

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

LOVE FIELD SERVICE
INTERPRETATION PROCEEDING

Docket No. OST-98-4363

**OPPOSITION OF CITY OF DALLAS
TO PETITIONS FOR RECONSIDERATION**

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The City of Dallas, Texas (“Dallas”) responds as follows to the Petitions for Reconsideration filed herein by the City of Fort Worth, Texas (“Fort Worth”) and the Dallas/Fort Worth International Airport Board (“DFW Board”). Without taking a position on all of the issues raised in Fort Worth and the DFW Board’s Petitions for Reconsideration and addressing only the questions of jurisdiction and preclusion, Dallas respectfully requests the Department overrule both Petitions for Reconsideration.

I. The Department’s Order is Not Barred by the State Court Ruling.

Both Fort Worth and the DFW Board insist the Department erred in issuing its Declaratory Order after the Tarrant County, Texas District Court entered its “Final Judgment” on December 16, 1998. Petitioners rely on the federal “Full Faith and Credit” statute, 28 U.S.C. § 1738, which requires federal courts to give state court judgments “the same full faith and credit . . . as they have by law or usage in the courts of such State . . .

from which they are taken.” The Department’s Declaratory Order did not violate the provisions of this statute.

A. Even if the state court’s ruling were final, the state court judgment would not be given preclusive effect under federal or state law.

Preclusion is not simply a matter of winning the “race to judgment.” Even if the state court’s judgment were suddenly made “final” for preclusion purposes, which it is not for the reasons discussed in part B below, the Department would not be obligated to give it preclusive effect under § 1738 and common law principles applied in federal and state courts.

Any analysis of the preclusive effect of the state court judgment on these administrative proceedings must take into account at least two important differences between the two actions. First, the state court denied motions to join Southwest Airlines and this Department as “persons who have or claim any interest that would be affected by the declaration,” pursuant to TEX. CIV. PRAC. & REM. CODE § 37.006. As a result, Texas law provides that a declaration entered in that action “does not prejudice the rights of a person not made a party to the proceeding.” *Id.* Fort Worth now seeks to rely on the judgment in that case to bind the Department, Southwest Airlines, and all airlines and other parties that might be affected by these determinations of federal law.

The suggestion that the Department is bound as a “party” to the judgment in the state court action because it was somehow “represented” in that action by Legend, Continental and/or Dallas (DFW Board Petition at 7) is not supported by federal or state law. In the case cited by the DFW Board, *ITT Rayonier*, the federal Environmental Protection Agency was collaterally estopped by a judgment against the Washington

[State] Department of Ecology because of the “partnership” relationship between the two agencies and the “dual track” enforcement scheme of the applicable federal statute.

United States v. ITT Rayonier, Inc., 627 F.2d 996, 1001, 1003 (9th Cir. 1980). No such relationship exists in this case. Similarly, under the Texas law of collateral estoppel, “privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts.” *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). Rather, “privity 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.” *Id.* The Department also is not a “citizen or taxpayer” of the City of Dallas such that it could be bound by a declaratory judgment against the City under the principles articulated in *Superior Oil Co. v. City of Port Arthur*, 726 F.2d 203, 206 (5th Cir. 1984) (cited in DFW Petition at 6).

Consequently, the extent to which the Department may be “bound” by the state court judgment must be determined under the preclusion principles of 28 U.S.C. § 1738 described below, considering the quasi-judicial role it fills in the adjudication of issues arising under the federal aviation laws.

