



August 29, 2006

The Honorable Arlen Specter, Chairman
Committee on the Judiciary
United States Senate
711 Hart Building
Washington, DC 20510

The Honorable Patrick J. Leahy,
Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Bldg.
Washington, DC 20510

The Honorable F. James Sensenbrenner, Jr., Chairman
Committee on the Judiciary
United States House of Representatives
2449 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr, Ranking Member
Committee on the Judiciary
United States House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

Dear Honorable Sirs:

We are writing in regards to the proposed agreement between the Cities of Dallas and Fort Worth, the DFW International Airport Board, Southwest Airlines and American Airlines. We are antitrust scholars with expertise in antitrust law and economics. Some of us also have expertise in matters of competition within the airline industry.

Darren Bush, Ph.D., J.D.
Assistant Professor of Law
Phone: 713.743.3346
Facsimile: 713.743.2131
DBush@central.uh.edu



Our basic argument is this:

1. The agreement utterly fails to help DFW area passengers, and most likely will cause them injury in the way of higher fares and reduced service.
2. The repeal of the Wright Amendment would potentially aid airline passengers in the long run, but such repeal does not require the undue burden placed upon competition by the agreement in the short run. In other words, there are less restrictive alternatives to the proposed agreement that would accentuate the pro competitive benefits of repeal without the substantial costs which the agreement imposes upon consumers.
3. Freeing DFW area passengers from the burdens of the Wright Amendment does not require anticompetitive conduct blessed via statutory immunity, but rather only the repeal of the Wright Amendment.

I. The Repeal of the Wright Amendment, Without More, Would Benefit Passengers.

One of the difficulties of the Wright Amendment is its restricting effect on competition for scheduled air passenger service between Love Field and destinations throughout the country. The Wright Amendment as modified by the Shelby Amendment prohibits scheduled air passenger service by aircraft with more than 56 seats between Dallas Love Field and any point outside the states of Texas, Kansas, Missouri, New Mexico, Oklahoma, Arkansas, Louisiana, Mississippi or Alabama. While this is not an absolute ban on air travel from Dallas Love Field to other cities throughout the country, it in effect reduces the number of potential flights and passengers traveling to Love Field by a seat restriction for each scheduled flight. Thus, the majority of air travel originating or terminating in the Dallas/Forth Worth (DFW) metropolitan area must come through DFW International Airport.

It should be noted that the Wright Amendment's effect extends well beyond Love Field. Any passenger seeking to fly to the DFW area or through the DFW area from a city outside the Wright Amendment territory is affected by the Wright Amendment restriction.

The elimination of the Wright Amendment helps foster competition by allowing for scheduled air passenger service from an airport that, due to its location, presumably would be a superior choice for Dallas business passengers. The availability of gates (absent the agreement) would greatly aid in competition for these and other DFW area passengers as well as for passengers from other states whose destination is the DFW area, as it allows for an increase in scheduled service. Such additional service, likely provided by a low cost carrier (LCC), would potentially have the effect of reducing fares while expanding service options for passengers flying to and from the DFW metropolitan area.¹

¹ A memo from the DOJ on the Love Field agreement accurately makes this claim. See also Entry and Competition in the U.S. Airline Industry: Issues and Opportunities, Transportation Research Board, Special Report 255, (1999), p. 52.

Moreover, DFW International Airport is less likely than Dallas Love Field to be seen as an attractive option for potential entrants seeking to provide scheduled air passenger service to the DFW metropolitan area. First, any such entrant would be forced to compete with a dominant hub carrier at DFW International Airport. The hub carrier is capable of greeting any LCC entry by offering reduced fares and increasing capacity, swiftly and decisively preempting such entry. Moreover, congestion at major airports is not attractive to LCCs seeking to serve a market. Many LCCs opt to serve less congested airports in order to maintain profitability.²

Thus, the elimination of the Wright Amendment would bring a major procompetitive benefit to passengers traveling to and from the DFW metropolitan area. Unfortunately, those benefits—lower fares and increased service—are fully eradicated by the proposed agreement.

II. The Agreement Will Restrict Output, Both in Terms of Number of Flights and Number of Competitors, Thereby Raising Fares.

