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# FAA ENDORSEMENTS—ESCAPING JUDICIAL REVIEW—THE SECOND CIRCUIT RULES THAT AN ENDORSEMENT OF PANEL RECOMMENDATIONS IS NOT A "FINAL ORDER"

J. BRYAN WHITE*

IN *PASKAR v. U.S. Department of Transportation,* the Second Circuit decided whether "a general aviation pilot and a not-for-profit corporation interested in the safety of aviation" could challenge and request judicial review of a letter written by the Federal Aviation Administration (FAA).[1] The letter endorsed a series of recommendations made by a panel of experts regarding the impact of a proposed marine trash-transfer facility on "safe airport operations at LaGuardia Airport."[2] In order for the Second Circuit to have jurisdiction to review the FAA Letter (Letter), (1) the Letter had to constitute a "final order," and (2) the review had to be requested by "a person disclosing a substantial interest in [the] order."[3] Had the Second Circuit found these criteria satisfied, the court could have "affirm[ed], amend[ed], modif[ied], or set aside any part of the order."[4] However, the Second Circuit determined that "because the Letter [was] not a 'final order' for purposes of 49 U.S.C. § 46110(a), [the court was] without jurisdiction to review it."[5] The petition for review was then dismissed.[6]

In 2006, as part of its Comprehensive Solid Waste Management Plan, the New York City (City) Department of Sanitation "proposed to reopen four shuttered marine trash-transfer sta-

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1 Paskar v. U.S. Dep't of Transp., 714 F.3d 90, 95 (2d Cir. 2013).

2 *Id.* at 92, 94.

3 *Id.* at 96.

4 49 U.S.C. § 46110(c) (2006).

5 *Paskar,* 714 F.3d at 91.

6 *Id.*

tions on . . . City waterways."[7] North Shore Marine Transfer Station, one of the four stations set to be reopened, is located "on the shore of Flushing Bay, across an inlet from LaGuardia Airport."[8] "Flushing Bay is a natural habitat for waterfowl" that flock and soar, causing potential "danger to the aircraft that take off and land at LaGuardia."[9] To investigate this and other concerns, the FAA conducted two aeronautical studies that resulted in findings of "No Hazard," but "[t]he FAA added . . . that while the structure would not be a hazard, its location in LaGuardia's runway protection zone was strongly discouraged in the interest of protecting people and property on the ground."[10] The FAA's finding eventually became final after the Port Authority, which had "objected and petitioned the FAA for discretionary review," withdrew its petitions when the North Shore Marine Transfer Station was redesigned to bring the height down to 100 feet and out of the "runway protection zone."[11]

Four months after the "No Hazard" determinations were made by the FAA, U.S. Airways Flight 1549 struck a flock of geese while taking off from LaGuardia Airport.[12] Responding to the incident, a Queens County Congressman "wrote to [the] FAA Acting Administrator [to] express[ ] concern that birds might be . . . gathering about and circling above the proposed Station."[13] The Secretary of Transportation, Ray LaHood, subsequently appointed a panel of experts from the FAA, the U.S. Department of Agriculture, the U.S. Air Force, the Port Authority of New York and New Jersey (Port Authority), the City, and an independent consulting firm to "study the impact of the proposed [Station] on safe airport operations at LaGuardia Airport."[14] The panel stated in a letter to the Secretary of Transportation that "changes to the building design, adherence to strict operational procedures, and the development and implementation of an integrated wildlife hazard management plan and program [could] reduce the hazards to aviation safety

[7] *Id.* at 92.

[8] *Id.*

[9] *Id.* at 91.

[10] *Id.* at 93 (internal quotation marks omitted).

[11] *Id.*

[12] *Id.*; Jonathon D. Rockoff & Elizabeth Holmes, *Pilot Lands Jet on Hudson, Saving All Aboard*, WALL ST. J. (Jan. 16, 2009), http://online.wsj.com/article/SB123205240502786899.

[13] *Paskar*, 714 F.3d at 93 (internal quotation marks omitted).

[14] *Id.* at 94.

posed by birds attracted to the proposed facility."[15] After a review of the panel's report, the FAA concluded that it was "important for the [C]ity to adopt the recommendations of the panel."[16] In a letter sent the day after the panel report was issued, the FAA urged the Department of Sanitation to fully implement the recommendations of the panel.[17] The City obliged and "proceed[ed] with construction of the facility as recommended by the FAA."[18]