The second important difference is that the Department’s Declaratory Order is much more comprehensive than the state court judgment in addressing the questions of federal law arising from the current disputes concerning air carrier services at Love Field. Although the state court’s summary judgment order appeared to determine the scope of permissible “scheduled interstate passenger *service* to or from Love Field,” the court subsequently stated that issues concerning the “through-ticketing” or “double-ticketing” services offered by Southwest, Continental, and/or American “were not before the Court

and thus were not addressed in the Order.” (Order Concerning Motion to Clarify signed Dec. 20, 1998 [Exhibit 1 hereto]; *see also* Dallas’ Motion to Clarify Summary Judgment Order filed Nov. 5, 1998 [Exhibit 2 hereto]; Fort Worth’s Response to Motion to Clarify, filed Nov. 11, 1998 [Exhibit 3 hereto]; and Response of Intervenor American Airlines, Inc. to Dallas’s Motion to Clarify Order, filed Nov. 11, 1998 [Exhibit 4 hereto]). In contrast, the Department’s Order addresses the full range of air carrier service authorized and restricted by the applicable federal statutes. Further, the state court judgment does not purport to resolve the questions addressed by issues (iv) and (v) of the Department’s Order.¹ Consequently, the state court’s rulings cannot simply be incorporated into this proceeding and given preclusive effect without an incredibly complex (and virtually impossible) analysis of the scope and focus of the two proceedings. Neither federal nor state law requires the Department to engage in such an analysis; both jurisdictions recognize exceptions to preclusion that are applicable to this case.

1. Federal exceptions to preclusion.

The DFW Board acknowledges that preclusion under 28 U.S.C. § 1738 is not rigidly applied; exceptions are made “where the state court imposed a requirement that is contrary to important, well-established countervailing federal policy.” DFW Board Petition at 6 n.1 (citing *NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320-21 (3d Cir. 1991); *United States v. ITT Rayonier*, 627 F.2d 996, 1001-02 (9th Cir. 1980)). The

¹Dallas does not agree with the Department’s rulings on issues (iv) and (v), but curiously neither Fort Worth nor the DFW Board addresses the substance of those rulings in their petitions for reconsideration. Issue (iv), dealing with the enforceability of the DFW Use Agreement restrictions limiting the rights of signatory airlines to conduct certificated air carrier services at competing airports, and Issue (v), dealing with restrictions on through service from Love Field, are issues that should be of primary significance to Fort Worth and the DFW Board, if indeed they are truly interested in maintaining DFW Airport’s role as the region’s dominant airport. Dallas reserves the right to seek review of the Department’s rulings on these issues in an appropriate federal Court of Appeals, pursuant to 49 U.S.C. § 46110.

federal Court of Claims (predecessor to the D.C. Circuit) articulated this exception in language readily applicable to the present situation:

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.

Midgett v. United States, 603 F.2d 835, 845 (Ct. Cl. 1979); *see also American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972) (“other well-defined federal policies, statutory or constitutional, may compete with [the] policies underlying section 1738”).

The national policies at stake in this dispute include the necessity of uniform nationwide application of the federal aviation statutes and regulations, particularly the preemption and proprietary powers provisions of the Airline Deregulation Act, codified as 49 U.S.C. § 41713(b)(1), (3), and the national aviation policies and procedures articulated in 49 U.S.C. §§ 40101(a); 40103(a), (b); 44705; 47101; 47103; 47107; 47108; and 47111. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366-67 (“Department is equipped, as courts are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances.”); *New England Legal Found. v. Massachusetts Port Authority*, 883 F.2d 157, 175 (1st Cir. 1989) (“*Mass. Port*”) (“The need for a cohesive, uniform national policy in the control of the country’s airspace is clearly paramount. To allow parochial interests to overcome such concerns is to invite ungovernable checkerboard anarchy.”). The primary purpose of the express preemption provision of the deregulation statute was to ensure that local governments “not undo federal deregulation with regulation of their own.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). Giving preclusive effect to a state court judgment mandating

specific restrictions on airline routes serving a particular airport would undermine the Department's ability to exercise the authority and responsibility given to it by Congress. *See Mass. Port*, 883 F.2d at 169 ("Congress intended to enact an exclusively administrative enforcement scheme" to govern federal airport improvement grants); *id.* at 171 (district court erred in not deferring to primary jurisdiction of the DOT to resolve questions of preemption and proprietary powers under ADA); *Stafford v. True Temper Sports*, 123 F.3d 291, 294 (5th Cir. 1997) (state administrative or judicial decisions are not given preclusive effect where "Congress created its own administrative scheme to deal with the matter"); *Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 915-16 (8th Cir. 1997) (49 U.S.C. § 47107 "rests enforcement authority" with the DOT and "indicates that Congress intended to establish an administrative enforcement scheme").

