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## New Entrant Airlines and Federal Grant Assurances: The End of Southwest's Dominant Presence at Love Field

Alex Paez  
*Southern Methodist University, Dedman School of Law*

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**NEW ENTRANT AIRLINES AND FEDERAL GRANT  
ASSURANCES: THE END OF SOUTHWEST'S  
DOMINANT PRESENCE AT LOVE FIELD**

ALEX PAEZ\*

**F**OR DECADES, SOUTHWEST AIRLINES enjoyed an unprecedented reign over the Dallas Love Field Airport.<sup>1</sup> However, recent legislation opened the door to new competitors of Southwest.<sup>2</sup> Historically, direct air travel out of Love Field was restricted to a small number of nearby states.<sup>3</sup> In 2014, Congress lifted the interstate ban on air travel to and from Love Field through the Wright Amendment Reform Act (WARA).<sup>4</sup> This change brought about a renewed interest from airlines seeking to service flights out of Love Field.<sup>5</sup> Recently, in *City of Dallas v. Delta Air Lines*, the Fifth Circuit ordered the City of Dallas to force Southwest to continue its subleasing arrangement with Delta Air Lines (Delta) while Delta pursues its litigation efforts to obtain a primary lease agreement.<sup>6</sup> The court's analysis primarily centered around competing interpretations within contract law and whether Delta enjoyed rights as a third-party beneficiary to the leasing arrangement between the City and Southwest.<sup>7</sup> In doing so, the court participated in an otherwise superfluous analysis of the parties' competing interpretations and ignored the bigger picture by failing to fully analyze WARA

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\* J.D. Candidate, SMU Dedman School of Law, May 2020; B.S., University of Colorado, December 2012.

<sup>1</sup> H.R. REP. NO. 109-600, at 3 (2006).

<sup>2</sup> See Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011 (2006).

<sup>3</sup> H.R. REP. NO. 109-600, at 2.

<sup>4</sup> *Id.* at 9.

<sup>5</sup> Terry Maxon, *End of the Wright Amendment: Next Leg of the Journey*, DALL. MORNING NEWS, <http://res.dallasnews.com/interactives/dfw-love-field/> [https://perma.cc/Q2MQ-L46D].

<sup>6</sup> *City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 290 (5th Cir. 2017).

<sup>7</sup> *Id.* at 287-88.

and the limitations it imposes on the underlying leasing contracts.

In 1973, the City of Dallas and the City of Fort Worth teamed up to create one centralized airport for the two cities.<sup>8</sup> However, some savvy entrepreneurs, namely Southwest Airlines, saw a business opportunity in remaining at Love Field by not signing the letters of agreement.<sup>9</sup> As part of the initiative, the two cities implemented bond ordinances to entice airlines at their respective city airports to sign letters of agreement stating that they would move their operations to the newly built DFW Airport.<sup>10</sup> The two cities did not actually exclude commercial operations from being conducted at the existing city airports, but instead merely asked the other airlines to relocate.<sup>11</sup> Southwest was able to use federal airport regulations to successfully argue that they would be unjustly discriminated against by being forced to leave Love Field.<sup>12</sup> Later, Southwest successfully fought to extend its reach beyond the Texas market with the enactment of the Airline Deregulation Act in 1978.<sup>13</sup> However, this did not come without some contingencies. Federal lawmakers recognized the monopolistic environment Southwest was able to create by remaining at Love Field and enacted the Wright Amendment, which essentially restricted Southwest's interstate travel to adjacent states.<sup>14</sup>

Recently, Congress loosened the Wright Amendment's grip by enacting WARA in 2006, which lifted the interstate ban on Love Field in 2014.<sup>15</sup> Undoubtedly, this legislation created renewed interest from competing airlines wanting back into Love Field. Although WARA does not directly address the process new entrants must undertake to service gates out of Love Field, it references the Scarce Resource provision of the underlying gate leasing agreements as controlling the process through which requesting airlines may receive gate access.<sup>16</sup> Thus, the

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<sup>8</sup> H.R. REP. NO. 109-600, at 1-2.

