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**THE CONTINUING LEGAL BATTLE TO DEFINE AIR SERVICE AT LOVE FIELD—FIFTH CIRCUIT HOLDS THAT DEPARTMENT OF TRANSPORTATION IS IN BETTER POSITION THAN COURTS TO INTERPRET PROVISIONS OF WRIGHT AND SHELBY AMENDMENTS.**

**AMERICAN AIRLINES V. DEPARTMENT OF TRANSPORTATION,  
202 F.3D 788 (5TH CIR. 2000).**

KEN THOMAS

**T**HE DEBATE OVER the extent of allowable air service operating out of the Love Field airport in Dallas, Texas, has been ongoing since development of the Dallas-Fort Worth International Airport (DFW) began in 1964.<sup>1</sup> As a consequence of lawsuits relating to the passage of the Wright and Shelby Amendments<sup>2</sup> (Amendments), both of which attempted to define the scope of air service at Love Field, various interested parties petitioned the United States Department of Transportation (DOT) to rule on several issues pertaining to the interpretation of the Amendments.<sup>3</sup> Several of the parties challenged the DOT's interpretations. Those challenges led to the consolidated appeal in *American Airlines v. Department of Transportation*.<sup>4</sup> In this case, the Fifth Circuit was presented with issues ranging from the allegation that the DOT's interpretive proceedings violated numerous procedural rules to the examination of the "reasonableness" of the DOT's final interpretations of the

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<sup>1</sup> In 1964, the Civil Aeronautics Board paved the way for the development of DFW Airport by requiring the Texas cities of Dallas and Fort Worth to cooperate in building and operating a new regional airport. See *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 793 (5th Cir. 2000), *cert. denied sub nom*, *City of Fort Worth v. Dep't of Transp.*, 120 S. Ct. 2740 (2000).

<sup>2</sup> See Int'l Air Transp. Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980) [hereinafter Wright Amendment]; Dep't of Transp. & Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997) [hereinafter Shelby Amendment].

<sup>3</sup> *Am. Airlines*, 202 F.3d at 795.

<sup>4</sup> *Id.* at 793.

Amendments. The Fifth Circuit concluded that the DOT has more expertise than the courts in the interpretation of federal aviation-related issues and upheld the DOT's "reasonable" interpretations.<sup>5</sup> The court correctly analyzed all elements of the grounds for appeal and appropriately concluded that the DOT's interpretations were reasonable and within the power that Congress had allocated to the DOT in its effort to regulate federal air traffic.

Prior to 1964, the cities of Dallas and Fort Worth, located within 40 miles of each other, operated separate and independent airports. The Civil Aeronautics Board (CAB), the predecessor of the DOT, determined that the operation of separate airports created competition in air service that was detrimental to the region.<sup>6</sup> Consequently, in 1964, the CAB ordered Dallas and Fort Worth to build an airport that would be cooperatively operated by both cities. In response, Dallas and Fort Worth created the DFW Board.<sup>7</sup> The Board adopted the 1968 Regional Airport Concurrent Bond Ordinance (Ordinance) that provided for the phase-out of certain air services from Love Field (along with air services at other Dallas-Fort Worth regional airports) and the transfer of those air services to the new DFW facility.<sup>8</sup> Southwest Airlines, which was exempt from CAB control because it operated only intrastate flights out of Love Field, refused to transfer its operations to the DFW facility.<sup>9</sup> An ongoing legal battle began in an attempt to define the allowable scope of Love Field air service.<sup>10</sup>

After the passage of the Shelby Amendment in 1997, numerous airlines operating or planning to operate out of Love Field began offering service to take advantage of the amendment's additional service exemptions (beyond those in the Wright Amendment).<sup>11</sup> Southwest Airlines, an established operator of intrastate flights from Love Field (as well as flights to the ex-

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<sup>5</sup> *Id.* at 813.

<sup>6</sup> *Id.* at 793.

