IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, v. NORTHWEST AIRLINES CORP., and CONTINENTAL AIRLINES, INC., Defendants.	Civil Action No. 98-74611 Judge Hood Magistrate Scheer

PLAINTIFF UNITED STATES OF AMERICA'S MEMORANDUM IN OPPOSITION TO NORTHWEST AIRLINES' MOTION TO REALIGN CONTINENTAL AS AN ADVERSE PARTY AND TO REOPEN DISCOVERY OF CONTINENTAL'S ADVERSE INTERESTS

Julia C. Pidgeon
Assistant United States Attorney
211 West Fort Street
Suite 2001
Detroit, Michigan 48226
(313) 226-9100

James R. Wade
John R. Read
Jill A. Ptacek
Trial Attorneys
Antitrust Division
Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, D.C. 20530
(202) 353-8730

October 17, 2000

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 20

Fed. R. Civ. P. 30(a)(2)

Fed. R. Civ. P. 26(b)(2)

Fed. R. Evid. 611(c)

United States v. Coca Cola Bottling Co. of Los Angeles, 575 F.2d 222 (9th Cir. 1978), Cert. denied, 439 U.S. 959.

Gates v. City of Memphis, 210 F.3d 371, (6th Cir. 2000)

Woods v. Lecureaux, 110 F.3d 1215 (6th Cir. 1997).

13B WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3607

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, v. NORTHWEST AIRLINES CORP., and CONTINENTAL AIRLINES, INC., Defendants.	Civil Action No. 98-74611 Judge Hood Magistrate Scheer

PLAINTIFF UNITED STATES OF AMERICA'S MEMORANDUM IN OPPOSITION TO NORTHWEST AIRLINES' MOTION TO REALIGN CONTINENTAL AS AN ADVERSE PARTY AND TO REOPEN DISCOVERY OF CONTINENTAL'S ADVERSE INTERESTS

Plaintiff United States of America submits this Memorandum in Opposition to Northwest Airlines' Motion to Realign Continental as an Adverse Party and to Reopen Discovery of Continental's Adverse Interests, filed September 20, 2000 (hereafter "Northwest Motion").

I. PRELIMINARY STATEMENT

Because Northwest already owns the stock that gives it control of Continental, it has no interest in a timely resolution of this lawsuit. Northwest's request to reopen discovery in this ligation would serve no legitimate purpose other than to delay the trial date of this case -- which is now set for October 24th, 2000 -- a date almost two years to the day since the United States filed this lawsuit. In addition to delay, by requesting to "realign" Continental with the Government, Northwest seeks unfair procedural advantages at trial: an unprecedented blanket right to lead all Continental witnesses on all issues without any showing that the specific witness is hostile to

Northwest as required by Fed. R. Evid. 611 (c), and a disproportionate time to present its evidence and arguments. Continental was and is properly named as a defendant in this lawsuit, and Northwest's requested realignment should be rejected.

Northwest's request to reopen discovery should also be denied. It would be extremely burdensome and unfair for the United States to have to prepare on the eve of trial for the seven repeat depositions Northwest seeks and to review new documents, based simply on Northwest's overwrought and implausible claim of "surprise." No litigant, including Northwest, is entitled to have its interests be congruent with a co-party on all issues at all times, especially in a case like this one, which involves predictive judgments about the future effects of current transactions. Moreover, Northwest had ample notice that the testimony of Continental witnesses was not going to parrot that of Northwest's executives on all issues. Fairness would be ill-served if the Court granted Northwest's request to reopen discovery after it has closed, thereby forcing the Government to divert its resources during the minimal remaining time from streamlining and focusing the already gathered evidence to be presented to this Court.

II. NORTHWEST'S REQUEST TO REALIGN CONTINENTAL AS A PLAINTIFF SHOULD BE DENIED

The Court should deny Northwest's request to realign Continental with the Government. Generally, realignment is appropriate only for determining whether diversity jurisdiction still exists after placing adverse interests properly. 13B WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3607 n. 2.[1] It would be truly extraordinary for a private party to be "realigned" with the government acting as prosecutor on behalf of the public, and we are aware of no case

[1]Indeed, all of the cases regarding realignment cited by Northwest in its motion involve disputes over whether diversity jurisdiction is proper.

doing so.

