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Order 2000-1-20

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

Issued by the Department of Transportation  
on the 24th day of January, 2000

Application of

**LEGEND AIRLINES, INC.**

for a waiver of the provisions of 14 CFR 201.5

Served: January 24, 2000

Docket OST-2000-6788-5

**ORDER GRANTING WAIVER**

**Summary**

By this order, we are granting Legend Airlines, Inc. (Legend) a waiver of section 201.5 of our rules (14 CFR 201.5) in order to permit it to issue tickets and accept payments from prospective passengers prior to receiving effective authority from the Department.

**Background**

By Order 98-12-29, the Department found Legend Airlines, Inc., fit and issued it a certificate to engage in interstate passenger air transportation.<sup>1</sup> Legend's certificate provided that the authority therein would not become effective until the sixth (business) day after we had received, among other things, the appropriate Federal Aviation Administration documents reflecting the carrier's operating authority, evidence of funding meeting our financial fitness criteria, and a statement describing any changes it had undergone in its ownership, key personnel, operating plans, financial posture, or compliance history since the date of the Show Cause order in this case.<sup>2</sup>

Section 201.5 prohibits a company that has been found fit, but has not yet been issued an effective certificate by the Department, from accepting any payments or issuing tickets for air transportation operations.

On January 12, Legend filed a request in Docket OST-2000-6788 for a waiver of the provisions of section 201.5 to the extent necessary to allow it to sell tickets and receive payments. In support of its request, Legend states that it is planning to commence its flight operations in late

<sup>1</sup> Legend plans to provide scheduled passenger services out of Dallas' Love Field using 56-seat DC-9 aircraft.

<sup>2</sup> Order 98-10-15, issued October 16, 1998.

February or early March and that it would like to issue and accept payments for tickets in advance of its planned start of flight services. Legend asked that its request be acted on by January 14 so that it could complete its arrangements for selling space on its prospective flights.<sup>3</sup>

Although the Department typically acts on requests such as Legend's without waiting for the filing of answers, in this case, because of the interest expressed by several parties, we decided to give interested persons until noon, January 18, to respond to the application.<sup>4</sup>

On January 18, the City of Fort Worth filed a response opposing Legend's request. Fort Worth states that grant of the relief sought by Legend would not be in the public interest because the carrier is currently the subject of a Final Judgment issued by a Texas state court which prohibits Legend from offering scheduled passenger service from Love Field, Texas, to points beyond Texas and the four contiguous states. No other objections to Legend's request were received in the docket, although we did receive a letter dated January 17 from the Love Field Citizens Action Committee (Committee).

### **Decision**

After reviewing the application and the responses, we have decided to grant Legend's request for waiver. We grant such requests routinely when the applicant remains fit, appears likely to obtain its FAA authority before its proposed start-up date, and has put in place mechanisms to protect prospective passenger funds and expectations.

Our primary concern in acting on "pre-sale" requests such as Legend's is the protection of consumers and their funds. Legend has agreed to establish procedures designed to protect its prospective customers. Specifically, Legend states that it will: (1) advise each customer that it does not currently possess full authority to operate the services for which the ticket is being issued and will not have such authority until such time as it is issued by the Department; (2) advise each customer that he or she may obtain a full refund of the purchased ticket price, without penalty, if the customer requests the refund and cancels his or her reservation before Legend commences revenue flight operations; (3) place all ticket sale proceeds (from both cash and credit card sales) into an irrevocable escrow account until Legend receives its final certification from the Department;<sup>5</sup> and (4) establish a comprehensive consumer protection program that will provide for customers to be carried on other airlines offering nonstop flights in the markets Legend intends to serve and notify customers that such alternative service will be

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<sup>3</sup> Legend states that it expects that a majority of its ticket sales will be through travel agents and that it will take several weeks after receipt of the waiver requested here for such arrangements to be fully in place.

<sup>4</sup> See Notice issued January 14, 2000.

<sup>5</sup> Legend submitted a copy of its escrow agreement which we have reviewed and find acceptable.

through Dallas-Fort Worth International Airport instead of Love Field.<sup>6</sup> In addition, as noted earlier, Legend has previously been found fit to conduct interstate air transportation operations, and updated information the carrier has provided to us indicates that it remains so. Finally, we have confirmed with the Federal Aviation Administration that Legend is progressing satisfactorily towards completion of that agency's certification process and is likely to have its final FAA authority prior to the proposed start-up date.

Fort Worth contends that we should not grant Legend's request because a Texas trial court held that Legend's proposed service would be unlawful and because Legend cannot predict the outcome of the proceeding before the Fifth Circuit in which that Court is reviewing our orders in the *Love Field Service Interpretation Proceeding*. In those orders,<sup>7</sup> we determined that Legend's service would be lawful and that federal law prohibits Dallas and Fort Worth from interfering with Legend's proposed service.

