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Order 99-4-14



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 13th day of April, 1999

Served: April 14, 1999

LOVE FIELD SERVICE	:	Docket OST-98-4363
INTERPRETATION PROCEEDING	:	
	:	
	:	

**ORDER ON RECONSIDERATION
ON PROCEDURAL ISSUES**

The Department began this proceeding to issue interpretations on the federal law issues raised by the dispute over the type of airline services that may be operated at Dallas' Love Field. The dispute was precipitated by a 1997 statute, Section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L. No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997) ("the Shelby Amendment"), which authorized additional airline services at that airport. This Department issued an order stating its interpretation of those issues, Order 98-12-27 (December 22, 1998), and an order ruling on the procedural issues raised in the proceeding, Order 98-12-28 (December 22, 1998). On the principal issue presented by the dispute, the Department held that the City of Dallas as Love Field's owner was not entitled to block airlines from operating the additional types of Love Field service authorized by the Shelby Amendment.

The City of Fort Worth and the Dallas-Fort Worth International Airport Board ("the DFW Board"), which seek to compel Dallas to restrict Love Field service, have filed petitions for reconsideration of both orders. The City of Dallas, Continental Express, and Legend Airlines oppose the petitions.

We are granting the petitions for reconsideration. The Department is addressing the procedural arguments in this order and the arguments on the substantive issues in a companion order. For the reasons stated below and in the companion order, we reaffirm our rulings on the issues in this proceeding.

BACKGROUND

Our earlier two orders set forth in detail the factual and legal background to the current dispute over additional Love Field service and the federal statutory and procedural issues presented in this proceeding. In essence, we began this proceeding because that dispute raised important issues involving the interpretation of federal statutes that we are responsible for administering and enforcing. In addition, several of the parties had asked us to intervene in the dispute. Order 98-12-27 at 2, 17-18.

The dispute had led to litigation in the state and federal courts in Texas. As explained below, the parties opposing additional Love Field service have contended that the state court proceeding, City of Fort Worth, Texas v. City of Dallas, Texas, et al., Tarrant County District Ct. No. 48-171109-97, bars us from issuing a decision on the federal law questions being considered by the state court. See Order 98-12-28 at 8-10.

Fort Worth had initiated the state court litigation by filing a suit against Dallas immediately after the Shelby Amendment's enactment. That proceeding grew to include American, the DFW Board, Continental Express, and Legend, but neither Southwest nor this Department has been a party in that proceeding. See Order 98-12-27 at 14-15.

After we began this proceeding, the state court granted summary judgment motions filed by Fort Worth, the DFW Board, and American against Dallas, Continental Express, and Legend. See Order 98-12-27 at 14-15. The state court's decisions on the federal law issues considered by it were contrary to our interpretation set forth in Order 98-12-27. The state court held that federal law allowed Dallas to restrict service at Love Field and that Dallas could not allow airline service between Love Field and points outside Texas and the four states bordering on Texas, even if operated with aircraft having no more than 56 seats. The state court made this decision final by an order dated December 16, 1998. DFW Petition at 3.

Dallas, Continental Express, and Legend have since filed motions asking for dismissal, a modification of the judgment, or a new trial. Dallas Opposition at 11.

SUMMARY OF OUR FINAL DECISION

We issued two final orders in this proceeding. Order 98-12-27 set forth our interpretation of the relevant federal statutes. Order 98-12-28 concluded that we had the responsibility and authority for issuing a ruling interpreting those federal statutes and that no improper conduct or ex parte communications had occurred.

We concluded that we should issue a decision interpreting the relevant federal statutes, since we had the responsibility for administering and enforcing the federal statutes relevant to the Love Field dispute. Those statutes consisted of the two statutes specifically regulating Love Field operations, the Shelby Amendment and an earlier statute, section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980), known as the Wright Amendment, and the statute preempting state and local government regulation of airline routes and services, 49 U.S.C. 41713. Order 98-12-28 at 6-8, citing, inter alia, Cramer v. Skinner, 931 F.2d 1020, 1024 (5th Cir. 1991), cert. denied, 502 U.S. 907; 49 U.S.C. 46101(a)(2) and 40113(a). We noted as well that we had issued an earlier order interpreting the Wright Amendment, Order 85-12-81 (December 31, 1985). Order 98-12-28 at 1.