The proposed legislation, memorializing the agreement between Southwest, American, et. al., eliminates completely the ability of any carrier to offer air passenger service now, or even eight years from now. The key method by which the parties chose to eliminate any competitive threat is through the destruction of gates.

The agreement requires the destruction of twelve gates at Love Field. In a competitive post-Wright Amendment world, these twelve gates would serve the purpose of allowing competing air passenger service into the DFW metropolitan area—service that would compete with American and Southwest.

Under the agreement, the only option made available to potential competitors is to lease gates from Southwest, American, or Continental Airlines³ at Dallas Love Field. The agreement essentially prohibits such leases prior to the Wright Amendment termination period, as all parties are to strongly discourage air passenger service to and from Love Field, apart from the incumbents currently serving the market. In the post-Wright Amendment world, the agreement bars potential competitors by requiring them to obtain gates from incumbent carriers, the only remaining gate holders at Dallas Love Field post-agreement. Importantly, there does not appear to be any obligation, legally or contractually, to compel the sharing of gates with competitors. Instead, it is solely within the good graces of the incumbent airlines to provide gates.

² Profitability in the airline industry is determined in part by revenue passenger miles, i.e., the number of passengers carried multiplied by the fares each passenger paid, and the total distance traveled. Thus, an airline makes it money when its planes are in flight.

³ The agreement provides that ExpressJet Airlines, Inc., which operates as Continental Express, shall have preferential use of two gates at Love Field.

However, even if American, Southwest, and Continental find it in their hearts to voluntarily lease gates to LCCs seeking to enter Love Field and compete with them, it is impossible to have two planes at one gate simultaneously. Thus, potential entrants would be unable to offer flights that depart at the same time as the incumbent carrier's flights in order to compete for passengers with the major carriers. Moreover, it would be unlikely that LCCs would ever be able to establish any base of operations there (i.e., provide "hub" type service) because of the gate restrictions. Thus, any LCC competition would be in a small number of routes, at off-peak hours, and with very limited service. The majority of competition would be in connections between the LLCs hub (necessarily located elsewhere) and the hubs of other carriers. Consequently, little benefit in nonstop fares would be achieved under this agreement. Therefore, the result, of the agreement is that any competitors are hamstrung at the onset of competition, assuming they could obtain gates in the first instance.

Southwest, too, agrees to limit its ability to compete post-agreement. The restriction in the number of gates under its control constricts the ability of Southwest to expand service options in the face of greater consumer demand. Pursuant to the agreement, Southwest will constrict its service as it currently stands, providing potentially inferior connect service where it might otherwise offer nonstop service.

Without access to gates at Love Field, there will not be any competition once the Wright Amendment meets its end. Instead, fares will likely increase on many routes, particularly nonstop passenger service to and from the DFW area. Competition cannot exist if potential competitors are thwarted from entering certain routes due to the demolition of gates. The result will be a substantial effect on nonstop fares to and from the destinations these potential entrants were contemplating serving; a firm dominating a route has the ability and incentive to charge higher fares than it might if it faced the risk of entry. Moreover, as Southwest forgoes other opportunities due to gate constraints,⁴ consumers will lose the benefit of reduced fares to and from those destinations, too.⁵ And passengers outside the Wright Amendment territory seeking to connect through Love Field on Southwest would be injured as Southwest forgoes opportunities due to gate constraints. Thus, the elimination of gates will have a substantial effect on nonstop fares to and from the destinations these potential entrants were contemplating serving; without the risk of entry, a firm with monopoly power has the ability and incentive to charge

⁴ The DOJ memo claims that "Southwest currently operates 120 flights from 14 gates at Love Field, and likely has only very limited ability to increase frequency from those facilities. By limiting Southwest to 16 gates, the agreement places a significant, hard cap on Southwest's service from Dallas for a period well beyond 8 years. . . . Under the gate cap, Southwest could not significantly expand its operations at Love Field once the Wright Amendment restrictions are lifted without exiting cities it currently serves, and it would be prohibited under the agreement from initiating service at any other Dallas-area airport without incurring significant penalties." Moreover, "Whichever new competitive opportunity Southwest is forced to forego, consumers will lose the benefit of the 50% decrease in fares that can stem from Southwest's entry into that market."