The Government properly named Continental as a defendant when it filed this lawsuit and none of the factors that supported that decision have changed. Fed. R. Civ. P. 20 provides that defendants may properly be joined if the plaintiff asserts against them "jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20 explicitly provides that all defendants need not be interested in defending against all the relief the plaintiff seeks, and that the court may give relief against one or more defendants according to their respective liabilities.

Moreover, it is proper in a Section 7 case to name as a defendant any person necessary for granting the relief sought. See *United States v. Coca Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 229 (9th Cir. 1978), *cert. denied*, 439 U.S. 959. Here, the governance agreements between Continental and Northwest have clauses that prohibit Northwest from divesting its control block to a third party without Continental's permission. Effective relief might well have to direct both defendants to abrogate that agreement. Another potential form of relief might include directing Continental to extinguish the supervoting rights of the Class A stock.

Despite Northwest's claims to the contrary, the Government's interests and those of Continental are not the same. The Government filed its complaint in this case to preserve competition between Northwest and Continental -- competition that will be lessened if Northwest continues to hold voting control of Continental. Continental's interests in this matter, on the other hand, are it's own business interests which may or may not involve the restoration of competition between the defendants. One way to restore competition between Northwest and Continental

would be if Continental repurchased its stock from Northwest, a remedy that happens to track with Continental's desire to buy back its stock. However, that is not the only remedy that would resolve the Government's concerns. For example, the sale by Northwest of its control block to a non-airline purchaser would also be a satisfactory remedy to the Government's concerns, but would not necessarily be the outcome desired by Continental.

It is neither surprising nor unusual that two defendants (or two plaintiffs for that matter) do not agree on issues of liability, defenses or remedies. But discord alone does not warrant a departure from the usual rules.[2] Northwest can, of course, impeach any Continental (or Government) witness with their prior inconsistent statements. Moreover, the United States does not oppose the Court exercising at trial its considerable discretion under Fed. R. Evid. 611(c) to control the examination of witnesses[3]. The standard procedure is for the trial judge to make rulings on whether a witness can be treated as adverse on a witness-by-witness basis at trial. *Gates v. City of Memphis*, 210 F.3d 371 (6th Cir. 2000); *Woods v. Lecureaux*, 110 F.3d 1215 (6th Cir. 1997). If the Court determines that a particular Continental witness is likely to be adverse or hostile to Northwest on any or all issues, the Court can at that time permit Northwest to treat the witness as adverse, just as the Court may determine that a Continental witness is adverse to the Government on any or all issues and permit the Government to lead the witness.

III. NORTHWEST'S REQUEST TO REOPEN DISCOVERY SHOULD BE REJECTED

---

[2]See, e.g., *Sweet Jan Join Venture v. F.D.I.C.*, 809 F. Supp. 1253 (N.D. Tex. 1992), where the court felt that re-labeling the parties late in the litigation would be confusing, expensive, and unnecessary, given the court's discretion over the presentation of evidence and argument.

[3]Fed. R. Evid. R. 611(c), 28 U.S.C.A., comment ("The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation. ... An almost total unwillingness to reverse for infractions has been manifested by appellate courts.").

Northwest's motion asks this Court to reopen fact discovery in this case (1) to allow Northwest to conduct depositions of every Continental employee designated as a potential trial witness by the Government or Continental, and (2) to authorize Northwest to serve document requests on Continental. Granting this relief would not only severely impair the ability of the United States to prepare this case for trial, but would also give Northwest an unwarranted and unfair advantage.

The period for depositions of fact witnesses in this action closed on December 3, 1999. *See Second Revised Scheduling Order*, 10/27/99. Under the scheduling order agreed to by the parties and entered by this Court, once factual discovery closed, a party may only depose a fact witness designated as a witness at trial if that person has not previously been deposed in connection with this action. *Id.* at ¶ 7. Northwest no longer wishes to be bound by its agreement.

Northwest requests that instead it be permitted to conduct depositions of all of the Continental employees listed by the Government on its "will call" and "may call" lists. Northwest should not be permitted to redepose previously deposed Continental employees unless it can show, at a minimum, that its request is consistent with the principals set forth in Fed. R. Civ. P. 26(b)(2). The factors for the Court to consider are whether:

(I) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Factors (ii) and (iii) are relevant here.