In *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), the Court held that a state court judgment confirming settlement of exclusively federal securities claims together with state securities claims is entitled to full faith and credit under § 1738. The Court carefully distinguished the situation, however, from other situations in which such deference would not be appropriate because the interests of "greater uniformity of construction and more effective and expert application" of the law might be threatened:

When a state court upholds a settlement that releases claims under the Exchange Act, it threatens neither of these policies. 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.

Id. at 383 (citations and internal quotation marks omitted). The state court judgment in this case, by contrast, directly threatens the policies of uniform construction and expert

application of the federal aviation laws, and thus would not be entitled to full faith and credit under § 1738.

Declining to accord preclusive effect to the state district court's judgment in the present case would be consistent with the recent decision of the federal hearing officer in *Centennial Express Airlines v. Arapahoe County Public Airport Auth.*, FAA Docket No. 16-98-05 (*Initial Decision* issued Dec. 23, 1998), which declined to bind the FAA to follow the Colorado Supreme Court decision in *Arapahoe County Public Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998), because under the Supremacy Clause the FAA had primary jurisdiction over the matter. Indeed, the state court ruling in the present case has an even weaker claim to preclusive effect than the final judgment of the Colorado courts in the *Arapahoe* case.

2. Texas exceptions to preclusion.

Although Texas courts may not have addressed the precise issues involved in this case, they have applied exceptions to preclusion that indicate they would not give preclusive effect to a state court judgment purporting to usurp the primary jurisdiction of a federal agency such as this Department. The Texas Supreme Court has expressly adopted several provisions of the Restatement (Second) of Judgments, including the exceptions to issue preclusion articulated in §§ 28-29, as well as the “fairness factors” delineated in *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 331-32 (1979). *See Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796, 802 (Tex. 1994); *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 7 (Tex. 1986); *see also Tankersley v. Durish*, 855 S.W.2d 241, 245-47 (Tex. App. — Austin 1993, writ denied). Pertinent provisions of the Restatement indicate that even when collateral estoppel would otherwise be applicable,

relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(2) The issue is one of law and . . . (b) a new determination is warranted in order to . . . avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action

RESTATEMENT 2D OF JUDGMENTS § 28 (1982). Similarly, section 29 provides that preclusion should not be invoked against other parties, even if otherwise applicable where:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(3) The person seeking to invoke favorable preclusion . . . could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;²

²The state court judgment is inconsistent with several previous judgments rejecting efforts by Dallas and Fort Worth to enforce their bond covenants to control airline routes serving Love Field. *See City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974) (“*Southwest I*”); *Southwest Airlines Co. v. City of Dallas*, No. 3-74-344-C (N.D. Tex. 1974) (“*Southwest II*”); *Southwest Airlines Co. v. Texas Int’l Airlines, Inc.*, 396 F. Supp. 678 (N.D. Tex. 1975), *aff’d*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) (“*Southwest III*”); *City of Dallas v. Continental Airlines, Inc.*, 735 S.W.2d 496 (Tex. App. — Dallas 1987, writ denied) (“*Continental I*”); *Continental Airlines, Inc. v. Department of Transportation*. 843 F.2d 1444 (D.C. Cir. 1988) (“*Continental II*”).

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Id. § 29.

