispute and to ask for our assistance before we began this proceeding.

In addition, on the eve of the state court's hearing on the temporary injunction requests, Continental Express asked the Department whether it could issue a statement of its position on certain issues that were likely to be relevant at the hearing. On June 30, Nancy E. McFadden, the Department's General Counsel, provided Continental Express a letter restating the Department's position on two factual issues, while declining to give a ruling on two legal issues, since the Department had not previously issued a ruling on the latter issues (a copy of her letter is in the docket for this proceeding).

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). The federal court has consolidated that case with a similar case filed by Continental Airlines and Continental Express, Continental Airlines and Continental Express v. City of Dallas and City of Fort Worth, N.D. Tex. No. 398CV1187-R (filed May 19, 1998).

Related Administrative Proceedings

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 on the ground that Legend's proposed service – longhaul flights from Love Field operated with large aircraft reconfigured to hold no more than 56 seats – would allegedly 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 it does not grant Fort Worth's motion to dismiss. Id. at 4-5.

Finally, the FAA began an enforcement proceeding against Centennial Airport, an airport near Denver, which has 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 airport's owner, has violated its obligations under federal law. 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). 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 PARTIES' COMMENTS AND MOTIONS

The dispute over new service at Love Field led the Department to institute this proceeding, as explained in Order 98-8-29. The requests by most of the parties in the litigation for the Department's assistance and the importance of the issues caused the Department to conclude that it should issue an interpretation of the the relevant federal statutes. Order 98-8-29 (August 25, 1998). As noted in that order, this Department, including the FAA, is responsible for administering the relevant statutes. Moreover, the Department had 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), affirmed, Continental Air Lines v. DOT, 843 F.2d 1444 (D.C. Cir. 1988). In this instance the Department stated its intent to issue a ruling that the courts could consider. Order 98-8-29 at 5.

After the proceeding began, Fort Worth filed requests to dismiss this proceeding and for disclosure of the circumstances surrounding the General Counsel's letter to Continental Express. The Department stated that it would defer ruling on those requests until it had reviewed the parties' comments and reply comments. Order 98-9-5 at 2-4.

In their comments on the merits, Fort Worth, American, and the DFW Board essentially argue that federal law allows Dallas as Love Field's proprietor to restrict services at that airport permitted by the Wright and Shelby Amendments. They also argue that the Department should not issue any ruling on federal law issues relevant to the Love Field dispute. They additionally ask the Department to hold an oral argument before deciding this proceeding.

Fort Worth renews its request for disclosure and asserts that discovery in the state court case has shown that Department officials and staff members had contacts about the case with parties other than Fort Worth, which allegedly indicates bias and unlawful ex parte communications. No other party has supported these assertions by Fort Worth.

The DFW Board also requests the Department to mediate the dispute over Love Field service and to suspend this proceeding during mediation.

Dallas, Southwest, Continental Express, and Legend 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.

Legend and Continental Express contend that Fort Worth's requests for further disclosure are without merit. Legend notes, among other things, that American had several contacts with Department officials and staff members before the Department began this proceeding. Legend contends that under established administrative law principles all such contacts were proper, since the prohibition against ex parte communications does not apply before a proceeding has begun.

Dallas and Legend oppose the request for oral argument. Dallas, Continental Express, Southwest, and Legend oppose the DFW Board's request for mediation.

SUMMARY OF THE DEPARTMENT'S PROCEDURAL DECISIONS

Since the Department has the responsibility to administer the federal statutes relevant to the Love Field dispute, the Department has concluded that it should publish a decision interpreting the relevant federal statutes. The Department is therefore denying Fort Worth's request to dismiss this proceeding.

The Department is denying Fort Worth's request for disclosure – Fort Worth has cited nothing suggesting any bias or improper conduct by Department officials and staff members, and the courts have refused to require the type of disclosure sought by Fort Worth except in rare cases where, unlike here, there is clear evidence of agency misconduct. See, e.g., Checkosky v. SEC, 23 F.3d 452, 489 (D.C. Cir. 1994). The conduct cited by Fort Worth violated no statute or Department rule and created no unfairness for Fort Worth. The Department is also denying the requests for oral argument, for no party has shown that an oral argument is necessary or would be useful in this proceeding.