We found that we should assist the parties by issuing our interpretation of those statutes, since doing so would help resolve the major issues in the dispute. An order stating our interpretation would also help Dallas comply with the applicable federal statutes in its management of Love Field. Order 98-12-28 at 8.

We determined that the state court proceeding did not bar us from issuing an order interpreting the relevant federal statutes. Although the parties opposing additional Love Field service contended, among other things, that the issuance of our interpretation would violate the Anti-Injunction Act, 28 U.S.C. 2283, the courts had not construed that act as barring federal agencies from carrying out their responsibilities. Order 98-12-28 at 8-10.

The other principal procedural issue addressed in our earlier order was Fort Worth's claim that Department officials and staff members were allegedly biased and had engaged in improper ex parte communications with some of the parties in the proceeding. On the basis of such allegations, Fort Worth asked us to disclose any communications between Department officials and staff members and outside parties. No other party supported Fort Worth's allegations, and Fort Worth did not ask to disqualify anyone from participating in our proceeding. Order 98-12-28 at 10-11.

We denied Fort Worth's request for disclosure. We pointed out that Fort Worth had cited nothing suggesting any bias or improper conduct by Department officials and staff members. We described in detail the communications that outside parties had with Department officials and staff members, noted that almost all of them had occurred before we began this proceeding, and explained that the later communications did not involve the merits of this proceeding and so were not unlawful. We additionally pointed out that

contacts by Fort Worth and American accounted for many of these communications. Fort Worth's allegations of bias similarly had no merit. We therefore concluded that the conduct cited by Fort Worth violated no statute or Department rule and had not prejudiced Fort Worth. Order 98-12-28 at 11-17.

THE PARTIES' PLEADINGS

Fort Worth and the DFW Board are seeking reconsideration of our decision that we may properly issue an interpretation of the federal statutes notwithstanding the pendency of the state court proceeding.¹ In its petition for reconsideration of Order 98-12-28, Fort Worth again demands disclosure of alleged improper communications.

The DFW Board and Fort Worth contend that we may not issue an order interpreting the federal laws at issue, for we are allegedly required to give full faith and credit to the state court's judgment under 28 U.S.C. 1738. The state court held that Dallas had the right (and obligation) as Love Field's owner to bar airlines from operating the additional types of service authorized by the Shelby Amendment, a holding directly contrary to our interpretation of the federal statutes. That court additionally ruled that the Wright and Shelby Amendments authorized no service between Love Field and points outside Texas and the four states bordering on Texas. We are allegedly obligated by 28 U.S.C. 1738 to give full faith and credit to the state court's judgment, even though we were not a party to the state court case. DFW Petition at 2-7; Fort Worth 98-12-27 Petition at 1.

Fort Worth also asks us to reconsider our alleged refusal to disclose the ex parte communications between the Department and the parties to this proceeding. Fort Worth 98-12-28 Petition. Fort Worth, however, does not attempt to show any error in our findings that no ex parte communications occurred.

Dallas, Continental Express, and Legend oppose the petitions for reconsideration. Dallas and Continental Express assert that the state court judgment did not end our authority to rule on the federal law interpretation questions and that we properly carried out our responsibility to administer and enforce the relevant federal statutes. Continental Express and Legend contend that Fort Worth's request for additional disclosure of ex parte contacts is baseless.

¹ The DFW Board's petition for reconsideration of Order 98-12-27, the order stating our interpretation of the applicable federal laws, also seeks reconsideration of our conclusion in Order 98-12-28 that we could issue an order interpreting the federal statutes despite the pendency of the state court proceeding. Fort Worth, which filed separate petitions for reconsideration of each order, similarly challenges that same conclusion in its petition for reconsideration of Order 98-12-27 rather than in its petition for reconsideration of Order 98-12-28. We will address that issue in this order.

We conclude that neither the DFW Board nor Fort Worth has shown any error in our earlier decisions. We therefore reaffirm our earlier decisions.

THE DEPARTMENT'S JURISDICTION

For the most part, Fort Worth and the DFW Board do not challenge the reasoning underlying our decision that we may and should issue an order stating our interpretation of the federal statutes underlying the dispute over additional Love Field service. They do not contest, for example, our conclusion that our responsibility for administering and enforcing those statutes makes it proper for us to issue an order interpreting them in the context of the Love Field dispute. Nor do Fort Worth and the DFW Board challenge our conclusion that the Anti-Injunction Act, 28 U.S.C. 2283, did not preclude us from issuing a decision interpreting the federal statutes. Order 98-12-28 at 9.

