

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CITY OF DALLAS,

Plaintiff,

V.

DELTA AIR LINES, INC., SOUTHWEST AIRLINES CO., VIRGIN AMERICA INC., AMERICAN AIRLINES, INC., UNITED AIRLINES, INC., SEAPORT AIRLINES, INC., UNITED STATES DEPARTMENT OF TRANSPORTATION, and THE FEDERAL AVIATION ADMINISTRATION,

Defendants.

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Civil Action No. 3:15-cv-02069-K

SOUTHWEST AIRLINES CO.'S RESPONSE IN OPPOSITION TO DEFENDANTS U.S. DEPARTMENT OF TRANSPORTATION AND FEDERAL AVIATION ADMINISTRATION'S MOTION TO DISMISS OR TRANSFER, AND FOR A STAY

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Defendant Southwest Airlines Co. (“Southwest”) hereby files this Opposition to Defendants U.S. Department of Transportation (“DOT”) and Federal Aviation Administration’s (“FAA”) Motion to Dismiss or Transfer, and For a Stay (Docket No. 165) (the “Motion”).¹

I. INTRODUCTION

The Court should exercise its discretion under the primary jurisdiction doctrine and deny the DOT’s request to stay this case in favor of the DOT’s own administrative proceedings for the following reasons. First, the DOT has already established its views on the issues in this lawsuit through two pre-suit opinion letters on the specific topic of Delta’s requested accommodation at Love Field. Thus, because “the [DOT] has already issued opinions which set out its position on some of the issues raised in this case . . . it is not necessary to refer this case to the [DOT] to obtain its views.” *AT&T Commc’ns of Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 590 (N.D. Tex. 1998).

Second, a stay or transfer is not proper because the core questions in this case do not require an agency’s technical or scientific expertise to resolve, but instead primarily involve statutory interpretation and contractual construction, which this Court is fully equipped to handle.

Third, courts routinely refuse to defer adjudication under the primary jurisdiction doctrine despite the pendency of related administrative proceedings, but especially where, as here, an administrative proceeding is initiated in response to threatened or actual litigation. See *New York State Thruway Auth. v. Level 3 Commc’ns, LLC*, 734 F. Supp. 2d 257, 269-70 (N.D.N.Y. 2010). The timing of the DOT’s request that the Court stay this case is both suspect and prejudicial. The FAA’s Notice of Investigation was issued not only almost two months after this

¹ Because, as the DOT explained in its Motion, the FAA is an operating administration within the DOT, for simplicity’s sake this memorandum will use “DOT” to refer to the entire department, including the FAA, unless otherwise specifically noted.

lawsuit was filed, but after both the Court and the parties had already agreed on an expedited discovery schedule in advance of the preliminary injunction hearing set for September 28 and 29, 2015. Even worse, the DOT proceeded to wait another month after issuing the Notice of Investigation (and just two weeks before the preliminary injunction hearing) before even requesting that this Court stay the proceedings under the primary jurisdiction doctrine. In the meantime, all the parties (including the DOT) engaged in a flood of time-consuming and expensive deposition and document discovery in preparation for the preliminary injunction hearing. Thus, there is simply no justification for DOT to have waited until the eve of the hearing before filing its motion.

Fourth, a primary jurisdiction referral and related stay of these judicial proceedings could produce years of “further delay and expense” in what is “already a lengthy, drawn-out” process. *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 520 (5th Cir. 1981). Such a delay is particularly harmful here where, as discussed in Southwest’s briefing in support of its request for a preliminary injunction, any delay in resolving this issue will continue to cause Southwest irreparable harm and preclude Southwest’s full use of the two gates it rightfully subleased from United.

Fifth, the DOT’s threatened investigation would not provide Southwest with a suitable forum in which to challenge the DOT positions which are contrary to Southwest’s Lease rights and federal law. In an FAA Part 16 proceeding, only the airport operator/sponsor is a respondent. Although an airline such as Southwest may be granted leave to “intervene,” this is discretionary with FAA and can only occur if and when a hearing is scheduled. *See* 14 C.F.R. 16.207. In addition, Part 16 proceedings can last years, and Southwest should not suffer

violation of its Lease rights and federal rights during the long pendency of such a proceeding in which it has such a limited role.

For these reasons, and for the reasons discussed below, this Court should deny the DOT's Motion.