THE DEPARTMENT'S JURISDICTION

The Department's authority to issue a ruling interpreting the federal laws applicable to Love Field is firmly established. The relevant statutes are statutes that we are responsible for administering and enforcing. As the Supreme Court stated, "The Secretary of Transportation is charged with administering the federal aviation laws . . . ." Northwest Airlines v. County of Kent, 510 U.S. 355, 366-367 (1994). See also New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 172 (1st Cir. 1989). The dispute over Love Field service, moreover, raises substantial federal issues that this Department should address, in particular, the ability of a local airport owner to restrict service at a second airport to improve the competitive position of the first airport. The Administrative Procedure Act authorizes the Department to issue declaratory orders such as this. 5 U.S.C. 554(e). See, e.g., British Caledonian Airways v. CAB, 584 F.2d 982 (D.C. Cir. 1978).

The Department is specifically responsible for enforcing the Wright Amendment (and thus the Shelby Amendment, which amends the Wright Amendment), as the Fifth Circuit has stated. Cramer v. Skinner, 931 F.2d 1020, 1024 (5th Cir. 1991), cert. denied, 502 U.S. 907. As noted above, the Department has already issued one order interpreting the Wright Amendment, Order 85-12-81 (December 31, 1985). The Department's General Counsel and Deputy General Counsel have also written opinions interpreting that statute. See September 16, 1996, letter from Nancy E. McFadden, the Department's General Counsel, to Dalfort Aviation, and May 16, 1994, letter from Rosalind A. Knapp, the Department's Deputy General Counsel, to Centennial Express.

In affirming our order interpreting the Wright Amendment, the Court of Appeals held that our interpretation of that statute was entitled to deference, a holding which necessarily assumes that the Department is the agency responsible for administering the restrictions. Continental Air Lines v. DOT, 843 F.2d 1444 (D.C. Cir. 1988). Any doubt about our responsibility for administering the Wright Amendment was resolved in a case challenging the constitutionality of that statute, State of Kansas v. United States, 16 F.3d 436 (D.C. Cir. 1994). There the Court of Appeals specifically acknowledged that this Department "administers the statute." 16 F.3d at 438.

Similarly, when the Texas Court of Appeals ruled on Continental's efforts to begin Love Field-Houston service over ten years ago, it relied in part on the Department's determination that Continental's proposed service would be

intrastate service. City of Dallas v. Continental Airlines, 735 S.W. 2d 496, 503 (Tex. Ct. App. 1987).

The other statute interpreted in this proceeding is the preemption provision, including the exception for airport proprietor's rights, 49 U.S.C. 41713(b), which was added to the Federal Aviation Act by the Airline Deregulation Act of 1978. The Secretary is responsible for enforcing the Federal Aviation Act, now Part A of Subtitle VII of Title 49 of the U.S. Code, including the preemption provision. The statute thus provides, "On the initiative of the Secretary of Transportation . . . , the Secretary . . . may conduct an investigation, if a reasonable ground appears to the Secretary . . . for the investigation, about . . . any question that may arise under this part." 49 U.S.C. 46101(a)(2). The statute additionally authorizes the Secretary to "take action the Secretary considers necessary to carry out this part, including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders." 49 U.S.C. 40113(a). As part of its responsibility for administering the Act's economic regulatory provisions, the Board issued a policy statement defining the kinds of state regulation that were preempted by 49 U.S.C. 41713(b). 14 C.F.R. 399.100, adopted by 44 Fed. Reg. 9948 (February 15, 1979).