Instead, Fort Worth and the DFW Board rely now on a different federal statute, 28 U.S.C. 1738, as the basis for their argument that we may not issue a decision contrary to the state court's decision. They claim that that statute requires us to give full faith and credit to the state court's decision.

We reaffirm our original conclusion that the state court judgment cannot preclude us from issuing our order interpreting the relevant federal statutes. The statute cited by Fort Worth and the DFW Board has not eliminated our authority to administer the federal aviation statutes applicable to Love Field. That result is hardly surprising, for the position taken by Fort Worth and the DFW Board is inherently unreasonable – they contend that this Department, the agency charged by Congress with the responsibility for administering and enforcing the Wright and Shelby Amendments and the statute preempting state and local government regulation of airline routes, would be bound by a decision made by a Texas court in a proceeding where this Department was not a party.

In our earlier order, we stated that we could not be bound by the state court's judgment because we were not a party in the state court proceeding. Order 98-12-28 at 8-9 and n. 2. The DFW Board complains that we cited no statute or case law in support of that statement, which it considers erroneous. DFW Petition at 4.

The DFW Board misunderstands the law. A fundamental principle of American law holds that, with some exceptions, a person who is not a party in a case cannot be bound by a judgment entered in that case. See, e.g., Richards v. Jefferson County, 116 S. Ct. 1761, 1765-1766 (1996); Hansberry v. Lee, 311 U.S. 32, 40 (1940); Restatement, Second, Judgments, section 34.

A person does not become bound by a judgment in earlier litigation by knowing about the litigation and having the opportunity to intervene. See, e.g., Martin v. Wilks, 490 U.S. 755 (1989). The Supreme Court stated in Chase National Bank v. Norwalk, 291 U.S. 431, 441 (1934) (Brandeis, J.),

The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

The statute cited by Fort Worth and the DFW Board, 28 U.S.C. 1738, does not overturn this principle of law. That statute states only that judicial proceedings of any court of any state “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken.” The statute by its terms and as interpreted by the courts does not compel us to apply the state court’s judgment.

First, the statute by its terms imposes obligations only on “every court.” We are not a court, so the statute does not apply to us. NLRB v. Yellow Freight Systems, 930 F.2d 316, 320 (3rd Cir. 1991).²

Secondly, even if the statute were deemed to apply to federal agencies, it would not require us to give full faith and credit to the state court’s decision. The federal courts have stated that the statute would not compel even a federal court to give full faith and credit to a state court judgment when doing so would frustrate important federal policies. See, e.g., Midgett v. United States, 603 F.2d 835, 845 (Ct. Claims 1979) (“A judgment or decree of a state court whose effect would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in a federal court”); Red Fox v. Red Fox, 564 F.2d 361, 365, n. 3 (9th Cir. 1977); American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir. 1972); Lyons v. Westinghouse Electric Corp., 222 F.2d 184, 189-190 (2nd Cir. 1955) (Learned Hand, J.). In Yellow Freight the Third Circuit held that 28 U.S.C. 1738 does not impose obligations on federal agencies in part because subjecting agencies to that statute would interfere with Congress’ goal of establishing uniform, nationwide standards. 930 F.2d at 320.

In deciding whether a state court judgment precluded the plaintiffs in a federal case from prosecuting their federal claims, the Supreme Court considered whether giving binding effect to the state court judgment would interfere with the administration of federal regulation. Matsushita Electrical Industrial Co. v. Epstein, 516 U.S. 367 (1996). The Court held that the state court judgment barred the plaintiffs, who had been members of the plaintiff class in the state court suit, from prosecuting their federal claims. In reaching

² Midgett v. United States, 603 F.2d 835, 845 (Ct. Claims 1979), assumed that federal agencies must also comply with 28 U.S.C. 1738. However, in Yellow Freight Systems the Third Circuit persuasively explains that the statute should not be given an interpretation contrary to its literal meaning. 930 F.2d at 320. But Midgett in any event stated that the statute would not apply when that would frustrate important federal policies, 603 F.2d at 845. That is true here.

that decision, the Court observed, “There is no danger that state-court judges who are not fully expert in federal securities law will say definitively what the Exchange Act means and enforce legal liabilities and duties thereunder.” 516 U.S. at 383.