<sup>9</sup> *The Wright Amendment: Hearing Before the Subcomm. on Aviation of the Subcomm. on Commerce, Sci., and Transp.*, 109th Cong. 5 (2005) (statement of John D. Rockefeller IV, Member of Subcomm. on Aviation).

<sup>10</sup> H.R. REP. NO. 109-600, at 1-2.

<sup>11</sup> *City of Dallas v. Sw. Airlines Co.*, 371 F. Supp. 1015, 1019 (N.D. Tex. 1973).

<sup>12</sup> *Id.* at 1035.

<sup>13</sup> H.R. REP. NO. 109-600, at 2.

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

<sup>15</sup> Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011 (2006).

<sup>16</sup> *City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 282 (5th Cir. 2017).

courts have so far turned their attention to the underlying lease agreements regarding new entrants such as Delta.<sup>17</sup>

In 2009 and in anticipation of WARA, Delta was able to acquire a sublease for two gates out of Love Field.<sup>18</sup> This sublease arrangement was enough to accommodate five flights but was due to expire in October 2014.<sup>19</sup> In 2014, with the expiration of their lease on the horizon, Delta sent a letter to all the signatory airlines at Love Field requesting an accommodation of the five flights.<sup>20</sup> However, its accommodation was denied, and Delta proceeded to turn to the City of Dallas for a mandatory accommodation.<sup>21</sup> Dallas initially granted Delta's request but subsequently rescinded the accommodation under pressure from Southwest.<sup>22</sup> Therein lies the problem: there was no clear policy in place to guide the parties in the event that Dallas rescinded its accommodation.<sup>23</sup> Delta then filed another request for accommodation through the City in October 2014.<sup>24</sup> Dallas responded by requesting that one of the signatory airlines, either Southwest or Virgin Atlantic, voluntarily accommodate Delta; otherwise the City would force one of the signatory airlines to accommodate Delta.<sup>25</sup> When none of the airlines agreed to a voluntarily accommodation, Dallas reached out to the Department of Transportation (DOT) twice for guidance.<sup>26</sup> In concurrence with this note, the DOT responded both times by stating that the City was required to accommodate Delta under federal grant assurances.<sup>27</sup>

Instead of heeding the guidance of the DOT, the City of Dallas decided to file a lawsuit "seeking declaratory relief related to, among other things, its legal obligations and rights with respect to the Five Party Agreement, WARA, the Lease Agreements and

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<sup>17</sup> *Id.* at 282–83.

<sup>18</sup> *Id.* at 283–84.

<sup>19</sup> *Id.* at 284.

<sup>20</sup> *Id.* (defining "signatory airline" as any airline with a primary gate-leasing agreement from the city. In 2014, Southwest was a signatory for eighteen of the twenty total gates; Atlantic was a signatory on the remaining two gates).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 288.

<sup>24</sup> *Id.* at 284.

<sup>25</sup> *Id.*

<sup>26</sup> Kathryn Thomson, *DOT Letter of Guidance to City of Dallas, DELTA* (June 15, 2015), <https://news.delta.com/sites/default/files/City%20of%20Dallas%20Love%20Field%20Letter%20%28Final%29%20%28Signed%29%206-15-15.pdf> [<https://perma.cc/JRB2-B297>].

<sup>27</sup> *Id.*

federal regulations and laws affecting Love Field.”<sup>28</sup> In response, both Southwest and Delta filed temporary restraining orders and preliminary injunctions against one another over Delta’s continued use of the gates.<sup>29</sup>