The Supreme Court has expressly recognized that this Department is responsible for administering and interpreting the preemption provision. In Wolens v. American Airlines, 513 U.S. 219 (1995), the Court described this Department as "the superintending agency" for the preemption provision, 513 U.S. at 229, n. 6, and upheld the statutory interpretation urged by the United States, in part because the interpretation had the approval of the statute's "experienced administrator," the Department of Transportation, 513 U.S. at 234. The lower courts have also recognized this Department's responsibility for administering the preemption provision. In New England Legal Foundation, supra, the First Circuit held that the district court should have deferred its ruling on whether an airport fee violated the preemption provision until we had issued a decision on the issue. 883 F.2d at 173. And the scope of the airport owner's proprietary

rights is one of the issues that the FAA necessarily addressed in its Centennial Decision. Centennial Decision at 27-31.[1]

The Department also finds that it has the responsibility to use this authority to issue an order interpreting the federal statutes relevant to the Love Field dispute. The dispute largely involves the meaning of those statutes. Given its responsibilities for administering those statutes, the Department should assist the parties by issuing its interpretation. The Court of Appeals approved our taking similar action in 1988. Moreover, the Department is a party in the pending federal court suit and presumably will have to state its position there. That likelihood further supports the Department's determination that it should issue this order, where the Department can determine the proper interpretation after giving the parties the opportunity to present their arguments.

The Department's dismissal of this proceeding would create a dilemma for Dallas. Dallas as Love Field's owner must comply with the applicable federal statutes. Dallas is understandably concerned that the Department's interpretation of the applicable laws could be inconsistent with the state court's decision. As the city explains, "Dallas strongly wishes to avoid a situation in which it is first forced to comply with a state court judgment directing it to impose a perimeter rule and later found by the Department to be violating its grant assurances or federal law by imposing that same rule." Dallas Reply at 8. The Texas state court proceeding will not prevent us from taking enforcement action against Dallas, because the Department is not a party to that proceeding and will not be bound by the decision. The Department's issuance of its interpretation will reduce Dallas' risk of being required to comply with inconsistent decisions, since the Texas appellate courts will be able to consider the Department's interpretation. For these reasons, Dallas urges the Department to issue a ruling interpreting the federal statutes.

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[1] To support their position that the Department should not decide the preemption issue, Fort Worth, the DFW Board, and American have cited a brief filed by this Department with the Board in one of the Board's Love Field proceedings. The brief asserted that the Board had no responsibility for administering that statutory provision. See, e.g., Fort Worth Comments at 15. Whether the brief's description of the Board's role was accurate, the cited statement does not accurately characterize the Department's responsibilities, as is apparent from the statute itself; the Supreme Court's decision in Wolens; the Department's decision in the Massport case, affirmed in New England Legal Foundation; and the FAA's Centennial Decision.

In arguing that the Department should nonetheless dismiss this proceeding, Fort Worth and American contend that the Texas courts can decide the relevant issues and should be allowed to do so. The Department agrees that the Texas courts could decide the federal statutory issues raised by the Love Field dispute without any interpretation being issued by it. However, the better course is for the Department to issue its own interpretation of the applicable statutes, which it administers and can enforce against Dallas as Love Field's owner. Fort Worth and American, moreover, never explain why the Department should dismiss this proceeding and thereby increase Dallas' risk of being subject later to conflicting orders from us and the state courts.[2]

Furthermore, as noted above, Fort Worth and American have contended in Docket OST-98-3667 that the Department may not grant Legend's application for certificate authority because Legend's service proposal allegedly violates the Wright and Shelby Amendments. The Department has the responsibility for determining whether Legend's application satisfies the statutory standards for certification. The existence of these issues in the Legend certificate proceeding thus further supports the Department's decision to rule on the federal law issues here.

American and Fort Worth err by asserting that the pendency of the state court case precludes the Department from issuing a ruling on the federal law issues. They wrongly claim that the Anti-Injunction Act, 28 U.S.C. 2283, prohibits the Department from issuing this order while the state court proceeding is pending. The Anti-Injunction Act bars federal courts from stopping state court proceedings (with some exceptions) but does not restrict federal agencies. The existence of a state court suit does not bar a federal agency from carrying out its responsibilities. In NLRB v. Nash-Finch Co., 404 U.S. 138 (1971), the Supreme Court declared, "The purpose of [the Anti-Injunction Act} was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." 404 U.S. at 146.