II. RELEVANT BACKGROUND

A. The Legal Framework

The Court is no doubt familiar with the general history of Delta's request for accommodation at Love Field as well as the statutory and contractual landscape governing this dispute. (*See generally* Southwest's Third Am. Crossclaim, Dkt No. 160.) For purposes of this response, it will suffice to highlight several general points. *First*, separate and apart from the federal grant assurances—which, as discussed below, form the sole basis of the FAA Investigation—the lease between the City of Dallas (the “City”) and Southwest (the “Lease”) unambiguously grants Southwest preferential use of the Love Field gates. This “preferential use” right allows Southwest to fully utilize its leased gate space and gives Southwest's flight schedule priority over any use by any other carrier. *Second*, both the Five Party Agreement and the Wright Amendment Reform Act of 2006 (“WARA”) prohibit the DOT from compelling the City to force Southwest to accommodate Delta. Indeed, WARA contains a facial prohibition on any action by the DOT that interferes with Southwest's preferential use lease rights at Love Field “unless such modification or elimination is implemented on a nationwide basis.” (WARA § 5(e)(2)(B)(ii).) And, as discussed in Southwest's previous briefs on this topic, compelling an accommodation when Southwest is fully utilizing its gates modifies Southwest's preferential lease rights. *Third*, the vast majority of the claims at issue in this lawsuit consist of standard state law claims that are far outside the bounds of the FAA administrative proceeding. For

example, Southwest has brought cross-claims against Delta for trespass and Delta has asserted claims for tortious interference and breach of contract.

B. The DOT Letters and the FAA Investigation

In connection with Delta's initial demand for accommodation at Love Field, the City sought input from the DOT regarding the City's obligations under federal law and the grant assurances. On December 17, 2014, the DOT sent a letter to the City (the "First DOT Letter") advising the City as to its accommodation responsibilities. (*See* Dkt. No. 1, Ex. 1.) Remarkably, and in contravention of longstanding DOT and FAA policies and Southwest's Lease rights, as well as decades of industry practice, the DOT noted that any mandatory accommodation made by the City for a requesting carrier must be made on a *permanent* basis, so long as the accommodated carrier continues its requested service. (*See id.*) Furthermore, the First DOT Letter approved the use of a novel "snapshot" date to determine availability for accommodation. (*Id.*) Despite the objectionable and unsupported statements in the First DOT Letter, the DOT correctly reaffirmed that any accommodation decision was, first and foremost, "within the City's discretion." (*See id.*) On June 15, 2015, the DOT sent the City a second letter (the "Second DOT Letter") (collectively, the "DOT Letters"), largely reiterating the positions the DOT took in the First DOT Letter. (*See* Dkt. No. 1, Ex. 1.) The Second DOT Letter, however, once again made clear that "it is the City's responsibility to decide how to act on Delta's requests" and that "[u]ltimately . . . it is the City that must make a decision." (*See id.*) The DOT recently admitted in a filing with this Court that those letters are "nothing more than nonbinding agency guidance." (Dkt. No. 134, at 2.)

The City filed its Complaint in this matter on June 17, 2015. (*See* Dkt No. 1.) Both Delta and Southwest filed Counterclaims against the City, and Crossclaims against each other.

(*See*, Dkt. Nos. 84, 133, 144, 160.) All three parties have moved for a preliminary injunction relating to Delta's right to continue at Love Field following the expiration of its temporary license, and the Court has set a hearing for those motions on September 28-29, 2015. (Dkt. No. 68.) On August 6, 2015, this Court entered a scheduling order setting forth a schedule of expedited discovery in advance of the September hearing. (Dkt. No. 77.) At no point did the DOT object to the Court's setting of the preliminary injunction hearing or the expedited discovery schedule.

On August 7, 2015, the DOT (through the FAA) issued a Notice of Investigation (the "FAA Notice") to the City of Dallas, initiating the FAA's investigation into the City's failure to accommodate Delta (the "FAA Investigation"). (*See* Dkt. No. 134-1.) The FAA Notice specifically referred to the above-captioned litigation, but did not indicate or suggest that it sought to stay the pending lawsuit. (*See* Dkt. No. 134-1, at 1.) In fact, at this Court's request, the FAA specifically extended the deadline for the City to respond to the FAA Notice until November 2, 2015—well after the preliminary injunction hearing was set to occur. The FAA Notice identified the topics of investigation narrowly, as relating solely to the federal grant assurances. (*Id.* at 11-12.)

Over a month later (and just two weeks prior to the preliminary injunction hearing), on September 14, 2015 the DOT filed its Motion suggesting, for the very first time, that the Court should employ the primary jurisdiction doctrine to stay this litigation based on the existence of the FAA Investigation. (*See* Dkt No. 165.) In the meantime, pursuant to the Court's expedited discovery order, the parties have engaged in a flood of document and deposition discovery. Not only that, but the DOT appeared at these depositions and filed motions related to the ongoing expedited discovery. Never once did the DOT suggest, prior to September 14, that the

preliminary injunction hearing or this litigation should be stayed as a result of the FAA Investigation.