<sup>7</sup> *Am. Airlines*, 202 F.3d at 793. The CAB intended for DFW to be the primary source of air service in the north Texas region.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* The first lawsuit was filed in an effort to force Southwest Airlines from Love Field. The court ruled that the airline had a "federally declared right" to continue using the airport as long as it remained open. See *Texas Int'l Airlines v. Southwest Airlines Co.*, 546 F.2d 84, 103 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977).

<sup>11</sup> *Am. Airlines*, 202 F.3d at 794-95.

empted states allowed by the Wright Amendment), began operating flights to Mississippi and Alabama.<sup>12</sup> Legend Airlines, a start-up service, announced plans to provide long-haul service to states outside the exempted service area by reconfiguring high-capacity jet aircraft to hold less than 57 passengers.<sup>13</sup> Continental Express announced its intention to provide regional jet service (with less than 57 passenger seats) direct to Cleveland.<sup>14</sup>

As a result of the Shelby Amendment's passage, Fort Worth sued the city of Dallas, the DFW Board, Legend Airlines, Continental Airlines, and Continental Express in state court in an attempt to prevent expanded air service at Love Field.<sup>15</sup> The state lawsuit centered around the language of Section 9.5 of the Ordinance, which required Dallas and Fort Worth to "take such steps as may be necessary, appropriate, and legally permissible. . .to provide for the orderly, efficient, and effective phase-out at Love Field. . .of any and all [air carriers] and to transfer such activities to [DFW]."<sup>16</sup> The state court ruled that federal laws regulating air traffic did not preempt the air service "phase-out" requirements of the Ordinance and that Dallas was contractually bound to prohibit interstate flights out of Love Field.<sup>17</sup> While the state suit was pending, the city of Dallas sued the city of Fort Worth and the DOT in federal court to obtain a declaratory judgment finding that Dallas was not required to prohibit eligible air carriers from operating out of Love Field within the service provisions of the Amendments.<sup>18</sup>

While the state and federal cases were pending, several of the parties petitioned the DOT to initiate administrative proceedings for the purpose of interpreting the provisions of the Amendments at issue in those suits.<sup>19</sup> The DOT informed the parties that it intended to rule on four issues of federal law and

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<sup>12</sup> *Id.* The Shelby Amendment added the states of Mississippi, Alabama, and Kansas to the list of states already exempt from the Wright Amendment's restrictions on direct flights from Love Field (Louisiana, Arkansas, Oklahoma, and New Mexico). See Wright Amendment, *supra* note 2, at § 29(c); see also Shelby Amendment, *supra* note 2, at § 337(b).

<sup>13</sup> *Am. Airlines*, 202 F.3d at 795.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 793; see also *City of Fort Worth Internet Briefing on Commercial Air Passenger Service in the Dallas/Fort Worth Area*, (last visited Sept. 23, 2000) <<http://www.dfwnet.com/cmo/Wright/bondord.htm>>.

<sup>17</sup> *Am. Airlines*, 202 F.3d at 795.

<sup>18</sup> *Id.*

<sup>19</sup> *Am. Airlines*, 202 F.3d at 795.

gave the parties an opportunity to submit comments.<sup>20</sup> The DFW Board submitted a request asking that the DOT also determine the effect of increased air service at Love Field on DFW Airport.<sup>21</sup> The DOT granted the Board's request and allowed the parties an extension of time to file responses for this fifth issue.<sup>22</sup> On December 22, 1998, the DOT issued a Declaratory Order resolving the five questions at issue.<sup>23</sup> The DOT interpretations were not accepted by all parties and a petition for review was submitted to the Fifth Circuit in the present case. The Fifth Circuit determined that the DOT interpretations were reasonable and that the court would defer to the expertise of the DOT in federal aviation issues.<sup>24</sup> The United States Supreme Court denied the petitioners' writ of certiorari on June 29, 2000.<sup>25</sup>