A. Northwest Had Ample Opportunity to Depose the Continental Witnesses

Northwest has had ample notice that the testimony of Continental employees may not mimic the testimony of Northwest employees on several of the issues in this case. Northwest ignored those warnings at its peril, and, in any event, is not entitled to assume Continental executives will "tilt" their testimony to favor Northwest.

The Government has identified the following Continental employees and executives on its witness list: Greg Brenneman, Jeffrey Smisek, and William Brunger ("will call"); Thomas Barber, Gordon Bethune, Mark Bergsrud, and David Grizzle ("may call").[4] Other than Parker (whom Northwest is entitled to depose under the Court's Order), all of the witnesses listed by the government were deposed by the government during the fact discovery phase set forth in the scheduling order -- most of them nearly a year ago. Northwest counsel attended all of those depositions.

If Northwest believed at the time of these depositions that a particular Continental witness testified truthfully at his deposition, then Northwest has every right and opportunity to use those prior statements to impeach that witness if he strays from that prior testimony at trial. If, on the other hand, Northwest's counsel believed that a Continental employee was testifying at deposition untruthfully or in a manner inconsistent with statements that witness had previously made, counsel had the opportunity at that time to seek to clarify or expand upon the witness' basis for such testimony. If, for whatever reason (perhaps strategic), Northwest's counsel chose not to do so,

[4]The Government initially included George Parker, a director on Continental's Board of Directors, as a "may call" witness, but has subsequently advised Northwest that he has been removed from the Government's list of witnesses.

Northwest cannot use its choice at the time to justify its current request to repeat discovery.

As has been made abundantly clear in recent filings by the parties, and the hearings conducted by the Court, Continental's testimony on what Northwest describes as one of "the central issues in the case -- the linkage between the equity and the Alliance," (Northwest Motion at 1), has been clear to Northwest for almost one year. During their depositions last fall, both Gordon Bethune, CEO of Continental, and Greg Brenneman, COO of Continental, testified that they did [**REDACTED** **]**[5] Northwest's counsel made no attempt to challenge or refine those statements at the time of the depositions. Northwest's counsel may have made a tactical decision not to explore those statements fearing that Continental's witnesses would provide further evidence to undercut Northwest's position. No matter, what is clear is that Northwest was put on notice in the fall of 1999 that Continental's testimony on this key issue was [**REDACTED**

] Northwest now struggles to find a basis to discredit that testimony simply because it undermines one of Northwest's key defenses in this case.

Finally, Northwest cannot justify reopening discovery on "governance" issues by claiming "surprise." No litigant is entitled to assume any co-party will agree with them on all issues and it is not surprising, at least to the Government, that Continental witnesses would develop a more

---

[5] [**REDACTED**

].

realistic assessment of the limitations of the governance agreements after gaining two years of experience working under the shadow of a competitor's control. If a witness has made a prior statement Northwest views as inconsistent, it is free to use it at trial. Otherwise, discovery is, and should remain, closed.

B. The Burden and Expense of Northwest's Proposed Discovery Outweighs its Likely Benefits

Northwest's request, coming as it does on the eve of trial, creates considerable burden to the Government. Even apart from Northwest's requested new discovery, the parties already are faced with a formidable amount of discovery to be completed in the remaining time before trial. There were 12 individuals identified on Northwest's Preliminary Witness List who had not previously been deposed in this case and which the United States has the right (and necessity) of deposing under the Court's scheduling order.[6] Similarly, there were six individuals identified on the Government's witness list whom Northwest has the right to depose prior to trial.[7] This means that the parties already have had to schedule and conduct as many as 17 depositions before trial, in addition to all of the other pretrial tasks, including negotiation of a final pretrial order and resolution of all possible evidentiary issues pertaining to trial exhibits and testimony. Adding to this burden by granting Northwest's request for depositions of seven Continental witnesses who have already been deposed in this case before October 24th is unnecessary.

C. If Discovery Is Reopened, the United States Is Entitled to Equivalent Discovery

[6]The individuals include five Northwest executives, employees of various corporations that presumably are customers of Northwest, and representatives from various Detroit area organizations.