A "general aviation pilot and a not-for-profit corporation interested in the safety of aviation" (Petitioners) filed a petition in October 2010 asking the court to review the Letter from the FAA to the City.[19] In their complaint, the "Petitioners alleged that they had a substantial interest in the Letter's subject matter, that the Letter was a final order reviewable by [the c]ourt, and that [the Letter] was arbitrary and capricious."[20] In January 2011, the U.S. Department of Transportation (Respondents) "moved to dismiss the petition on the ground that the Letter was not an 'order,' and that the court of appeals therefore lack[ed] subject matter jurisdiction to hear the petition."[21] In April 2011, "a motions panel . . . denied the motion to dismiss, holding that the Letter was an order subject to review pursuant to the provisions of 49 U.S.C. § 46110."[22] The Second Circuit determined that there was "cause to reexamine the motions panel's decision because 'there [was] reason to believe that [the court's jurisdiction] may [have been] lacking.'"[23]

The Second Circuit determined that it lacked jurisdiction to review the Letter and therefore dismissed the petition for review.[24] The court found that the Letter did not satisfy the two criteria of a "final order" outlined by the U.S. Supreme Court in

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[15] Letter from Technical Panel for the Evaluation of the N. Shore Marine Transfer Station & Its Compatibility with Respect to Bird Strikes & Safe Operations at LaGuardia Airport, to Ray LaHood, Sec'y of Transp. 2 (Sept. 2, 2010), *available at* http://www.faa.gov/airports/airport_safety/wildlife/resources/media/final_report_nsmts_ny.pdf.

[16] *Id.* at A-29.

[17] *Id.*; *Paskar*, 714 F. 3d at 94–95.

[18] *Paskar*, 714 F.3d at 95.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* (citing Motion Order Denying Respondents' Motion to Dismiss, Paskar v. U.S. Dep't of Transp., No. 10-4612-ag (2d Cir. Apr. 6, 2011)).

[23] *Id.* at 96 (quoting Rezzonico v. H & R Block, Inc., 182 F.3d 144, 149 (2d Cir. 1999)).

[24] *Id.* at 99.

*Bennett v. Spear.*[25] Under that test, the agency action must: (1) "mark the consummation of the agency's decision making process;" and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow."[26] The Second Circuit found that the Letter did not meet these criteria, specifically stating that "[n]o term in the Letter 'imposes an obligation' on the City, 'denies a right' of the City, or 'fixes some legal relationship' with the City."[27] Furthermore, the court noted that there was "nothing in the Letter that command[ed] the City to stop, change, or continue construction of the North Shore Station" and that "[t]he City could have accepted or rejected the FAA's recommendations without recourse by any party."[28] The court continued, stating,

> "A person disclosing a substantial interest in an order" issued by the Administrator of the FAA "may apply for review of the order by filing a petition for review . . . in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business."[29]

The Second Circuit assumed, without deciding, that the petitioners had a "substantial interest" in the matter before the court.[30] Therefore, the determinative issue was whether the Letter constituted an "order" by the FAA.

"Order" is defined in the Administrative Procedure Act as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making."[31] In *New York v. FAA*, the Second Circuit indicated that while the term "order" is to be liberally construed, "only final orders are reviewable" under the predecessor to § 46110(a).[32] A final order, as defined by the Second Circuit, is one that "imposes an obligation, denies a right, or fixes some legal relationship."[33] As mentioned above, there are two criteria that an order must satisfy to constitute a "final order" that is reviewable by the court: (1) "the agency action

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[25] *Id.* at 96–98 (citing Bennett v. Spear, 520 U.S. 154, 177–78 (1997)).

[26] *Id.* at 96 (internal quotation marks omitted).

[27] *Id.* (quoting New York v. FAA, 712 F.2d 806, 808 (2d Cir. 1983)).

[28] *Id.*

[29] *Id.* (quoting 49 U.S.C. § 46110(a) (2006)).

[30] *Id.* at 96 n.10.

[31] *Id.* at 96 (quoting 5 U.S.C. § 551(6) (2012)).

[32] New York v. FAA, 712 F.2d 806, 808 (2d Cir. 1983) (citing McManus v. Civil Aeronautics Bd., 286 F.2d 414, 417 (2d Cir. 1961)); *see* 49 U.S.C. § 46110(a) (amending 49 U.S.C. § 1486(a) (1958)).

[33] *New York*, 712 F.2d at 808 (quoting Rombough v. FAA, 594 F.2d 893, 895 n.4 (2d Cir. 1979)).

must mark the 'consummation of the agency's decision making process' "; and (2) the agency action "must be one by which rights or obligations have been determined, or from which legal consequences will follow."[34] The Second Circuit, in addition to finding that a "letter advising the City to follow safety recommendations, without more, hardly 'fixes a legal relationship,' " endorsed a D.C. Circuit case from 1979 stating, "The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation."[35] Here, the court highlighted the fact that the FAA, in addition to purporting to only "recommend" that the City implement the panel's recommendations, does not have the legal authority to "impose an obligation" or "deny a right" to "fix a legal relationship" with the City with regard to the construction of the North Shore Marine Transfer Station.[36] The Second Circuit, in differentiating the Letter, simply stated that "the [FAA] Letter here had no such fixed consequences," unlike letters in cases in other circuits that were held to be reviewable as final agency actions.[37]