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[2] Fort Worth's supplemental motion to dismiss, filed December 1, mistakenly assumes that the state courts could issue a final decision on the dispute that would avoid other litigation. Since the state courts' decision would not bind the Department, their decision would not finally resolve the dispute.

The state court itself, moreover, has not opposed this proceeding. And the federal district court in Dallas will probably be deciding a case involving the same issues, despite the existence of the state court proceeding.

In addition, the Department has decided other cases where a related case was pending in a federal court. For example, the First Circuit affirmed the Department's decision on Massport's fees, reversed the district court's contrary decision, and held that the district court should have delayed deciding its case until the Department issued its decision. New England Legal Foundation, 883 F.2d at 173.[3] Cf. Alaska Airlines et al., Wien Acquisition, 82 CAB 1636, 1651 (1979).[4]

The Department disagrees with American's complaint that its ruling will increase rather than decrease the amount of litigation. In any event the Department as the administrator of the statutes has the responsibility to issue its interpretation of their meaning.

Finally, the Department does not agree with the suggestions by Fort Worth and American that, instead of issuing this order, it should present its views by either intervening or participating as an amicus in the state court proceedings. See, e.g., Fort Worth Motion to Dismiss at 9; American Comments at 80-82. The Department has the responsibility for administering the federal statutes and resolving the issues raised in the Legend certification case. Congress has entrusted the Department with the task of ensuring that airports and their owners comply with the requirements established by statute to achieve Congress' policy goals.

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[3] Fort Worth and American contend that the First Circuit's decision is not relevant, since one basis for the court's decision was the existence of complex factual issues involving airport rates. The dispute here, in contrast, appears to involve no complex factual issues. See, e.g., Fort Worth Reply at 3. The First Circuit, however, noted that the Massport fee dispute involved no factual disputes and based its decision in part on Congress' decision to make the Secretary responsible for administering federal aviation laws. New England Legal Foundation, 883 F.2d at 167, 172-173.

[4] The parties argue over whether the doctrine of primary jurisdiction applies to the federal law issues raised by the Love Field dispute. See, e.g., Fort Worth Comments at 13-18; Continental Express Reply at 20-23. The issue is not relevant here, since the Department is not considering whether the state courts must suspend their proceedings on primary jurisdiction grounds.

BACKGROUND TO FORT WORTH'S REQUEST FOR DISCLOSURE

Fort Worth suggests that the Department's staff may be biased and may have engaged in improper ex parte communications. It bases these suggestions on the contacts between Department officials and staff members, on the one hand, and several of the parties and on the General Counsel's letter to Continental Express. Fort Worth has used these allegations of possible bias and ex parte communications to demand that the Department disclose information regarding the General Counsel's letter to Continental Express and related matters.

Fort Worth, however, has not asked that any official or staff member of the Department be recused from this proceeding. No other party has supported Fort Worth's suggestions of possible bias and improper conduct. Fort Worth itself has not tried to show that any specific communication has prejudiced it, even though the state court discovery process has enabled Fort Worth to learn what the other parties told Department officials and staff members.[5]

The Department rejects Fort Worth's insinuations of improper conduct. Fort Worth has provided no factual or legal support for its allegations of improper conduct. Among other things, Fort Worth ignores the many contacts that its ally, American, has had with Department officials and staff members on Love Field issues and Fort Worth's own meeting with Department officials and staff members.

This order will first describe the contacts with the parties and the letter given Continental Express and then show why Fort Worth's allegations are entirely unsupported and that these actions were proper.