The critical issues in this case can be divided into two distinct categories: procedural issues and interpretive issues. Regarding the procedural issues, some of the petitioners in the present case argued that: (1) DOT's procedures violated the Administrative Procedure Act (APA); (2) DOT's decision contravened a prior Texas state court ruling on the same issues in dispute; and (3) DOT did not comply with environmental regulations prior to reaching its decision.<sup>26</sup> With respect to the interpretive issues, the petitioners sought a detailed review of each of the interpretations of federal law on which the DOT ruled. First, the petitioners argued that the Airline Deregulation Act (ADA) did not preempt the contractual obligations of Dallas and Fort Worth under the Ordinance.<sup>27</sup> Second, the petitioners argued that the Amendments did not authorize long-haul service (flights to states outside of the Amendments' exempted service areas) from Love Field, contrary to the DOT's findings.<sup>28</sup> Third, the petitioners argued that the contractual "use agreements"

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<sup>20</sup> Dep't of Transp. Order 98-8-29 (Docket OST-98-4363) at 10, 13 (Aug. 25, 1998).

<sup>21</sup> *Am. Airlines*, 202 F.3d at 795.

<sup>22</sup> *Id.* See also Dep't of Transp. Order 98-9-5 (Docket OST-98-4363) at 2-4 (Sept. 3, 1998).

<sup>23</sup> Dep't of Transp. Order 98-12-28 (Docket OST-98-4363) (Dec. 22, 1998).

<sup>24</sup> *Am. Airlines*, 202 F.3d at 813.

<sup>25</sup> *City of Fort Worth*, 120 S. Ct. at 2740.

<sup>26</sup> *Am. Airlines*, 202 F.3d at 796; see also Admin. Procedure Act, 5 U.S.C. § 551 *et. seq.* (2000) [hereinafter Administrative Procedure Act (APA)].

<sup>27</sup> *Am. Airlines*, 202 F.3d at 804; see also Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in scattered sections of 49 U.S.C.) [hereinafter Airline Deregulation Act (ADA)].

<sup>28</sup> *Am. Airlines*, 202 F.3d at 808.

signed by numerous air carriers as a result of the Ordinance were not preempted by federal law.<sup>29</sup> Finally, numerous parties to the present action argued that permitting an air carrier to provide "through service" between Love Field and any other airport outside the permitted exclusion zones violated the Wright Amendment.<sup>30</sup> In its analysis of each interpretive issue, the court looked closely at the level of review it would exercise over the DOT's findings.<sup>31</sup>

Judge Garza, writing for the Fifth Circuit, began the court's decision by examining the procedural issues raised by the petitioners. The court determined that the DOT's proceedings did not violate the APA because the DOT complied with minimum procedural notice requirements and because the DOT's contacts with Continental Express and Legend Airlines were permissible under the DOT regulations in as much as they did not affect the outcome of the DOT's proceedings.<sup>32</sup> Furthermore, the court ruled that common law preclusion doctrines were not applicable to the present case and, as such, the DOT was not required to give preclusive effect to previous state court rulings on the issues at hand.<sup>33</sup> The court noted that the regulation of aviation is a federal issue and Congress created the DOT with preeminent authority over such matters.<sup>34</sup> In discussing the final procedural issue, the court examined the contention that the DOT violated regulatory procedures by failing to file an Environmental Impact Study (EIS) prior to issuing its interpretations of federal law.<sup>35</sup> Under the National Environmental Policy Act (NEPA), a governmental agency must perform an EIS when the acts of that agency constitute "major Federal actions significantly affecting the quality of the human environment;" but, as the court noted, the DOT was merely interpreting federal law created by Congress.<sup>36</sup> Therefore, the court determined that

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<sup>29</sup> *Id.* at 810.

<sup>30</sup> *Id.* at 812.

<sup>31</sup> *Id.* at 796.

<sup>32</sup> *Am. Airlines*, 202 F.3d at 797-98. DOT regulations prohibit certain *ex parte* contacts between the agency and parties to an administrative proceeding. See 14 C.F.R. § 300.2(a) (2000).

<sup>33</sup> *Am. Airlines*, 202 F.3d at 801.