III. ARGUMENT

A. Legal Standard

Primary jurisdiction is a form of abstention. *See Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (discussing primary jurisdiction as a form of abstention). And like other forms of abstention a stay under the primary jurisdiction doctrine “is the exception, not the rule.” *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 313 (5th Cir. 1993) (citing *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 813 (1976)). This is so because primary jurisdiction is at odds with “the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.” *Colorado River*, 424 U.S. at 817.

The Supreme Court has made clear that “[n]o fixed formula exists for applying the doctrine of primary jurisdiction,” and “[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Indeed, the primary jurisdiction doctrine “is a flexible doctrine to be applied at the discretion of the district court.” *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988). The doctrine “does not require that all claims within an agency’s purview be decided by the agency. . . [n]or is it intended to ‘secure expert advice’ for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency’s ambit.” *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002).

The Fifth Circuit has identified two factors to consider in determining whether a trial court should exercise its discretion to stay a case pending a related administrative proceeding:

“when (a) it will promote even-handed treatment and uniformity in a highly regulated area, or when sporadic action by federal courts would disrupt an agency’s delicate regulatory scheme; or (b) the agency possesses expertise in a specialized area with which the courts are relatively unfamiliar.” *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 811 (5th Cir. 2011). In the context of these two factors, however, the Fifth Circuit has admonished that application of the doctrine is only warranted if “the benefits of obtaining the agency’s aid [outweigh] the need to resolve the litigation expeditiously.” *Wagner*, 837 F.2d at 201. This is because “[a]gency decision-making often takes a long time and imposes enormous costs on individuals, society, and the legal system.” *Nat’l Commc’ns Ass’n, Inc. v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 222-23 (2d Cir. 1995).

B. The Requested Stay Is Unnecessary To Promote Regulatory Uniformity Because the DOT Has Already Made Its Positions Clear in the DOT Letters

This Court should not stay this case or defer to the FAA Investigation because such a deferral is unnecessary to “promote even-handed treatment and uniformity in a highly regulated area” and because action by this court would certainly not “disrupt an agency’s delicate regulatory scheme.” *Elam*, 635 F.3d at 811. According to the Fifth Circuit, “when the agency’s position is sufficiently clear . . . courts should be very reluctant to refer” cases to the agency under the primary jurisdiction doctrine. *Miss. Power & Light Co. v. United Gas Pipe Line*, 532 F.2d 412, 419 (5th Cir. 1976). Here, the DOT has already offered its (incorrect and now admittedly “non-binding”) position on the accommodation issue in the DOT Letters. The DOT’s position is clear on the issue of Delta’s request for accommodation at Love Field. Thus, because “the [DOT] has already issued opinions which set out its position on some of the issues raised in this case . . . it is not necessary to refer this case to the [DOT] to obtain its views.” *AT&T Commc’ns of Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 590 (N.D. Tex. 1998).

Further, DOT wrongly insists that all claims in this lawsuit revolve around the question at issue in the FAA Investigation, which is “whether the City’s grant assurances and related federal obligations require it to accommodate Delta.” To the contrary, the issues in this case extend well beyond a narrow construction of the grant assurances and, at their core, require the Court to address questions of statutory construction and contractual interpretation, including the application of WARA and the Five Party Agreement to the terms of the Lease. (*See, e.g.*, Southwest’s Second Am. Ans. and Counterclaim, Dkt No. 84, ¶¶ 103-115.) Moreover, given the fact that the parties have already accommodated Delta voluntarily to date, the central questions in the lawsuit are simply the permanency of Delta’s accommodation and whether there is now a legal right to justify Delta’s five (or thirteen) flights. Thus, deferral to the DOT is unnecessary and will not aid in the promotion of regulatory uniformity.

C. The Requested Stay is Unnecessary To Obtain The DOT’s Expertise Because the Central Issues Here Require Primarily Statutory and Contractual Construction, Which This Court Is Fully Equipped To Do

A stay or transfer is unnecessary to obtain the DOT’s specialized expertise as to the central issues in this lawsuit. *Elam*, 635 F.3d at 811. This is not a case involving a highly technical factual analysis addressing esoteric scientific matters in which referral to an agency’s expertise is helpful. Rather, the central issues in this lawsuit require primarily statutory and contractual construction, which this Court is fully equipped to do. *See, e.g., Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305-06 (1976) (refusing to apply the primary jurisdiction doctrine because the issue did not involve “technical questions of fact uniquely within the expertise and experience of an agency”). Where, as here, “the issues before a court can be resolved by using the plain language of the [applicable law] and the ordinary rules of construction, the court should adjudicate the case without referral to the agency.” *Sw. Bell Tel. Co. v. Fitch*, 643 F. Supp. 2d

902, 912-13 (S.D. Tex. 2009). As a result, this Court “is as well equipped as the Agency to conduct this statutory [and contractual] analysis” required in this case. *AT&T Commc’ns*, 8 F. Supp. 2d at 590.