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[5] The state court allowed Fort Worth and other parties to conduct discovery into the parties' contacts with the Department on Love Field issues. Fort Worth has filed copies of interrogatory answers and deposition transcripts discussing the other parties' contacts that it obtained by discovery. In response, Legend filed similar documentation on the contacts by Fort Worth and American. Legend, however, contends that the contacts with the parties were proper. The Department believes that no federal court would have permitted the type of discovery authorized by the state court, since Fort Worth has failed to show any likelihood of bias or ex parte communications. See, e.g., Checkosky v. SEC, 23 F.3d 452, 489 (D.C. Cir. 1994); United States v. Morgan, 313 U.S. 409, 422 (1941). The state court discovery, however, has demonstrated that Fort Worth's allegations are baseless.

Department Contacts with the Parties

As discussed above, after the litigation began in the courts in Texas, most of the parties in the dispute, including American and Fort Worth, met with Department officials and staff members to urge the Department to take some action to help resolve the dispute. Some of these parties, primarily American and Legend, also sent letters and discussed the state court proceedings in telephone conversations with Department officials and staff members.

On May 6, 1998, Fort Worth's mayor and other Fort Worth representatives met with Department officials and staff members to ask the Department to mediate the dispute. Before the Department began this proceeding, American urged it in several meetings and telephone conversations with Department officials to take no action and to allow the state courts to resolve the dispute. American also argued that additional Love Field service would be harmful and unlawful. Legend Reply at 46-49; Legend Motion to Supplement the Record.

Dallas and Legend, on the other hand, urged the Department to intervene in the state court proceeding; if the Department was unwilling to do that, they suggested that it should issue a ruling interpreting the relevant federal statutes. They arged that the Department should intervene because the litigation involved important federal legal and policy questions that might be wrongly decided by the state courts if they were not given the Department's position on those issues. These meetings included a discussion of the relevant legal issues, since they necessarily wanted to show that their position on the legal issues was correct and that Fort Worth's position was incorrect. Legend also sent several letters urging the Department's intervention in the state court proceeding.

In all of these meetings and conversations, Department officials and staff members listened to the views of the parties but made no commitment and expressed no view on the legal issues.[6] After this proceeding began, Legend

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[6] Officials from both Continental Express and Legend have testified, for example, that they had no knowledge of the Department's intent to hold this proceeding until it published the order beginning the proceeding. Cox Answers to Deposition at 16, 22, attached to October 21 Fort Worth Motion to Supplement the Record; McArtor Deposition at 49-50, 55, 86, attached to October 19 Fort Worth Motion to Supplement the Record. American's suggestion, American Reply at 4, that the Department may have given some parties advance notice of its decision to conduct this proceeding is incorrect, for it told none of the parties.

wrote a letter intended to cause the Department to intervene in the state court proceeding; the letter did not discuss the merits of this proceeding. McArtor Deposition at 246-247, attached to October 19 Fort Worth Motion to Supplement the Record.

Department staff members and officials have had several contacts with Continental Express, primarily after this proceeding began, but those contacts resulted from Fort Worth's efforts to suggest that the opinion given Continental Express demonstrated improper favoritism. The Department staff members discussed the litigation with Continental Express to confirm that Fort Worth's allegation had no factual support whatever. Cox Answers to Deposition at 15-17, attached to October 21 Fort Worth Motion to Supplement the Record. Legend also informed Department officials of the allegations made by Fort Worth in the state court proceeding. These communications did not involve any discussion of the merits of this proceeding.

American has also had some contacts with Department officials and staff members after this proceeding began, primarily to discuss the charges made by Fort Worth in the state court proceeding. The DFW Board asked Department officials on numerous occasions to mediate the dispute, a request made later by a motion filed in the docket. Legend Motion to Supplement the Record.

Before this proceeding began, the Department 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 proceeding began, the Department received letters supporting Fort Worth's position from Senator Kay Bailey Hutchison and Congresswoman Kay Granger and status inquiries from Senator Lott, Congressman Martin Frost, and the staff of the Senate Appropriations Committee.

<u>The General Counsel's Letter to Continental Express</u>

On June 30, as noted, Nancy E. McFadden, the Department's General Counsel, sent Continental Express a letter discussing several issues relevant to the state court's hearing on the motions to enjoin Continental Express' proposed Love Field-Cleveland flights (we have placed a copy of her letter in the docket for this proceeding). This proceeding began eight weeks later, on August 25.