Fort Worth's contentions are unpersuasive. First, while the state trial court held that Legend may not operate its proposed service, we found the contrary. We concluded on the basis of the language and intent of the relevant federal statutes and the judicial and administrative decisions interpreting those statutes that Legend may operate its service and that Dallas and Fort Worth have no right to stop it from doing so. While our decision is under review by the Fifth Circuit, we have not stayed it, and it is effective.<sup>8</sup> In fact, we recently denied Fort Worth and American's request to stay our orders on the grounds that they had failed to show irreparable injury if the orders were not stayed and that staying the orders would be contrary to the public interest.<sup>9</sup> Moreover, as we stated in denying the motions by Fort Worth and American for a stay of our decision, we think it unlikely that the Fifth Circuit will reverse our decision.<sup>10</sup> If the Court does invalidate our decision, however, travelers purchasing Legend tickets will be protected by the escrow account and alternate service arrangements that the airline has established.

The state trial court's decision provides no basis for denying Legend's request. Legend and other parties have appealed that decision to the Texas Court of Appeals. That court has stayed proceedings until the Fifth Circuit issues its decision.<sup>11</sup> If the Fifth Circuit affirms our decision, we would expect that the state appellate court would defer to the federal court's

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<sup>6</sup> In addition, Legend has agreed to advise prospective customers that not only will alternate transportation be provided from DFW, but also that such transportation may be in a different class of service than offered by Legend. Moreover, if substitute air transportation cannot be obtained, Legend agreed that it would compensate affected passengers by paying them 200 percent of the ticket price paid, inclusive of the refund.

<sup>7</sup> Orders 98-12-27 (December 22, 1998) and 99-4-13 (April 13, 1999).

<sup>8</sup> Order 2000-1-18 (January 20, 2000) at 17-18, 19.

<sup>9</sup> Order 2000-1-18.

<sup>10</sup> Order 2000-1-18 at 15.

<sup>11</sup> Order 2000-1-18 at 5.

decision on the federal law questions raised by Legend's proposed service.<sup>12</sup> If Fort Worth or other parties threaten to use the state court proceedings to block Legend from beginning operations in advance of the Fifth Circuit's decision, we can take appropriate action to protect the rights of Legend and other airlines to conduct the Love Field services authorized by Congress.

The Love Field Citizens Action Committee has objected to Legend's beginning operations on environmental grounds. The Committee, a group representing the residents who live near Love Field, claims that Legend's service would cause environmental harm and that the FAA must investigate the environmental impact of Legend's operations. The Committee suggests that granting the exemption would indicate that the FAA will not consider those environmental issues. We are confident that the FAA has studied the environmental issues insofar as federal law requires it to do so.<sup>13</sup>

The Committee additionally questions whether Legend has satisfied its obligation to provide the Department information on changes in Legend's ownership, personnel, operating plans, and financial position. We would not grant this exemption if Legend had not satisfied us that it has complied with this requirement.

Finally, the Committee mistakenly contends that Legend should serve the Dallas-Fort Worth area through Dallas-Fort Worth International Airport, as other airlines do, and that there is no public interest reason for Legend's planned use of Love Field. By enacting the Wright Amendment and then subsequently the Shelby Amendment, Congress determined that some types of Love Field service are in the public interest. We cannot ignore Congress' judgment.<sup>14</sup>

In view of Legend's acceptance of the consumer-protection conditions that we have prescribed, its demonstration of continuing fitness, and affirmation by the FAA of the carrier's satisfactory progress toward certification, we find that it is in the public interest to grant Legend's request for a waiver of the pre-operational sales prohibitions of section 201.5.

**ACCORDINGLY:**

1. We grant Legend Airlines, Inc., a waiver of 14 CFR 201.5 to the extent necessary to allow it to issue tickets and accept payments from prospective passengers prior to receiving effective Department authority, subject to the conditions described above.

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<sup>12</sup> Cf. *City of Dallas v. Continental Airlines*, 735 S.W. 2<sup>nd</sup> 496, 503 (Tex. Ct. App. 1987), cited in Order 98-12-28 (December 22, 1998) at 6-7.

<sup>13</sup> Unlike Legend, airlines that already have certificate authority are free to operate at Love Field within the limits set by federal statute without further environmental review. American, for example, began operating fourteen daily roundtrip flights between Love Field and Austin. Thus, a denial of Legend's application for certificate authority could not prevent alleged environmental harm feared by the Committee from expanded Love Field service.

<sup>14</sup> Order 2000-1-18 at 14.

2. We reserve the right to amend, modify, or revoke this authority without hearing.
3. We will serve a copy of this order on the persons listed in Attachment A.

By:

**A. BRADLEY MIMS**  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

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