⁵ As Southwest's entry into a market has been shown to have a demonstrable effect on prices, there is every reason to believe this might change with respect to any operations at Love Field if the airlines are statutorily permitted to engage in the output restriction agreement proposed.

higher fares than it might if it faced the risk of entry. It may also limit competition with respect to some connect markets.

III. The Proposed Legislation Would Potentially Create an Antitrust Immunity, Expressly or Impliedly. Such an Immunity Proposal Demands an Inquiry into the Costs and Benefits of the Proposal as a Whole and Whether the Proposed Immunity is Necessary to Achieve the Procompetitive Benefits of the Agreement.

A recent report submitted to the Antitrust Modernization Commission (coauthored by Darren Bush, Steve Ross and Greg Leonard) notes that Congress must approach statutory immunities with care.⁶ As one of us has stated elsewhere, immunities should be few and far between, adopted only after a thorough cost-benefit analysis has been undertaken, and with a sunset provision that would terminate it after a period of time.⁷

First, Congress should require that proponents of antitrust immunity⁸ demonstrate the need for the immunity in a transparent and inclusive process.⁹ “At a minimum, the proponents should: (1) clearly explain why conduct within the scope of a proposed immunity is both prohibited or unduly inhibited by antitrust liability and in the public

⁶ http://www.amc.gov/commission_hearings/pdf/IE_Framework_Overview_Report.pdf.

⁷ Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to (De)regulated Industries*, forthcoming, 2006 UTAH L. REV. ____ (invited article for antitrust symposium)(on file with author). The article states:

Apart from the inherent ambiguities of language created by statutory immunities, the difficulty with statutory immunity is manifold. First, in many instances, the economic rationale for the statutory immunity is uncertain. The industries or firms seeking the statutory immunity may not have laid out a compelling rationale for the elimination of the default rule of competition. Even if the proponents of the statutory immunity were to have laid out a compelling case, their analysis may not have been subject to the sunlight of an open decision-making process that has heard from all stakeholders. Such stakeholders may have opposing evidence and viewpoints that could enable decision makers to weigh the costs and benefits of the immunity. They could also present less restrictive alternatives to the proposed immunities. Statutory immunities often are not time limited, and thus may live well beyond their useful purposes in light of changing industry conditions. Congress does not often review statutory immunities to determine whether or not they have met their stated purpose. Finally, because of a lack of legislative history and clear record as to the underlying purpose of the immunity, courts have often expanded the scope of the immunity beyond its stated limit. Unless Congress expressly states, after careful weighing of costs and benefits, the parameters of the immunity, the default rule should always be competition.

Id.

⁸ It is an insufficient remedy to ask the Federal Trade Commission or the Department of Justice to engage in any analysis of this proposed legislation post-implementation. Any comment from the federal antitrust agencies should be obtained prior to passage of the legislation to aid Congress in highlighting procompetitive benefits and anticompetitive effects.

⁹ Bush, *supra* note 7. “Any promulgated immunity, although eligible for renewal, is limited in duration to limit unintended consequences.” Id.

interest; (2) make some estimation as to the effects the proposed immunity will have in addition to its intended effect; and (3) demonstrate that the proposed immunity is necessary to achieve the desired policy outcome.”¹⁰

The difficulty with the proposed immunity contained in the Love Field agreement and proposed legislation is that it is completely *unrelated* to the procompetitive benefits purported to be achieved. The only procompetitive benefits stem from the relaxation of through-ticketing restrictions in the short run and the complete elimination of the Wright Amendment in the long term. It is unclear as to why any immunity would be necessary to bring about these procompetitive benefits.

Moreover, the immunity is clearly *related* to the anticompetitive effects of the agreement discussed above; namely, the potential increase in nonstop fares to and from the DFW metropolitan area, the reduction in capacity/output in that area, and the elimination of any means of entry for potential competitors via the needless destruction of gates. As the Department of Justice memo states, “Some of the proposed new restrictions – such as the agreement between American and Southwest to permanently reduce their gates at Love Field, and for Southwest to stay out of DFW for 19 years – would be hard-core, per se violations of the Sherman Act.” We agree with this assessment, and would add that the anticompetitive effects established by hard-core, per se violations would need to be offset by substantial benefits in order to obtain a statutory immunity. In the Love Field Agreement, it is simply not the case that *any* procompetitive benefits arise from the destruction of gates or from the allocation of airports between Southwest and American.