The district court initially granted Delta’s preliminary injunction, thus allowing them to continue the operation of their five flights out of Love Field.<sup>30</sup> Accordingly, the court denied Southwest’s motion for preliminary injunction and ruled that the City of Dallas’s request for declaratory relief was moot because Delta was being permitted to stay for the time being under their own request for preliminary injunction.<sup>31</sup> Southwest appealed the district court’s decision, arguing that Delta had no third-party beneficiary status to the leasing agreement and thus could not ask the court to require mandatory accommodation by the City pursuant to the leasing agreement.<sup>32</sup> Although the City of Dallas did not also appeal, it agreed with Southwest, arguing in its brief “that although Delta should be accommodated under the Lease Agreement, Delta is not entitled to sue as a third party creditor beneficiary.”<sup>33</sup>

On appeal, the Fifth Circuit vacated the lower court’s order terminating the City of Dallas’s motion for declaratory relief as moot and instead rendered judgment declaring that Dallas was required to allow Delta to continue its operations out of Love Field for the time being.<sup>34</sup> Accordingly, “[b]ecause Delta [received] an accommodation under the City’s preliminary injunction, [the Fifth Circuit] decline[d] to address, as moot, the district court’s grant of Delta’s motion for a preliminary injunction.”<sup>35</sup> By doing so, the Fifth Circuit was able to set aside Southwest’s claim that Delta was not a third-party beneficiary and center the issue on the parties’ competing interpretations of the contract between Southwest and the City of Dallas: “Either the Lease Agreement requires accommodation or it does not.”<sup>36</sup>

In its analysis, the court briefly turned to the underlying WARA provisions for guidance.<sup>37</sup> However, as mentioned above,

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<sup>28</sup> *Delta Air Lines*, 847 F.3d at 284.

<sup>29</sup> *Id.* at 285.

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

<sup>31</sup> *Id.* at 291.

<sup>32</sup> *Id.* at 286.

<sup>33</sup> *Id.* at 281.

<sup>34</sup> *Id.* at 291.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 286.

<sup>37</sup> *Id.* at 287.

the court quickly concluded that WARA relies on the underlying leasing agreements to establish the process through which the City must accommodate a new entrant airline.<sup>38</sup> Specifically, the court examined Section 4.06F, which “provides that the Signatory Airline (here Southwest) ‘agrees to accommodate such Requesting Airline at its Lease Premises at such times that will not unduly interfere with its operating schedule,’” but noted that the contract “does not define the phrase ‘unduly interfere with.’”<sup>39</sup> Southwest argued that the term “unduly interfere with” means the City of Dallas was not required to accommodate a new entrant airline because Southwest had immediate plans to utilize all leased gates to their fullest capacity.<sup>40</sup> However, the court looked to statements made by the parties at the time WARA was formed and found that the term “unduly interfere with” means Southwest was required to accommodate a new entrant airline at the City’s request because it would not “unduly interfere with” Southwest’s operations at the time the request was made.<sup>41</sup>

In response, the dissent focused on the fact that the City of Dallas only wanted judicial clarification of the leasing agreement and consistently denied any legal claim against Southwest.<sup>42</sup> In doing so, Judge Jones argued that, because Dallas has no claim against Southwest, the issue of whether Delta was a third-party beneficiary is outcome determinative as to whether Delta should have access to Love Field.<sup>43</sup> Judge Jones then went on to explain that the underlying leasing agreement did not provide Delta with third-party beneficiary status and argued that Southwest’s motion for preliminary injunction should have been granted.<sup>44</sup>

Although the court properly looked to the Scarce Resource provision of the underlying lease agreements, the court prematurely looked to the parties’ intentions to resolve ambiguity within the contract and failed to properly address other provisions in WARA when interpreting the underlying leasing agreements. Specifically, WARA states, “[A]ny actions taken by the parties to such contract that are reasonably necessary to implement its provisions, shall be deemed to comply in all respects

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<sup>38</sup> *Id.* at 288.

<sup>39</sup> *Id.* at 287.

<sup>40</sup> *Id.* at 290.

<sup>41</sup> *Id.* at 289–90.

<sup>42</sup> *See generally id.* at 292 (Jones, J., dissenting).