In *Tankersley*, the court applied several of these principles in holding that a Texas district court “would not be bound by an Eighth Circuit opinion interpreting Texas law.” 855 S.W.2d at 246. In part, problems inherent in applying collateral estoppel to some parties, but not others, on identical issues justified the court’s decision not to give “full faith and credit” to the federal court’s interpretation of Texas law. *Id.* at 246-47. The same problems would arise from attempting to apply collateral estoppel in the present case. The Texas Supreme Court has confirmed collateral estoppel should not be invoked where its purposes would not be served. *Sysco Food*, 890 S.W.2d at 803; *see also Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362-63 (Tex. 1971) (“The rule of collateral estoppel . . . rests upon equitable principles and upon broad principles of justice.”).

Texas courts also recognize the importance of deferring to the primary jurisdiction of an administrative agency where “uniformity of ruling is essential to comply with the purposes of the regulatory statute administered.” *Lake Country Estates, Inc. v. Toman*, 624 SW.2d 677, 680 (Tex. App. — Fort Worth 1981, writ ref’d n.r.e.); *Kavanaugh v.*

Underwriters Life Ins. Co., 231 S.W.2d 753, 755 (Tex. Civ. App. — Waco 1950, writ ref'd); *see also Shell Pipeline Corp. v. Coastal States Trading, Inc.*, 788 S.W.2d 837, 842 (Tex. App. — Houston [1st Dist.] 1990, writ denied) (primary jurisdiction especially appropriate where uniformity of decision is important); *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 71 (Tex. App. — Austin 1995, no writ) (primary jurisdiction properly invoked where “uniformity of decision is of paramount importance” to application of regulatory statute). Accordingly, Texas law does not mandate the Department’s deferral to the state district court’s rulings on federal aviation laws the Department is responsible for administering.

B. The state trial court’s “Final Judgment” is not final for purposes of appeal or execution and is currently being challenged by motions to dismiss and for new trial.

The principles of claim and issue preclusion, which are incorporated into 28 U.S.C. § 1738, require a judgment be “final” before it can have preclusive effects in other jurisdictions. Although Texas law provides that a judgment that has been appealed is nevertheless final for preclusion purposes, *see Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986), the “Final Judgment” issued by the trial court in this case is not appealable until the court’s plenary power to modify or set aside the judgment has expired — a minimum of 30 days after the judgment was signed. TEX. R. CIV. P. 329b; *see, e.g., Malone v. Emmert Indus. Corp.*, 858 S.W.2d 547, 548 (Tex. App.—Houston [14th Dist.] 1993, writ denied). The filing of a motion for new trial, motion to modify the judgment, or similar motion extends the court’s plenary power for an additional period. *Bastrop Indep. Sch. Dist. v. Toungate*, 958 S.W.2d 365, 367 (Tex. 1997). On January 15, 1999, Dallas filed a Motion to Dismiss or, in the Alternative, for New Trial [Exhibit 5 hereto],

asking the trial court to dismiss the case in deference to the primary jurisdiction of the Department or to modify its “Final Judgment” to conform, in relevant part, to the Department’s Declaratory Order.³ Moreover, no party may obtain the benefits of the judgment through execution until thirty days after any new final judgment is signed or thirty days after the motions for new trial are overruled by the court or by operation of law. TEX. R. CIV. P. 627. Accordingly, the state trial court’s “Final Judgment” should not be entitled to “full faith and credit” under 28 U.S.C. § 1738.

II. The Department Need Not Resolve Evidentiary Issues Raised by the DFW Board.

The DFW Board also asks the Department to reconsider its assessment of the evidence concerning the possible effect on DFW Airport of allowing service at Love Field authorized by the Love Field Amendment. (DFW Board Petition at 7) According to the DFW Board, its evidence indicates “that imposition of the Bond Ordinance perimeter rule is a valid exercise of Dallas’ proprietary rights.”⁴ (*Id.* at 16) Although Dallas is concerned about the potential impact of expanded traffic at Love Field on DFW Airport, Dallas does

³Continental Airlines, Inc., Continental Express, Inc., and Legend Airlines have also filed motions for new trial, asking the court to reconsider its judgment in light of the Department’s Order. (Continental Airlines, Inc. and Continental Express, Inc.’s Motion for New Trial filed 1/6/99 [Exhibit 6 hereto]; Legend Airlines Motion for New Trial filed 1/15/99 [Exhibit 7 hereto]).