Our giving full faith and credit to the state court judgment would interfere with important federal policies. A requirement here that we follow the state court decision would interfere with Congress’ determination that this Department’s administration of the statutes governing airline and airport operations would help achieve the best air transportation system. As the Supreme Court stated, Northwest Airlines v. County of Kent, 510 U.S. 355, 366-367 (1994):

The Secretary of Transportation is charged with administering the federal aviation laws His Department is equipped, as the courts are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances.

Requiring us to comply with state court interpretations of federal statutes governing airport operations would also interfere with the creation of a uniform policy, as the First Circuit pointed out, New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 175 (1st Cir. 1989):

The need for a cohesive, uniform national policy in the control of the country’s airspace is clearly paramount. To allow parochial interest to overcome such concerns is to invite ungovernable checkerboard anarchy.

Allowing state court judgments to definitively determine the scope of an airport’s proprietary rights could undermine our ability to enforce Congress’ decision that state and local governments may not regulate airline routes and service, subject to the exception for proprietary rights. The state court has issued a decision which is contrary to the interpretation of the relevant federal statutes followed by federal courts and agencies. And, of course, the state court decision would bar airlines from operating services that Congress chose to authorize when it enacted the Wright and Shelby Amendments.

In a recent enforcement case, the FAA similarly concluded that it was not obligated to give full faith and credit to a state court judgment when doing so would interfere with the FAA’s administration of its responsibilities and the need to establish national standards governing airport operations. Centennial Express Airlines v. Arapahoe County Public Airport Authority, Final Agency Decision and Order, FAA Order No. 1999-1 (February 18, 1999), at 17.

Thirdly, 28 U.S.C. 1738, if applicable, requires us to comply with the state court judgment to the extent required by Texas law. The statute only requires tribunals to give full faith and credit to a Texas court decision when the Texas courts would do so. Under Texas law we are not bound by the state court decision.

A Texas statute specifically states, “A declaration does not prejudice the rights of a person not a party to the proceeding.” Tex. Civ. Prac. & Rem. Code, section 37.006. Dallas points out that the state court denied requests to join us and Southwest as parties. Dallas Opposition at 2. This statute thus holds that we cannot be bound by the state court judgment.

In addition, under Texas case law a judgment does not ordinarily bind a person who was not a party to the proceeding unless the person was in privity with a party. There is no privity between us and any party in the state court litigation under Texas law. “[T]he mere fact that persons may happen to be interested in the same question or in proving the same state of facts” does not establish privity. Privity instead “connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right.” Benson v. Wanda Petroleum Co., 468 S.W. 2d 361, 363 (Tex. S. Ct. 1971). Cf. Centennial Express Airlines, Final Agency Decision at 15-16.

We know of no basis under Texas law for stating that we are in privity with the parties to the state court litigation. We do not have “an identity of interest” with any of them. None of them has participated in that proceeding as our agent, under our control, or at our request. The DFW Board has cited only one case, Superior Oil Co. v. City of Port Arthur, 726 F.2d 203 (5th Cir. 1984), in support of its position. DFW Petition at 6-7. That case stated “that a judgment in favor of or against a municipal corporation, county, or state on a matter affecting the public interest binds all citizens and taxpayers even though they were not made parties to the suit.” 726 F.2d at 206. While two municipal corporations, Dallas and Fort Worth, are parties to the state court litigation, neither this Department nor the United States is a citizen or taxpayer of either city.

In addition to relying on 28 U.S.C. 1738, the DFW Board and Fort Worth cite two cases where a U.S. court of appeals allegedly held that a state court decision barred a federal agency from taking action contrary to that decision, even though the agency had not been a party to the state court proceeding. Those decisions are Town of Deerfield v. FCC, 992 F.2d 420 (2^d Cir. 1993), and United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980). Neither case supports the position of the DFW Board and Fort Worth. Each case held that a federal agency was bound by the judgment in an earlier court proceeding in which the agency was not a party, but the circuit courts based their decisions on the unusual nature of the federal regulatory scheme, not on any general principle that federal agencies must comply with state court judgments entered in proceedings in which they were not a party.

In Town of Deerfield v. FCC, 992 F.2d 420 (2nd Cir. 1993), the Court of Appeals reversed an FCC decision holding that an FCC regulation had preempted a Deerfield zoning ordinance. The FCC regulation generally stated that local governments could not use their zoning powers to block the installation of satellite antennas. To avoid becoming a national zoning board, the FCC had stated, however, that it would take enforcement action only after a person seeking to install such an antenna had first exhausted his or her remedies in the courts.