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

<sup>44</sup> *Id.*

with the parties' obligations under title 49."<sup>45</sup> Additionally, WARA provides, "Nothing in this Act shall be construed . . . to limit the authority of the Federal Aviation Administration or any other Federal agency to enforce requirements of law and grant assurances . . . ."<sup>46</sup> Thus, through Title 49 of the U.S. Code and the corresponding grant assurances, WARA necessarily dictates that the underlying lease agreements must accommodate new entrants. Furthermore, even if, as the dissent argues, the case must ultimately come down to whether Delta enjoys rights as a third-party beneficiary, Title 49 and the corresponding grant assurances require that the underlying lease agreements grant third-party beneficiary status to airlines seeking accommodation as a new entrant.

By participating in the Passenger Facility Charge (PFC) program, airport sponsors (here, the City of Dallas) are able to receive federal funding.<sup>47</sup> In turn, airport sponsors are required to make certain operational assurances to the Federal Aviation Administration (FAA) stating that they will function in a nondiscriminatory manner.<sup>48</sup> Although the power to enforce these grant assurances remains with the FAA, 49 U.S.C. § 47107 backs up these grant assurances through the enactment of the Airport and Airway Improvement Act (AAIA).<sup>49</sup> Specifically, Federal Grant Assurance 22, the Economic Nondiscrimination grant, which implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), requires that an airport operator "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport."<sup>50</sup> The FAA has interpreted this assurance to require airport sponsors to make space available for new entrants so long as it is reasonably possible.<sup>51</sup> Thus, the fact that Southwest was able to accommodate Delta's request at the time the request was made mandated that

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<sup>45</sup> Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011 (2006).

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

<sup>47</sup> 49 U.S.C. § 47107(a) (2018).

<sup>48</sup> *Id.* § 47107(a)(1).

<sup>49</sup> *See id.* § 47107(a).

<sup>50</sup> FED. AVIATION ADMIN., ASSURANCES: AIRPORT SPONSORS (2014).

<sup>51</sup> FED. AVIATION ADMIN., ORDER 5190.6B, FAA AIRPORT COMPLIANCE MANUAL, at 8-6 (2009).

the City of Dallas negotiate the terms of its lease with Southwest to accommodate Delta.

Ironically, the FAA's use of the words "if reasonably possible" are eerily similar to the "unduly interfere with" language that the court focused on in its interpretation of the leasing agreement. There, Southwest argued that the court should have taken into consideration the fact that it had plans to scale up towards full utilization of its leased premises when Delta requested accommodation, so Delta's request would "unduly interfere with" Southwest's operations.<sup>52</sup> In this regard, the court noted that the language of the leasing agreements and statements concerning the parties' intentions at the time WARA was constructed indicate that Southwest was required to accommodate Delta if it could do so at the time of their request. Additionally, the court found that the terms of WARA may even provide for accommodation under an exclusive lease agreement where Southwest was fully utilizing its leased gates.<sup>53</sup>

However, the court did not need to look to the intentions of the parties to resolve the ambiguity in the leasing agreements. Federal Grant Assurance 23, Exclusive Rights, prohibits a sponsor from directly or indirectly granting an air carrier the exclusive right to use a gate.<sup>54</sup> Moreover, Section 47107(a)(3) of Title 49 of the U.S. Code states that "the airport operator will not withhold unreasonably the classification or status of tenant or signatory from an air carrier that assumes obligations substantially similar to those already imposed on air carriers of that classification or status."<sup>55</sup> In fact, some courts have interpreted this language to require accommodation by the City of Dallas in situations very similar to the case at hand.<sup>56</sup> Admittedly, Love Field is unique from other airports in that WARA limits its number of gates to twenty.<sup>57</sup> Accordingly, some may argue that the City would not be unreasonably withholding signatory status from a new airline if all gates were currently being occupied to full capacity because the City is unable to construct new gates. To this

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<sup>52</sup> City of Dallas v. Delta Air Lines, Inc., 847 F.3d 279, 288 (5th Cir. 2017).

<sup>53</sup> *Id.* at 288–89.

<sup>54</sup> FAA AIRPORT COMPLIANCE MANUAL, *supra* note 51, at 6-7.