⁴The DFW Board does not identify what “Bond Ordinance perimeter rule” it is referring to. The “perimeter rule” mandated by the state court is not found in the 1968 Concurrent Bond Ordinance or any other duly enacted regulation of the City of Dallas. The only “perimeter rule” applicable to Love Field is that imposed by the federal Wright and Shelby Amendments. The Board is similarly unclear in identifying the flights that it expects to cause the anticipated effects at DFW Airport. Specifically, the Board refers to “unfettered operations . . . under the Shelby Amendment” and flights “beyond the current restrictions of the Wright Amendment” as having undesirable ramifications. (Petition at 10) Surely the Board is aware that operations authorized by the Shelby Amendment are not “unfettered,” and that flights “beyond the current [amended] restrictions of the Wright Amendment” are prohibited by federal law. Such vague, essentially rhetorical references do not facilitate a careful, reasoned analysis of these complex issues.

not believe that such issues can be adequately addressed in the context of this interpretative proceeding.⁵

The evidence submitted by the DFW Board does not indicate that interstate traffic serving Love Field within the limits imposed by the Shelby Amendment “will undermine DFW’s viability or end that airport’s role as the area’s primary airport,” which is the standard articulated in the Department’s Declaratory Order. Rather, the DFW Board argues that its evidence suggests that the Cleveland flights at Love Field proposed by Continental likely would prompt a competitive response by American and other airlines currently serving DFW, which ultimately could have deleterious effects:

In sum, the optimal development of DFW Airport contemplated by the Bond Ordinance would be undermined; DFW’s role as the principal airport for serving the Dallas/Fort Worth area degraded; and DFW’s long-term viability as an engine for growth for the whole Dallas/Fort Worth area needlessly placed in jeopardy.

(DFW Petition at 15)

The Department need not, at this time, determine whether the evidence supports the conclusions asserted by the DFW Board or contrary conclusions urged by Legend and Continental. Indeed, determining the actual economic impact on DFW Airport of any particular level of service at Love Field would require studies and analyses of numerous complex and interrelated factors. The threshold legal question, however, is the *standard* for determining the type and scope of competitive impact that may properly be considered by Dallas as the proprietor of Love Field. If it is consistent with federal law and aviation policies for Dallas to restrict interstate passenger traffic serving Love Field in order to

⁵The evidence cited by the DFW Board was presented at a temporary injunction hearing against Continental, and was not part of the summary judgment record on which the trial court’s “Final Judgment” was based.

protect DFW Airport from competition and thus optimize its growth and development, then Dallas intends to take all actions “necessary, appropriate, and legally permissible” to accomplish the goals articulated in the 1968 Concurrent Bond Ordinance. However, if proprietary rights and powers do not encompass regulation for economic or other governmental purposes, then it serves little purpose to embark on the extensive studies and analysis that would be required to resolve the myriad of questions raised by the conflicting evidence on the potential impact of Love Field on DFW Airport. These threshold questions should be resolved by the anticipated appellate review of the Department’s Order. Once the scope of proprietary powers has been resolved by the appellate court, it may then be appropriate for Dallas to undertake studies and/or hearings to determine whether the facts would support its exercise of those powers to restrict routes, services, and/or facilities at Love Field. Dallas therefore urges the Department to overrule the petitions for reconsideration at this time, so that the appropriate federal Court of Appeals can review the Department’s interpretation of the federal statutes governing this dispute, and bring some closure to the parties and the flying public on these issues.

Respectfully submitted,

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