The Second Circuit believed that the effect of the Letter was similar to that of the Letter in *Air California v. U.S. Department of Transportation*,[38] where the Ninth Circuit found that the Letter "from the FAA's chief counsel did not constitute a reviewable order because it lacked requisites of finality."[39] In *Air California*, "the Orange County Board of Supervisors limited the number of airline carriers permitted to fly into" Orange County Airport "in an effort to reduce noise."[40] The FAA concluded, in response, that "denying other airlines access to the airport violated FAA-administered, federal statutes" and further provided "a number

[34] *See Paskar*, 714 F.3d at 96 (citing Bennett v. Spear, 520 U.S. 154, 177–78 (1997)).

[35] *Id.* at 96–97 (quoting Aircraft Owners & Pilots Ass'n v. FAA, 600 F.2d 965, 967 (D.C. Cir. 1979)).

[36] *Id.* at 96.

[37] *Id.* at 97. The Second Circuit cites several cases that have held that FAA letters are reviewable. *See* San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966, 970 (9th Cir. 1989) (holding that an FAA letter banning parachuting near an airport was a final order); Air One Helicopters, Inc. v. FAA, 86 F.3d 880, 882 (9th Cir. 1996) (holding that a letter denying Air One the right to register its helicopter in the United States was a final order); S. Cal. Aerial Advertisers' Ass'n v. FAA, 881 F.2d 672, 677 (9th Cir. 1989) (holding that an FAA letter banning fixed-wing aircraft travel through a shoreline area was final agency action).

[38] 654 F.2d 616 (9th Cir. 1981).

[39] *Paskar*, 714 F.3d at 97.

[40] *Id.*

of suggestions for reducing noise around the airport."[41] The Letter at issue in *Air California* was written by the FAA's chief counsel.[42] It suggested that "the FAA might withhold federal funding" and "threatened to impose penalties," but it was not a "final order" because "it was neither a definitive statement of the agency's position nor a document with the status of law.[43] The Ninth Circuit also pointed to the fact that the FAA could have been challenged in subsequent enforcement actions before ultimately concluding that the Letter "did not impose an obligation, deny a right, or fix some legal relationship."[44]

The holding in *Paskar* is in line with the restrictive view of what constitutes a reviewable agency order in the Second Circuit.[45] The Second Circuit concluded that the Letter was not a final order because the Letter did not contain a "command."[46] Rather, it "urged" action and labeled the recommendations it endorsed as "important."[47] The Letter did not impose an absolute duty, but the City chose to comply, so there is no clear indication as to whether the FAA would have brought legal action or exercised its authority in any manner that would have disrupted the construction of the North Shore Marine Transfer Station.[48] Additionally, the Second Circuit was correct in pointing out the similarity of the case to the Ninth Circuit's holding in *Air California*, which applied a comparable but more generalized test to determine whether an order was reviewable.[49] Similar to the Letter in *Paskar*, the Letter in *Air California* contained strong im-

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*; Air Cal. v. U.S. Dep't of Transp., 654 F.2d 616, 621 (9th Cir. 1981).

[45] *See Paskar*, 714 F.3d at 90.

[46] *See id.* at 96.

[47] *Id.*

[48] *See id.* The FAA is an agency of the U.S. Department of Transportation with authority to regulate and oversee all aspects of American civil aviation. *Safety: The Foundation of Everything We Do*, FAA, http://www.faa.gov/about/safety_efficiency/ (last modified Feb. 1, 2013). The Second Circuit, without a supporting citation, notes that the City could have accepted or rejected the FAA's recommendations without recourse by any party. *See Paskar*, 714 F.3d at 96.

[49] *See Paskar*, 714 F.3d at 97. The Ninth Circuit based its decision in *Air California* on an analysis of whether the letter written by the FAA contained *requisites of finality*, holding that the letter in question was not a final order because it was "neither a definitive statement of the agency's position nor a document with the status of law." *Air Cal.*, 654 F.2d at 620.

plicit language and a number of suggestions—none of which were binding.[50]

However, the test used by the Second Circuit to determine whether an order is reviewable under 49 U.S.C. § 46110 ignores the practical implications of letters written by agencies to cities.[51] The method of analysis used by the Second Circuit allows the FAA to compel compliance with aviation construction recommendations in a manner that is not reviewable by the courts.[52] In *Paskar*, it was a third party that was left without a remedy at law for the recommendations of the FAA,[53] but in future cases it could be a party directly affected by an FAA recommendation that wants to seek assurance, by way of court review, that legal action will not be commenced if the recommendations are rejected. Allowing the FAA to endorse recommendations in a direct letter with intimidating language and escape the oversight established by Congress seems to directly undermine the spirit of 49 U.S.C. § 46110.