D. The Pendency of the FAA Investigation Does Not Justify a Stay

The FAA Investigation does not warrant a primary jurisdiction deferral or stay. Courts routinely refuse to defer adjudication under the primary jurisdiction doctrine despite the pendency of related administrative proceedings. *See, e.g., Gulf States Util. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1473 (5th Cir. 1987) (affirming denial of primary jurisdiction motion despite issuance of initial decision by agency’s Administrative Law Judge on related issues). Moreover, a pending petition for declaratory judgment is a suspect basis for referral when, like here, the agency proceeding was initiated *in response to* the litigation. *See New York State Thruway Auth. v. Level 3 Commc’ns, LLC*, 734 F. Supp. 2d 257, 269-70 (N.D.N.Y. 2010) (declining to grant referral to the FCC where the defendant, in response to anticipated litigation, had filed a petition for a declaratory judgment with the FCC in an effort “to gain some conceived tactical advantage”).

Beyond this, the timing of the DOT’s request that this Court stay this case is both suspect and prejudicial. Even though the DOT has been aware of the accommodation issue since October 2014 (if not earlier) when the DOT General Counsel convened a conference call among affected parties and announced the agency’s interest in the accommodation dispute, the DOT nevertheless chose to wait until August 2015—almost two months *after* this lawsuit had been filed—to assert its desire to investigate Delta’s accommodation request at Love Field. And the FAA’s August 7 Notice of Investigation came after the Court and the parties had already agreed on an expedited discovery schedule in advance of the preliminary injunction hearing set for

September 28 and 29, 2015. In response to this Court’s request, the DOT then agreed to delay the City’s response to the Notice of Investigation until November 2, 2015—*i.e.*, after the preliminary injunction hearing. The DOT then proceeded to wait yet another month, until September 14—during which time the parties engaged in significant expedited discovery to prepare for the preliminary injunction hearing—before requesting that this Court stay or transfer the proceedings under the primary jurisdiction doctrine. The DOT’s delay in asserting this defense suggests that it is nothing more than litigation gamesmanship, which this Court should not permit. *See, e.g., Morsey v. Chevron USA, Inc.*, 779 F. Supp. 150, 153 (D. Kan. 1991) (stating that “[c]ourts may weigh the timeliness of the assertion of the defense in making their discretionary decision to invoke the primary jurisdiction doctrine”).

E. The Requested Stay Would Result in Continued Irreparable Harm to Southwest and Unnecessary Delay

A primary jurisdiction referral and related stay of these judicial proceedings is highly likely to produce years of “further delay and expense” in what is “already a lengthy, drawn-out” process. *See Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 520 (5th Cir. 1981). Such a delay is particularly harmful here where, as discussed in Southwest’s briefing in support of its request for a preliminary injunction, delay in resolving this issue will cause Southwest irreparable harm. (*See generally* Dkt No. 11.) The “added expense and delay” that would result if Southwest were forced to wait until the FAA Investigation is resolved (including all associated appeals) prior to continuing with this lawsuit weighs heavily against invocation of the primary jurisdiction doctrine, especially when compared with the lack of benefit, discussed above, that the DOT’s expertise would provide on the subject. *See Miss. Power & Light Co.*, 532 F.2d at 419. Accordingly, in this case, “the benefits of obtaining the agency’s aid” do not “outweigh the need to resolve the litigation expeditiously.” *Wagner & Brown*, 837 F.2d at 201.

In addition, as noted above, Southwest cannot be a respondent in an FAA Part 16 proceeding arising out of the Notice. Rather, its ability to participate would be limited to intervenor status, and then only at the FAA's discretion, and not unless and until FAA holds a hearing in the Part 16 case. See 14 C.F.R. 16.207. Such a hearing, if it occurs at all, may not be for several months or even years to come, and Southwest would be irreparably injured if it were required to accommodate Delta's flights in violation of Southwest's Lease rights and federal protections during that lengthy process.

IV. CONCLUSION

For the foregoing reasons, Southwest respectfully requests that the Court deny Defendants U.S. Department of Transportation and Federal Aviation Administration's Motion to Transfer and For a Stay.

DATED: September 21, 2015

Respectfully submitted

/s/ Christopher Patton

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 21, 2015, the foregoing document was served on all counsel of record through the Court's ECF system.

/s/ Christopher Patton

Christopher Patton