The Deerfield case arose out of a resident's installation of a satellite-dish antenna on a smaller lot in violation of the town ordinance. The ordinance prohibited the installation of satellite-dish antennas on smaller residential lots. After the town denied the resident's request for a zoning variance authorizing the antenna's installation, he asked the FCC to intervene. The agency declined on the basis of its regulation and stated that it would consider intervening only after he had exhausted his rights in the courts. When the town resident attempted to defend his installation of the antenna in the state courts, those courts held that the town's zoning ordinance was not preempted. When the resident then sued the town in the federal courts, the district court and the Second Circuit held that the final state court decision precluded him from relitigating his claims. See 992 F.2d at 423-425.

Only after the end of the state and federal court litigation did the FCC investigate whether Deerfield had unlawfully interfered with the antenna's installation. The FCC decided that its regulation preempted the town's zoning ordinance. See 992 F.2d at 425-426.

The Second Circuit reversed the FCC, not because the FCC was bound by the state court decision, but because the FCC had in effect reversed the judgment of the federal courts: "A judgment entered by an Article III court having jurisdiction to enter that judgment is not subject to review by a different branch of government, for if a decision of the judicial branch were subject to direct revision by the executive or legislative branch, the court's decision would in effect be merely advisory." 992 F.2d at 428. The Second Circuit's holding thus does not apply here, for no federal court has issued a decision contrary to our decision in Order 98-12-27.

In addition, the Second Circuit's refusal to affirm the FCC decision on the preemption question reflects the unusual nature of the FCC regulation. The FCC chose not to become involved in the dispute over the antenna until the matter had been finally decided by the state courts. The FCC regulation indeed had created a procedure whereby the agency would not intervene in any such dispute until after the courts had issued a final judgment. The FCC thus made the state and federal courts into advisory bodies. Here, in contrast, we began this proceeding before the state court had issued a final decision.

More importantly, the dispute over Love Field service, unlike the dispute over the antenna, involves important public policy issues. Among other things, the state court judgment would block airlines from operating services that Congress chose to authorize when it adopted the Shelby Amendment and that could benefit many travellers. The Deerfield decision, in contrast, affected few members of the public. See also Centennial Express Airlines, Hearing Officer Decision (December 23, 1999), at 16-17.

Equally inapplicable here is the Ninth Circuit's decision in Rayonier that the EPA was precluded by an earlier state court decision from prosecuting a firm for alleged violations of the firm's discharge permit. The EPA had not participated in the state court suit, which had been filed by the state agency responsible for enforcing such permits.

The Ninth Circuit held that the state court judgment barred the EPA from suing the firm in a federal action, because the interests of the EPA and the state agency were identical. 627 F.2d at 1003. The Court of Appeals pointed out that the underlying federal statute created concurrent enforcement authority and a “delicate partnership” between the EPA and state agencies. 627 F.2d at 1000-1001. Here, in contrast, no party in the state court proceeding has the same interests as this Department, which is charged by Congress with the responsibility for administering and enforcing the statutes specifically governing Love Field and those generally governing airport operations. Airport owners and airlines do not have concurrent enforcement authority, unlike the state agency in Rayonier.

Since the DFW Board and Fort Worth have failed to show that the state court judgment has nullified our authority to issue an interpretation of the federal statutes, we reaffirm our original decision that we have the authority and the responsibility to issue an order stating our interpretation of the applicable federal statutes.

FORT WORTH'S RENEWED REQUEST FOR DISCLOSURE

The other procedural issue presented by the petitions for reconsideration is Fort Worth's renewed request for disclosure of contacts between the Department and the parties to this proceeding. On the basis of unsupported charges that improper ex parte communications had occurred, Fort Worth had demanded in its original comments in this proceeding that we disclose all such communications. Fort Worth then alleged, among other things, that the Department had acted improperly by giving Continental Express a letter restating the Department's position on certain issues relevant to Continental Express' plan to begin operating nonstop flights between Love Field and Cleveland with regional jets. See Order 98-12-28 at 10-11.