Because the proposed statutory immunity is unrelated to any procompetitive benefit (and therefore any desired outcome), it is simply unnecessary for purposes of legislation. For the parties to suggest that the agreement falls apart absent acquiescence to every detail is a red herring. Congress has authority to simply repeal the Wright Amendment and ignore the pleas of the parties who have claimed procompetitive benefits to the termination of the Wright Amendment all the while protecting themselves from that day by entrenching their dominant position in the DFW metropolitan area. In other words, there is a less restrictive alternative to the anticompetitive agreement thrust before Congress: The repeal of the Wright Amendment. Such repeal requires no other extraordinary legislation, no statutory immunity from the antitrust laws, and no agreement between any parties.

Finally, it is insufficient to excise the statutory immunity provision from the Act as currently proposed. The doctrine of preemption might carve the conduct of the parties out of state antitrust scrutiny. Similarly, implied immunities, or claims that Congress “intended” to exempt regulatory conduct from antitrust even though it did not do so by express statutory language, are not necessarily excised completely from existence by elimination of express statutory immunity. Historically, courts have viewed implied immunities with extreme skepticism.¹¹ However, Congress always runs the risk of a

¹⁰ Id.

¹¹ As one group of commentators has stated:

[T]wo grounds--and only two grounds--will support an implied repeal: the first is irreconcilability and the second is an affirmative showing of legislative intent to repeal by

court finding implied immunity where Congress did not desire one and perhaps expanding the scope of such immunity beyond what would be necessary to further the purposes of the act. Thus, care should be taken when constructing any piece of legislation related to Love Field so as not to imply immunity where no such immunity is intended and where none is needed.

To conclude, the proposed agreement and legislation confers few, if any benefits to consumers, while producing significant anticompetitive effects. In particular, the agreement as structured would nullify any procompetitive effect arising from the elimination of the Wright Amendment. In particular, it would likely cause a reduction in service, an increase in fares, and the eradication of any potential competition in the provision of air passenger service to and from the DFW metropolitan area. It should, therefore, not be blessed with any sort of antitrust immunity, express or implied. Instead, the least restrictive alternative (and the one conferring the most consumer benefit) is the eradication of the Wright Amendment without the underlying proposed agreement.

Sincerely,



Darren Bush
Assistant Professor of Law
University of Houston Law Center

Mark Bauer
Assistant Professor of Law
Stetson University College of Law

Peter Carstensen
George H. Young-Bascom Professor of Law
University of Wisconsin Law School

implication. The latter criterion has only been satisfied in cases in which the repealing act contains a directive to the regulatory agency to police the interplay of competitive forces. The irreconcilability criterion requires, at a minimum, that the statutes [antitrust and regulatory] produce differing results. This finding alone is not sufficient however. Rather, to find 'irreconcilability' there must be a determination that repeal of the antitrust laws is necessary to make the regulatory act work. This requires an appreciation of the nature of the various regulatory acts.

Robert Balter and Christian Day, *Implied Antitrust Repeals: Principles for Analysis*, 86 *Dick. L. Rev.* 447 (1982). See also *United States v. National Association of Security Dealers*, 422 U.S. 694, 719 (1975) ("Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system"); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975).

John M. Connor
Professor of Industrial Economics,
Purdue University

John J. Flynn
Hugh B. Brown Professor of Law Emeritus
S.J. Quinney College of Law at the University of Utah

Shubha Ghosh
Professor of Law
Southern Methodist University Dedman School of Law

Warren Grimes
Irving D. and Florence Rosenberg Professor of Law
Southwestern Law School

Max Huffman
Visiting Assistant Professor
University of Cincinnati College of Law

Spencer Weber Waller
Professor and Director
Institute of Consumer Antitrust Studies
Loyola University Chicago School of Law