IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, *Plaintiff,* v. AMR CORPORATION, AMERICAN AIRLINES, INC., and AMR EAGLE HOLDING CORPORATION, *Defendants.*	)	Civil Action No.: 99-1180-JTM

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION *IN LIMINE* TO PRECLUDE ADMISSION OF "STATE ACTION" EVIDENCE

Pursuant to Federal Rules of Evidence 401 and 402, the United States moves *in limine* to preclude the admission of evidence that the State of Texas has articulated a clear policy to regulate competition at airports in the Dallas/Ft. Worth area and has conferred authority on the cities of Dallas and Fort Worth and/or the DFW Airport Authority to implement business practices in furtherance of that state policy, and the admission of evidence that the DFW Airport Authority actively supervises the use of facilities at DFW, including certain activities of lessees, such as subleasing and transfers of leaseholds. Such evidence, offered by way of presenting a state action immunity defense to this antitrust action, is inadmissible because it is irrelevant.

The only conduct for which American appears to be claiming state action immunity involves American's operation of leaseholds at DFW. (Pretrial Order at 74). While the United

States may seek to introduce evidence that American's dominant position at DFW (however achieved) raises barriers to entry by other airlines into DFW routes, the United States does not intend to challenge American's operation of leaseholds at DFW. The sole issue presented by this motion is whether the state action defense requires the Court to ignore the potential barrier to entry created by American's leaseholds at DFW in determining whether American monopolizes certain DFW routes. This issue is purely a question of law, the resolution of which will reduce the length of the trial.

A. BACKGROUND

Defendants AMR Corporation, American Airlines Inc., and AMR Eagle Holding Corporation (collectively American) recognize that the state action immunity defense applies only when the *challenged conduct* is authorized by clearly articulated, affirmatively expressed, and actively supervised state policy. *California Retail Liquor Dealers Ass'n v. MidCal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). (*See* Pretrial Order at 74). To satisfy the "clear articulation" element of the state action defense, American must show that the State has an announced policy "to displace competition with regulation or monopoly public service," *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985), and that the State expressly authorized the conduct challenged by the United States in this case. *MidCal*, 445 U.S. at 105. While the State of Texas may have articulated a policy regarding the regulation of airports[1], the United States has found no

[1] Tex Transp. Code Ann. § 22.002 (West 1998) provides: "the planning, acquisition, establishment, construction, improvement, equipping, maintenance, operation, regulation, protective, and policing of an airport . . . " falls in the category of "public and governmental functions, exercised for a public purpose, and matters of public necessity."

reference to the State of Texas articulating a policy regarding the regulation of competition between airlines.[2]

American does not and cannot claim that the State of Texas endorses and actively supervises the predatory pattern of conduct challenged by the United States in this case -- American's unprofitable capacity additions, with accompanying pricing, yield management and other actions. Instead, American's purported state action defense focuses on whether the DFW Airport Authority actively supervises facility issues at DFW Airport, including the subleasing and transfers of leaseholds by lessees, expansion plans and gate allocations and assignments, under the authority of the State of Texas and pursuant to a clearly articulated state policy to displace competition with regulation. The United States is not asking this Court to find that American violated the Sherman Act by entering into leases at DFW Airport -- at most, the United States is asking the Court to find certain conditions at the DFW airport constitute barriers to entry which assist American in maintaining monopoly power on certain DFW city-pair routes.

B. THE ONLY RELEVANT ISSUE REGARDING BARRIERS TO ENTRY IS WHETHER THEY EXIST; THEIR CAUSE IS NOT RELEVANT

The Court's consideration of barriers to entry at DFW is not limited to those barriers that result from American's predatory conduct. The United States Court of Appeals for the Tenth Circuit recognizes that "entry barriers are relevant to the analyis of market or monopoly power." *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F. 2d 951, 967 (10th Cir. 1990). The Tenth

[2] To the extent that the State of Texas regulates air carriers, it does so through the Texas Aeronautics Commission, and not through municipal airport authorities. Vernon's Ann. Texas Civ. St. Art 46c -6 (West 2000).

Circuit defines entry barriers as "particular characteristics of a market which impede entry by new firms into that market, " and recognizes legal and regulatory requirements as possible sources of barriers to entry. *Id*. In *Reazin*, the Tenth Circuit recognized that historical advantages stemming from Kansas legislation contributed to Blue Cross' "dominant position in Kansas." *Id*. at 969.

Courts have rejected the notion that conditions resulting from the federal regulatory process cannot be considered in the "barrier to entry" analysis. *Consolidated Gas Company v. City Gas Company*, 880 F. 2d 297, 300 ((11th Cir. 1989)(rejecting defendant's contention that it did not have monopoly power because the barriers were "not of its own making, but the result of the Commision regulation and the economic realities of a capital intensive industry.") "Any market condition that makes entry more costly or time-consuming and thus reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm should be considered a barrier to entry, regardless of who is responsible for the existence of that condition." *Southern Pacific Communications Co. v. AT&T*, 740 F. 2d 980, 1001 (D.C. Cir. 1984). Any argument by American that its conduct in entering into leaseholds at DFW is immune from antitrust scrutiny under the state action doctrine is legally irrelevant to the Court's determination of whether conditions exist at DFW which make entry there difficult.

C. CONCLUSION

Analysis of entry barriers faced by potential carriers seeking to serve DFW city-pair routes from either Dallas-Love Field or DFW Airport is necessary to the Court's determination of American's monopoly power on those city-pair routes. Whether those entry barriers result from federal regulation, municipal regulation, or any American leases immunized from scrutiny by the

state action doctrine is irrelevant -- and evidence relating to the "state action" defense should therefore be excluded from trial.

Dated April 1, 2001

Respectfully submitted,
PLAINTIFF UNITED STATES

By: /"s"/

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