<sup>55</sup> 49 U.S.C. § 47107(a)(3) (2018).

<sup>56</sup> See Midway Airlines, Inc. v. Westchester City, 584 F. Supp. 436, 440–41 (S.D.N.Y. 1984); see also Arapahoe Cty. Pub. Airport Auth. v. Centennial Exp. Airlines, Inc., 956 P.2d 587, 596–97 (Colo. 1998).

<sup>57</sup> Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011 (2006).

end, the FAA Office of Chief Counsel has previously “determined that a sponsor may not deny an air carrier access solely based on the nonavailability of existing facilities.”<sup>58</sup> Therefore, it is reasonable to conclude that Dallas must allow Delta access to gates at Love Field for the underlying lease agreements to be compatible with WARA and Title 49.

Lastly, assuming the court correctly looked to Title 49 of the United States Code and the corresponding grant assurances to resolve ambiguity in the underlying lease agreements, the dissent may still be correct in concluding that Delta must have rights as a third-party beneficiary to remain at Love Field.<sup>59</sup> However, Federal Grant Assurance 23, the Exclusive Rights grant, mandates that Delta be given rights as a third-party beneficiary.<sup>60</sup> As discussed above, Federal Grant Assurance 23 prohibits a sponsor from directly or indirectly granting an air carrier the exclusive right to use a gate.<sup>61</sup> Thus, if a new entrant airline seeks accommodation to service gates out of Love Field but is denied access simply because they do not have rights as a third-party beneficiary, the City of Dallas has indirectly created a prohibited exclusive right in Southwest to use the gates.

With the parties due back in court in February 2019, they have recently come to a short-term agreement, allowing a requesting airline gate access for a minimum of three years provided the gate space is not currently in use.<sup>62</sup> While this is surely a temporary fix, Delta and other airlines have expressed concerns about the agreement and what it could mean for their future operations out of Love Field.<sup>63</sup> More importantly, the short-term agreement does not provide a requesting airline with the option of signatory status as a primary leaseholder, bringing into question the validity of the agreement under Section 47107(a)(3).<sup>64</sup> Additionally, under these new terms, if another airline currently requested accommodation into Love Field and was denied tenant status because the gates are at full capacity,

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<sup>58</sup> FAA AIRPORT COMPLIANCE MANUAL, *supra* note 51, at 9-10.

<sup>59</sup> See *City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 291–92 (5th Cir. 2017) (Jones, J., dissenting).

<sup>60</sup> See generally FAA AIRPORT COMPLIANCE MANUAL, *supra* note 51, at 8-1.

<sup>61</sup> *Id.* at 6-7.

<sup>62</sup> Conor Shine, *Southwest, Delta, American and More Object to Dallas' Love Field Gate Plan*, DALL. MORNING NEWS (May 25, 2018), <https://www.dallasnews.com/business/love-field/2018/05/25/southwest-delta-american-object-dallas-love-field-gate-plan> [<https://perma.cc/Q48Z-VANS>].

<sup>63</sup> *Id.*

<sup>64</sup> 49 U.S.C. § 47107(a)(3) (2018).

then the City of Dallas would likewise be in violation of Section 47107(a)(3).

Love Field is distinguishable from almost every other airport in the nation due to the federal constraints WARA has placed on its operations. WARA's cap on the number of gates at Love Field has resulted in a relatively high barrier to entry. So far, other airports have been able to comply with grant assurances and Title 49 by using PFC funding to construct new gates when a new entrant requests access to the airport. Some critics of WARA have admonished the statute for artificially creating market constraints and claim that it should be repealed in its entirety. Unfortunately, practical limitations and local restraints will eventually cause other airports to reach their maximum growth capacity, like the situation artificially created at Love Field. As they do, airports will increasingly become unable to accommodate requesting airlines seeking access to their gates. The ultimate outcome in Delta's access to Love Field may serve as a precursor for other airlines at Love Field and also airlines seeking entrance into congested airports across the country.