Continental Express had asked the Department whether it could issue a statement of its position on certain issues that were likely to be relevant at the hearing. The June 30 letter responded in part to the airline's request. Continental Express had asked her for the Department's position on four issues. Two of the issues were whether additional service at Love Field would decrease safety or threaten the viability of DFW. The General Counsel set forth the Department's earlier findings on those two issues. The other two issues were legal questions: whether Dallas could restrict service at Love Field to carry out its agreement with Fort Worth and whether the Wright and Shelby Amendments allow airlines to operate longhaul service at Love Field with regional jets. The letter stated that the Department had not specifically addressed those issues and expressed no opinion on them. It noted, however, that the earlier rulings on the proposals by Centennial Express and Dalfort had suggested that an airline could use aircraft with a passenger capacity of 56 passengers or less of any type to provide longhaul service from Love Field and that the Shelby Amendment had overturned her opinion that reconfigured large aircraft could not be used to provide longhaul service.

THE DEPARTMENT'S CONDUCT WAS PROPER

Neither the sending of the letter to Continental Express nor the contacts with the parties were improper. Fort Worth, despite its extensive discovery efforts, cites no facts indicating that any ex parte communications occurred (that is, communications occurring after the Department began this proceeding that discussed the merits of the federal law issues being considered here), that any Department official or staff member is biased, or that Fort Worth's due process rights have in any way been violated. Fort Worth has failed to explain how any statute, regulation, or judicial decision supports its claims.

Fort Worth's request, moreover, on its face is extraordinary -- Fort Worth essentially assumes that any contact with the parties opposing Fort Worth was improper, while any contact with Fort Worth and American is proper. In addition, the General Counsel's letter expressly refused to state an opinion on the legal issues being considered in this proceeding.

The various contacts with the parties on the dispute created no unfairness. As explained, Department officials and staff members met with most of the parties

in the litigation. Fort Worth has never tried to explain why it would be unfair for
the Department to meet with the parties opposed to its position when Fort Worth itself met privately with Department officials and staff members.[7] In any event, virtually all of the meetings with the parties occurred before this proceeding was begun. Those meetings did not involve any ex parte communications, for both the Administrative Procedure Act's ex parte rules and our ex parte rules do not restrict communications occurring before the beginning of the administrative proceeding. 5 U.S.C. 557(d)(1)(E); 14 C.F.R. 300.2. Fort Worth has cited no evidence that any communication occurring after we began this proceeding discussed the merits of the federal law issues being considered here or that the earlier communications have prejudiced its ability to present its case.

The discussions of the state and federal court litigation were proper. The Department has been a defendant in a federal court suit on Love Field issues, and several of the parties in the state court suit thought the Department should intervene in that proceeding to protect the federal interests at stake. Discussions focused on whether and why the Department should participate in the litigation are proper. Government agencies are often asked by parties in court proceedings to participate in order to present the United States' position. No court has ever held that such contacts prejudiced related administrative proceedings. The Department, moreover, declined to intervene in the state court proceeding.

Fort Worth has cited no evidence, despite its extensive discovery efforts, indicating that Continental Express or Legend actually tried to influence the outcome of this proceeding. The communications that occurred after this proceeding began primarily involved matters raised in the state court litigation (principally Fort Worth's charges of bias) and included no discussion of the issues in this proceeding. Legend's communications similarly represented renewed efforts to persuade the Department to intervene in the state court proceeding. McArtor Deposition, Exhibit 7, attached to October 19 Fort Worth Motion to Supplement the Record.

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[7] One of the Legend communications cited by Fort Worth as an alleged ex parte communication is a fax to a Department official referring to the Department's agreement to give Legend copies of materials given the Department by Fort Worth, American, and the DFW Board. December 9, 1997, fax from Edward Faberman, attached to October 13 Fort Worth Motion to Supplement the Record.