<sup>34</sup> *Id.*

<sup>35</sup> The Love Field Citizens Action Committee, a petitioner in the present case, argued that the DOT was required to perform an EIS since its interpretations of the Shelby Amendment, which would inevitably increase air traffic at Love Field, constituted a "major federal action" within the meaning in the NEPA. *Id.* at 803.

<sup>36</sup> *Id.* See also Public Health & Welfare Act, 42 U.S.C. § 4332(2)(C) (1994).

congressional lawmaking, not the DOT's interpretations of those laws, triggered the requirement of an EIS.<sup>37</sup>

The court then reviewed the DOT's interpretations of the provisions of the Amendments and certain provisions of the ADA. The court ruled that the DOT has the authority and expertise to interpret the provisions of the ADA; therefore, the court deferred to the DOT's determination that the power to restrict air service out of Love Field was outside Dallas' rights as "proprietor" of the airport.<sup>38</sup> The court then noted that a plain reading of the Amendments permits the operation of long-haul air service out of Love Field within the prescribed aircraft size limitations (a "commuter airline").<sup>39</sup> The court reviewed the DOT's interpretation of a "commuter airline" using the *Chevron* analysis—a two-step test developed by the United States Supreme Court to review a governmental agency's interpretation of a statute that it is charged with administering.<sup>40</sup> The court determined that the DOT's interpretation of a "commuter airline" (to include both turboprop and jet aircraft with less than 57 passenger seats) was reasonable; therefore, the court deferred to the DOT's interpretation.<sup>41</sup> Additionally, the court used the *Chevron* analysis to conclude that the DOT was reasonable in its conclusion that the commuter airline exemption applied to *all* air service restrictions proscribed by the Wright Amendment.<sup>42</sup> In this instance, the DOT determined that any air carrier that met the size and passenger limits of a "commuter" airline (as specified in the Wright Amendment) may

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<sup>37</sup> *Am. Airlines*, 202 F.3d at 803.

<sup>38</sup> *Id.* at 804-8. The court was primarily concerned with the provision of the ADA that says a State may not "enact or enforce a law, regulation, or other provision" that affects the "route" or "service" of an air carrier. *See* 49 U.S.C. § 41713(b)(1) (1994). However, the exception to this provision gives a State the authority to exercise its "proprietary powers" as owner or operator of an airport. *See id.* § 41713(b)(3).

<sup>39</sup> *Am. Airlines*, 202 F.3d at 809.

<sup>40</sup> *Id.* at 808. In the *Chevron* analysis, the court must first determine whether Congress has defined a clear intent as to the meaning of a provision of the law. If congressional intent is clear, the court will give effect to the clear intent. If congressional intent is not clearly expressed, the court must determine if the agency's interpretation of the issue at hand is reasonable. If the court finds the agency's interpretation to be reasonable, the court will uphold that interpretation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>41</sup> *Am. Airlines*, 202 F.3d at 810.

<sup>42</sup> *Id.* at 812-13. The petitioners argued that the restrictions on through service in the Wright Amendment applied to commuter aircraft as well as larger aircraft. *See id.*

provide "through service" from Love Field to any airport outside the States exempted in the Amendments so long as that airline uses a city within Texas as a connecting airport.<sup>43</sup> No dissenting opinions were presented in this case, as Judges Duhe and Barksdale joined Judge Garza in the opinion.<sup>44</sup>

The Fifth Circuit correctly analyzed the procedural issues presented in this case. The court noted that the DOT precisely specified the issues it would rule on, allowed the interested parties the opportunity to comment on those issues, and then ruled on those precise issues, as well as a factual issue that should have been obvious to all parties.<sup>45</sup> Therefore, the court was correct in holding that the DOT provided adequate notice to the parties of the issues to be discussed.<sup>46</sup> In analyzing the propriety of the contact that various parties had with the DOT, the court looked to the timing and nature of those contacts to determine if they had any effect on the interpretive rulings. The court determined that some contacts occurred prior to DOT proceedings, so they did not violate DOT regulations on *ex parte* contact.<sup>47</sup> Additionally, the court noted the contacts that took place during the interpretive proceedings did not involve the merits of the proceedings, but rather were requests by the parties for the DOT to intervene on their behalf in the pending lawsuits.<sup>48</sup> From this review, the court correctly determined that the contacts were not improper since they had no persuasive effect on the DOT's findings.<sup>49</sup>