We denied Fort Worth's request in our earlier order, since no improper communications had occurred. Our order listed the various contacts between the Department and the parties to this case.³ Almost all of the contacts between any party and Department

³ A few contacts occurring just before the final orders' issuance were not described by Order 98-12-28. Legend's counsel had a telephone conversation and sent a letter to one Department official restating Legend's interest in obtaining a prompt ruling by the Department on the statutory issues. Dallas' counsel similarly stated that Dallas still wanted the Department to issue a ruling, notwithstanding press reports that Dallas and Fort Worth might be engaged in settlement discussions. Other Department officials discussed the status of the proceeding with members of Congress, including Senator Hutchison. The North Texas Commission sent letters to Department officials supporting the DFW Board's request for mediation and requesting us to delay our decision while the cities were holding settlement talks. In addition, in January Legend's counsel sent one Department official a letter enclosing a copy of a Fort Worth newspaper editorial and further orders of the state court. On March 24 Legend's counsel sent another letter requesting a prompt decision. None of these contacts involved a discussion of the merits of the issues in this proceeding, and we have placed all of the written communications in the docket.

officials and staff members had occurred before we began this proceeding. Those contacts, moreover, included meetings with American and Fort Worth itself. We additionally pointed out that the letter given Continental Express was also sent before this proceeding began and that that letter specifically declined to rule on the legal questions presented in this proceeding. The contacts occurring before this proceeding began by definition could not be ex parte communications.⁴ The relatively few contacts that occurred thereafter did not involve the merits of the issues in this proceeding. And we stated that none of the contacts had prejudiced Fort Worth. Order 98-12-28 at 14-16, 17.

Fort Worth's reconsideration petition does not attempt to dispute any part of our rationale for denying its request for disclosure. Fort Worth makes no effort to show that any communication cited in our order violated our rules, any statute, or its due process rights. Instead Fort Worth again summarily complains that we have not disclosed all contacts between the Department and the parties.

Fort Worth asserts that "the Department engaged in ex parte communications with Fort Worth's adversaries about issues in this case" in "the middle of this proceeding" and "in violation of its own rules." Petition at 2. Fort Worth wrongly assumes that other communications occurred that were not disclosed by us or by discovery in the state court proceeding. Fort Worth, moreover, makes no effort to substantiate its charge – it does not identify which allegedly ex parte communications occurred, when they occurred, or how they violated our rules. Given Fort Worth's complete failure to make any showing that improper communications occurred, there is no basis for granting its request for reconsideration on this matter. As happened earlier in this proceeding and in the state court proceeding, Fort Worth has made charges of improper conduct without any factual or legal basis.

Fort Worth wrongly claims it cannot substantiate its charges of bias because it has allegedly been denied access to the Department's records. There is no bias, so no evidence of the type sought by Fort Worth can exist. As we explained in our earlier order, no party is entitled to an investigation of an agency's decision-making process without a strong showing of likely misconduct. Order 98-12-28 at 17, citing Checkosky v. SEC, 23 F.3d 452, 489 (D.C. Cir. 1994). Fort Worth has made no such showing.

In addition, Fort Worth again focuses on events that occurred before we began this proceeding, notably the letter given Continental Express. Fort Worth claims that Continental Express has been unable to give the city a copy of the draft opinion letter sent Continental Express by a Department attorney before the Department finalized its letter to

⁴ Our reasoning is consistent with a Fifth Circuit case, DCP Farms v. Yeutter, 957 F.2d 1183 (5th Cir. 1992), which held that Congressional contacts occurring before the beginning of quasi-judicial proceedings could not be improper.

the airline. Fort Worth 98-12-28 Petition at 2. We have also been unable to find a copy of the draft letter. However, as we stated earlier, Order 98-12-28 at 16, the changes made to the text of the draft were made by Department officials and staff members, not by Continental Express. In any event, as we have repeatedly pointed out, the letter expressly declined to rule on the issues raised in this proceeding. As a result, the drafting and sending of the letter cannot possibly indicate any bias in this proceeding.

ACCORDINGLY:

1. The Department of Transportation grants the petitions for reconsideration of Orders 98-12-27 and 98-12-28 filed by Fort Worth and the Dallas-Fort Worth International Airport Board;
2. The Department of Transportation denies the various requests by Fort Worth and the Dallas-Fort Worth International Airport Board that it modify findings and conclusions set forth in Order 98-12-28 and reaffirms the findings and conclusions made in that order; and
3. Except to the extent granted, all other petitions, applications, motions, and other requests are denied.

By:

A. BRADLEY MIMS

Acting Assistant Secretary for Aviation
And International Affairs

(SEAL)

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