In addition, Fort Worth's position on the issue of the contacts is contrary to its position on how the Department should best state its position on the legal issues. Fort Worth asserts that, if the Department should take a position on the issues at all, it should do so by filing a brief stating that position in the state court proceedings. Fort Worth Motion to Dismiss at 9. If the Department had followed that course, the Department could have developed its litigation position in private consultations with parties and given no party a right to formally present its arguments to the Department. This proceeding, on the other hand, has given all parties a formal opportunity to present their arguments.

The Department is basing its decision on the legal issues on the pleadings filed in this proceeding, not on any information given it by a party outside the formal record. The courts will review this decision, moreover, on the basis of the analysis in this order and the record in this proceeding.

The General Counsel's letter to Continental Express was not improper. The letter on its face cannot support any claim of bias since she specifically declined to rule on legal issues that had not been previously resolved by the Department. Fort Worth itself has not objected in this proceeding to any of the statements made in the letter. The General Counsel's letter accurately presented the Department's position on the issues discussed in it. The Department staff attorney most familiar with Love Field issues drafted the letter, and the only revisions to the text of his draft were made by several Department officials and staff members who reviewed the draft.

Continental Express had requested the letter, since it thought that the state court could otherwise be unaware of the Department's position on several relevant issues. The importance of the issues reasonably caused the General Counsel to believe that providing a statement of the Department's position, to the extent that the Department had established a position, would assist the court. Accordingly, the letter was sent in a timely fashion.

Even if the General Counsel's letter were read as stating a position on issues relevant to this proceeding, that would not make this proceeding unfair. The Supreme Court has held that a statement of views on an issue by an agency member does not require the member's disqualification in an adjudicatory proceeding. FTC v. Cement Institute, 333 U.S. 683, 700-703 (1948). Staff officials are equally entitled to hold policy views. Texas Int'l-Pan American-National Acquisition Cases, 80 CAB 324, 337 (1979). See also National Airlines, re Board Employee Testimony, 82 CAB 160 (1979). The courts have similarly held that an

agency may fairly decide a proceeding even if the agency initially began the proceeding due to its determination that there was a likelihood of unlawful conduct by the respondent or if the agency had sought a preliminary injunction against the respondent pending completion of the agency proceeding. Withrow v. Larkin, 421 U.S. 35 (1975); Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166, 1174 (D.C. Cir. 1998).

We note that as well that Fort Worth suggested in the state court proceeding that the General Counsel agreed to respond to Continental Express' request because of past connections between the General Counsel and a lawfirm that allegedly represented the airline. There is no basis for Fort Worth's suggestion. The lawfirm was not involved in the matter and never discussed the opinion request with the General Counsel. The record compiled as a result of the state court discovery demonstrates that the firm never contacted the Department on this proceeding.

Statements That the Department, Dallas, and Legend Had Common Interests

In an apparent effort to limit discovery by Fort Worth in the state court proceeding, Legend and Dallas each objected to several of its discovery requests on the basis that this Department and Legend or Dallas had common interests under Texas law. American and Fort Worth suggest that Legend's statement puts in question our impartiality. Fort Worth Request for Limited Hearing; American Surreply at 4, n. 1.

The Department disagrees. Whatever action was taken by Legend and Dallas was taken without its authorization and without any commitment that it would agree with their position on the issues. Thus far the Department has taken no position on the merits in the district court suit filed by Dallas against it and Fort Worth and has made no promises to Legend or Dallas on what position it may ultimately take.

Denial of Requests for Disclosure and Abatement. Fort Worth has asked the Department to disclose various matters related to the opinion given Continental Express and to hold a limited hearing to investigate the alleged ex parte communications. Since Fort Worth has completely failed to substantiate its charges of unfairness, the Department will deny these requests. Due to its failure to show any indication of improper conduct, it has no right to investigate the Department's decisionmaking processes. As stated in Checkosky v. SEC, 23 F.3d 452, 489 (D.C. Cir. 1994), "Requiring an agency to produce such internal materials and allowing litigants to depose agency officials about such matters

would be warranted only in the rarest of cases." See also United States v. Morgan, 313 U.S. 409, 422 (1941). This is clearly not a case where a party is entitled to disclosure of the Department's procedures and decisionmaking.