[7]The witnesses include a corporate travel manager from Eaton Corporation and executives of various airlines.

Northwest's desire to serve additional document requests is a ploy designed to give Northwest an unfair advantage by conducting one-sided discovery out of time. For example, Northwest seeks discovery of documents related to Continental's reasons for seeking to repurchase the supervoting Continental shares Northwest now owns. (See Document Request 4 of Northwest's Proposed Document Requests.) Obviously, in the event such discovery is granted, the Government would be entitled to seek similar discovery from Northwest for documents relating to its reasons for rejecting Continental's overtures and continuing to hold equity in Continental. Equally relevant to the issues in this litigation are documents relating to Northwest's recent merger talks with American Airlines that discuss Northwest's ownership of Continental stock or its alliance with Continental. Although Northwest stridently argued to this Court during the August 30th hearing that its alliance with Continental "is the single most life-saving and life threatening deal" in Northwest's history (Hearing Transcript at p. 43), the Government suspects Northwest would have been willing to abandon its relationship with Continental (and the "efficiencies" it created) if necessary to achieve a deal with American. In short, any further discovery must be a "two way street."

III. CONCLUSION

The interests of justice will best be served at this late stage by having all parties focus on preparing this case for trial rather than engaging in a new round of time consuming and unnecessary

factual discovery. Northwest's eleventh-hour claims of unfair surprise and prejudice are belied by Northwest's deliberate decision not to pursue further inquiry into Continental employees' testimony almost one year ago. Accordingly, Northwest's motion should be denied.

DATED: October 17, 2000

Respectfully submitted,

"/s/"

James R. Wade
Jill A. Ptacek
Trial Attorneys
Antitrust Division
Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, D.C. 20530
(202) 353-8730

COUNSEL FOR PLAINTIFF UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, v. NORTHWEST AIRLINES CORP., and CONTINENTAL AIRLINES, INC., Defendants.	Civil Action No. 98-74611 Judge Hood Magistrate Scheer

ODER DENYING NORTHWEST AIRLINES MOTION TO REALIGN CONTINENTAL AS AN ADVERSE PARTY AND TO REOPEN DISCOVERY OF CONTINENTAL'S ADVERSE INTERESTS

This Court has considered Defendant Northwest Airlines Corp.'s Motion to Realign Continental as an Adverse Party and to Reopen Discovery of Continental's Adverse Interests and has had the opportunity to have this matter fully briefed by the parties. Having considered the arguments of the parties, this Court being otherwise fully advised;

IT IS HEREBY ORDERED that Defendant Northwest Airlines' Motion to Realign Continental as an Adverse Party and to Reopen Discovery of Continental's Adverse Interests is denied

Dated: _____

_____
DENISE PAGE HOOD
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing redacted version of PLAINTIFF UNITED STATES OF AMERICA'S MEMORANDUM IN OPPOSITION TO NORTHWEST AIRLINES' MOTION TO REALIGN CONTINENTAL AS AN ADVERSE PARTY AND TO REOPEN DISCOVERY OF CONTINENTAL'S ADVERSE INTERESTS was served by hand and/or first-class U.S. mail, postage prepaid, this 17th day of October, 2000 upon each of the parties listed below:

Donald L. Flexner (By Hand)
James P. Denvir
BOIES, SCHILLER & FLEXNER PLLC
5301 Wisconsin Avenue, N.W.
Suite 570
Washington, D.C. 20015
(202) 237-2727

John L. Murchison, Jr. (By U.S. Mail)
VINSON & ELKINS, LLP
2300 First City Tower
Houston, TX 77002-6720
(713) 758-2338

Alexandre de Gramont (By Hand)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Paul L. Yde (By Hand)
VINSON & ELKINS
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-1008
(202) 639-6685

Lawrence G. Campbell (By U.S. Mail)
DICKENSON, WRIGHT, MOON
VAN DUREN & FREEMAN
500 Woodward Avenue
Suite 4000
Detroit, MI 48226
(313) 223-3500

Eugene Driker (By U.S. Mail)
BARRIS, SOTT, DENN & DRIKER, PLLC
211 West Fort Street, 15th Floor
Detroit, MI 48226-3281
(313) 965-9725

"/s/"
Salvatore Massa
Counsel for Plaintiff
United States of America