Additionally, the court correctly ruled that the DOT did not have to give preclusive effect to prior state court rulings on the issues in question. This decision was based on the court's view that the resolution of the federal statutory questions in the present case is better left to the expertise and authority of the DOT.<sup>50</sup> As a final procedural inquiry, the court appropriately

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 792, 813.

<sup>45</sup> *Id.* at 797. Petitioner Fort Worth argued that it was not given adequate notice that the DOT would investigate the effect of increased air service at Love Field. The court found that no notice of this additional factual issue was required because the parties could reasonably expect this issue to be discussed based on the nature of the interpretive issues that the DOT would be reviewing. *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Am. Airlines*, 202 F.3d at 798.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 798-801.



determined that the DOT was not required to prepare an EIS since the interpretative findings issued by the DOT were not the root cause of the increased flight traffic at Love Field.<sup>51</sup>

In its review of the DOT's interpretive findings, the Fifth Circuit correctly applied the *Chevron* analysis to determine whether the court should defer to the DOT's findings. For each of the disputed issues, the court correctly found that the DOT's interpretations of the Amendments and the ADA were "reasonable" (thereby satisfying step two of the *Chevron* analysis); consequently, the court deferred to the DOT's interpretations.<sup>52</sup> The Fifth Circuit conducted an extremely detailed inquiry using thorough and logical reasoning in resolving all points of contention in the present petition.

Interestingly, the Fifth Circuit specifically noted that it did not feel that the DOT's interpretations were the only possible interpretations of the Amendments; but, the court noted that it did not have the proper expertise in aviation-related issues to overrule the DOT when the agency's findings were reasonable.<sup>53</sup> Additionally, the court showed concern over how its ruling would affect the intended operation of the DFW Airport. The court's main worry appears to be that small, commuter airlines operating out of Love Field might begin cooperative service with larger airlines operating from other Texas airports (such as Houston or San Antonio) to provide long-haul service originating at Love Field, which could be detrimental to the volume of air service at DFW.<sup>54</sup> It is important to note that, as of September 2000, some air carriers operating out of Love Field have not taken advantage of the additional service area exemptions provided by the Shelby Amendment.<sup>55</sup> Consequently, the concerns of the court have not been fully realized since DFW remains the sole provider (in the north Texas region) for certain air service routes that are permitted to originate at Love Field.

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<sup>51</sup> *Id.* at 803.

<sup>52</sup> *Id.* at 804-13.

<sup>53</sup> *Am. Airlines*, 202 F.3d at 813.

<sup>54</sup> *Id.*

<sup>55</sup> For example, as of September 23, 2000, Southwest Airlines did not operate flights between Love Field and any airport in Kansas—a location exempted from the service limitations of the Wright Amendment as supplemented by the Shelby Amendment. Southwest Airlines does operate flights to Kansas City International Airport, which is located in Missouri. See Southwest Airlines Schedule Homepage, at <<http://www.southwest.com/cgi-bin/requestSchedule.htm>> (last visited Sept. 23, 2000).

This case represents another dispute in the long and bitter struggle to define the limits of air service permitted at Love Field. The debate involves a myriad of legal questions and foremost among them are the interpretations of the Wright and Shelby Amendments. As this case points out, the courts are willing to defer to the expertise of the DOT in the interpretation of federal aviation law, provided that those interpretations are reasonable. Further litigation will surely follow, but the Fifth Circuit has provided a clear signal to future litigants that the court will defer to the DOT's reasonable interpretations of the provisions of the Amendments.



# **Essay**