A more sensible approach is that taken by the Fifth Circuit as recently as 2008, in which a "moral suasion" test is applied to determine whether an order is final and thus reviewable.[54] In *Paskar*, the Second Circuit acknowledged this approach as an alternative test but stated that it is "not the test in the Second Circuit."[55] The court elaborated, stating that even if it applied the moral suasion test, it would not be satisfied "because the FAA Letter did not impose a 'practical stumbling block to the construction' of the North Shore Station."[56]

The Second Circuit's application of the Fifth Circuit's "moral suasion" test is guided by the "practical stumbling block" analysis found in *Air Line Pilots' Ass'n International v. U.S. Department of Transportation*.[57] While the "practical stumbling block" analysis is

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[50] *See Paskar*, 714 F.3d at 96–97; *Air Cal.*, 654 F.2d at 618–19.

[51] *Compare Air Cal.*, 654 F.2d at 619–21, *with Paskar*, 714 F.3d at 96–98.

[52] The FAA was one of the appointed members of the panel that was assembled to address the problems at LaGuardia Airport. *Paskar*, 714 F.3d at 94. Thus, the FAA is endorsing a panel recommendation that it presumably had strong influence over while avoiding judicial review by refusing to make any kind of "final order" or other reviewable determination.

[53] *See id.* at 91, 95–96.

[54] *See id.* at 98 (referencing *Air Line Pilots' Ass'n Int'l v. Dep't of Transp.*, 446 F.2d 236, 240–41 (5th Cir. 1971), and *Menard v. FAA*, 548 F.3d 353, 357 (5th Cir. 2008)).

[55] *Id.*

[56] *Id.* at 99.

[57] *See id.* at 98; *Air Line Pilots' Ass'n Int'l*, 446 F.2d at 240–42.

sufficient to determine the finality of an order when challenged by someone planning to carry out construction, the analysis does not adapt very well to third-party challenges, as in *Paskar*. As petitioners Kenneth Paskar and LaGuardia Airport, Inc. pointed out in their Reply Brief, the Letter had "substantial practical impacts."[58] Furthermore, the Second Circuit pointed to the fact that "[n]o other regulatory agenc[ies were] await[ing] the issuance of the panel report."[59] However, the court failed to mention that the Department of Environmental Conservation "approved [the] modification of the [City's] permit, with the condition that '[a]ll of the assumptions and recommendations in [the Panel Report were] to be strictly followed.'"[60] In *Air Line Pilots' Ass'n International*, the Fifth Circuit also considered the fact that "the wind [was] taken out of [any] safety argument" by the order and that it would be difficult for opponents to "arouse public reaction against the structures."[61] Similarly, City officials, including Mayor Michael Bloomberg, dismissed safety concerns about the North Shore Marine Transfer Station by pointing to the fact that it had been "vetted by the FAA."[62] At the very least, the argument that the Letter had the force of "moral suasion" would have had a higher chance of succeeding than the argument the petitioners had to make under the Second Circuit's narrow two-pronged test.[63]

By dismissing the claim in *Paskar*, the Second Circuit allowed the FAA to endorse recommendations by panels on which the FAA has members without being subject to judicial review.[64] As shown by the arguments put forth by the petitioners, these letters can have "substantial practical impacts."[65] By allowing such endorsements to escape judicial review, the Second Circuit opens up the possibility of administrative abuse and leaves third

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[58] Reply Brief of Petitioners Kenneth Paskar and Friends of LaGuardia Airport, Inc. at 8, *Paskar*, 714 F.3d 90 (No. 10-4612), 2011 WL 4350682, at *8 [hereinafter Reply Brief of Petitioners].

[59] *Paskar*, 714 F.3d at 99.

[60] Reply Brief of Petitioners, *supra* note 58, at 9.

[61] *Air Line Pilots' Ass'n Int'l*, 446 F.2d at 241.

[62] Alison Bowen, *Next 'Miracle' May Be Disaster, LGA Critics Say*, METRO (Jan. 11, 2011), http://www.metro.us/newyork/lifestyle/2012/01/11/next-miracle-may-be-disaster-lga-critics-say/.

[63] *See Paskar*, 714 F.3d at 96, 98–99.

[64] *See id.* at 91, 96–99.

[65] *See* Reply Brief of Petitioners, *supra* note 58, at 9.

parties without legal recourse even if they qualify as "person[s] disclosing a substantial interest in an order."[66]

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[66] *See Paskar*, 714 F.3d at 91, 96–99.

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