Furthermore, the state court has already allowed Fort Worth to pursue these matters by discovery. Fort Worth has failed to explain why it needs any additional opportunity to investigate the issue.

Fort Worth also asked the Department to abate this proceeding until it conducts more discovery in the state court case. The Department sees no need to delay its decision on that ground. Fort Worth has provided no evidence of bias or improper conduct. There is therefore no reason to delay this proceeding. Fort Worth in any event has conducted additional discovery and still failed to find evidence supporting its allegations of improper conduct.

ORAL ARGUMENT

The DFW Board filed a motion for oral argument four days after the deadline for reply comments. The DFW Board asserts that the issues being considered here are the kind of issues often considered by the courts of appeals, that the courts of appeals normally decide such issues only after holding an oral argument, and that the Department should therefore hold an oral argument. American requested an oral argument in its reply comments. American Reply at 28. Fort Worth later filed its own motion for oral argument.

The Department denies these requests. Parties have no due process right to an oral argument. FCC v. WJR, The Goodwill Station, 337 U.S. 265 (1949). The Administrative Procedure Act does not require oral arguments in agency proceedings. The Department rarely hold oral arguments. No one has shown that an oral argument in this proceeding would be useful or necessary. Moreover, no one claims that it cannot adequately present its arguments in their written comments and reply comments. Scheduling an oral argument would also delay the issuance of a decision.

The Department is unpersuaded by the DFW Board's citation of its intent to hold an oral argument before issuing a decision on the application by American and British Airways for approval and antitrust immunity for their proposed alliance. The Department stated that that case was "an exceptional case" that involved difficult factual issues and "an enormous degree of regulatory complexity." Order 97-9-4 (September 5, 1997) at 16-17. The Department does not believe that this case raises issues requiring an oral argument.

MEDIATION

The DFW Board has asked the Department to act as mediators to settle the dispute. The DFW Board also asks that the Department suspend this proceeding during the mediation process. Dallas, Southwest, Continental Express, and Legend oppose this suggestion. They assert that the DFW Board is trying to delay the issuance of a ruling on the federal law issues. While mediation could be desirable later, successful negotiations would be unlikely without the issuance of the Department's interpretation of the federal statutes. Dallas additionally suggests that the Department could not appropriately act as a mediator when it may later issue an order on the legal issues presented in this proceeding.

The Department encourages the parties to settle the dispute privately. A settlement acceptable to all of the parties would be the best outcome. The parties' current positions are far apart, and the state court's efforts at mediation were unsuccessful. Since the state court has already established a mediation process, there is a forum for settlement efforts if the parties consider further discussions worthwhile.

OTHER PROCEDURAL ISSUES

The Department determined to issue a decision promptly in this proceeding. It noted that the state and federal courts were moving toward deciding the cases next year. Order 98-8-29 at 5. In fact, on October 15 the state court issued its decision on the summary judgment motions. The Department set a procedural schedule that gave the parties adequate time to file comments and reply comments, and it later extended that time due to requests by Fort Worth, American, and the DFW Board. Order 98-9-5. The Department sees no reason to delay this proceeding further.

American nonetheless complains that the Department have accelerated the schedule without cause. American Comments at 2. American, however, neither explains why the courts' schedules make it unreasonable to resolve the issues promptly nor shows that the comment schedule has prejudiced it.

ACCORDINGLY:

1. The Department of Transportation denies the motions of Fort Worth for dismissal;

2. The Department of Transportation denies the requests by Fort Worth for disclosure and abatement;

3. The Department of Transportation denies the motions for oral argument;

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

5. The Department of Transportation denies the motion for mediation; and

6. The Department of Transportation grants the motions for leave to file surreplies and other unauthorized documents.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
And International Affairs

(SEAL)

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