



and sections 107.21(a)<sup>3/</sup> and 108.11(c)<sup>4/</sup> of the Federal Aviation Regulations (FAR), as alleged in the complaint. Of the \$3000 civil penalty sought in the complaint, the agency sought \$500 for Respondent's alleged violation of section 108.11(c) of the FAR, and \$2,500 for the remaining violations. The law judge affirmed the \$500 civil penalty sought for the violation of section 108.11(c). However, he found that, due to the "incredibly unique situation" in this case, Respondent's violations of section 901(d) of the Act and section 107.21(a) of the FAR warranted only a "token" \$50 civil penalty. Accordingly, the law judge reduced the total civil penalty from \$3000 to \$550.

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3/ 14 C.F.R. §107.21(a) provides, in pertinent part:

§107.21 Carriage of an explosive, incendiary, or deadly or dangerous weapon.

(a) Except as provided in paragraph (b) of this section, no person may have an explosive, incendiary, or deadly or dangerous weapon on or about the individual's person or accessible property --

(1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area[.]

4/ 14 C.F.R. 108.11(c) provides, in pertinent part:

§108.11 Carriage of weapons.

(c) No . . . person [may] transport or tender for transport, any explosive, incendiary or a loaded firearm in checked baggage aboard an airplane. For the purpose of this section, a loaded firearm means a firearm which has a live round of ammunition, cartridge, detonator, or powder in the chamber or in a clip, magazine, or cylinder inserted in it.

Complainant has appealed from the reduction in sanction, arguing that the factors cited by the law judge as the basis for his reduction are not valid mitigating factors, and that the \$3,000 civil penalty sought in the complaint should be assessed in full. In his reply brief, Respondent contends that the assessment of any civil penalty in this case is improper in light of the court's decision in Air Transport Association of America v. Department of Transportation, et. al., 900 F.2d 369 (D.C. Cir. 1990). In the alternative, Respondent argues that the factors considered by the law judge are valid mitigating factors, and urges affirmance of the law judge's initial decision.

In Air Transport Association, the court of appeals held that the procedural rules in civil penalty cases (14 C.F.R. §13.16 and Part 13, Subpart G) were improperly promulgated without prior notice and comment, and that the FAA was barred from initiating new civil penalty actions or prosecuting pending actions until new rules were promulgated.<sup>5/</sup> Contrary to Respondent's assertion, that case did not "declare all civil penalties invalid." The court stated that a respondent whose case was initiated under the old rules could "raise the defense that the FAA could not have successfully prosecuted him but for

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<sup>5/</sup> In response to the court's decision, the agency subsequently initiated a new rulemaking and, after notice and comment, promulgated a revised set of procedural rules. 55 Fed. Reg. 27548 (July 3, 1990) (to be codified at 14 C.F.R. §13.16 and Part 14, Subpart G). Those rules became effective on August 2, 1990. See, 55 Fed. Reg. 27549.

the agency's reliance on some aspect of the . . . [r]ules abandoned in the new scheme." Id., at 380-81. Indeed, Respondent appears to assert this defense in his brief by repeating the court's language. However, he does not point to any change in the rules that would have affected the result in this case.<sup>6/</sup> The holding in Air Transport Association, standing alone, does not require dismissal of this case.

The relevant facts of this case can be summarized briefly. On May 8, 1988, Respondent and three traveling companions were scheduled to fly from Shreveport Regional Airport to New Orleans on a Royale Airlines flight which was scheduled to depart at 1:30 p.m. Respondent checked two pieces of luggage, one of which contained heart medication and insulin that Respondent takes every day. That bag also contained a loaded .25 caliber pistol. Respondent testified that he had put the pistol (which he had purchased for self-protection after a 1986

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<sup>6/</sup> I recognize that Respondent's brief was filed before the new rules were issued. However, in reviewing this case, I have considered whether any changes made in the Rules of Practice during the pendency of this case may have affected the result in this case, and have concluded that no change in the Rules is pertinent to this case. If Respondent believes that changes in the rules would have affected the outcome of this case, Respondent may file a petition for reconsideration of this decision and order, pursuant to 14 C.F.R. §13.234. Such a petition for reconsideration must include a particularized showing of harm, citing the specific rule change (or changes) and its relevance to the challenged findings or conclusions. See, 55 Fed. Reg. 15110, 15125 (April 20, 1990). Although the filing of a petition for reconsideration does not normally stay the effectiveness of the Administrator's decision and order, under these circumstances, if Respondent files such a petition I will stay the effectiveness of this decision and order pending disposition of the petition.

mugging) in the bottom compartment of the bag when he packed for a recent automobile trip to Tennessee, and that when he packed hurriedly for the trip to New Orleans he simply forgot it was there. Respondent does not contest the law judge's findings that by tendering the bag containing the loaded gun to Royale for transport as checked baggage, he violated section 108.11(c) of the FAR, and that a \$500 civil penalty is appropriate for that violation.

Shortly before the flight's scheduled departure time, Royale notified the passengers that the flight had been cancelled, and that they should hurry to catch a Continental Airlines flight which was scheduled to depart for New Orleans within a few minutes. Royale representatives said that they would try to get the checked luggage from the cancelled Royale flight onto the Continental flight, but that they could not guarantee the luggage would make it. After Respondent informed a Royale agent that he had medication in one of his checked bags that he would need later that day, he was told to retrieve the bag and carry it with him on the Continental flight. Although the bag was too big to fit under a seat, the Royale agent said that Continental personnel would stow it "up front."

With less than five minutes remaining before the Continental flight's scheduled departure time, Respondent went to the Continental gate and placed his bag on the conveyor belt of the x-ray screening device. According to his testimony, it was at that point that he recalled that his gun might still be in the bag, and before the bag had entered the x-ray portion of the screening machine, Respondent exclaimed "Oh my God, I may

have a gun in there," or words to that effect.<sup>2/</sup> As Respondent passed through the walk-through metal detector and the bag went through the x-ray screening device, the gun was revealed on the monitor and the machine was stopped. The security screeners summoned an airport security official who opened the bag and found the loaded gun. After Respondent confirmed the gun was his, he was arrested and taken to the city police station where he was placed in jail. Later that day, after he posted bond and was released, he continued on to New Orleans.

The law judge found that Respondent violated section 901(d) of the Act and section 107.21(a) of the FAR when he presented his bag containing the loaded gun at the security checkpoint. His decision to reduce the \$2,500 civil penalty sought for these violations to a "token fine" of \$50 was based on his assessment of what he saw as the "incredibly unique situation" in this case. Specifically, the law judge cited the following factors: the confusion associated with the last-minute

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<sup>2/</sup> The two security screeners on duty at the time of this incident testified that Respondent did not mention the gun in his bag until after the gun was already visible on the x-ray monitor. The law judge rejected this testimony and credited the testimony from Respondent and his traveling companion that the bag had not yet entered the x-ray portion of the machine when Respondent made the statement about the gun in his bag. (However, the law judge found that performance of the security inspection began, and thus the violation occurred, as soon as Respondent placed his bag on the conveyor belt. Respondent has not appealed from that finding.) Complainant characterizes the timing of Respondent's statement as a "disputed" fact, thus suggesting some disagreement with the law judge's credibility finding on that point. However, Complainant does not ask me to overturn that credibility determination, and I see no reason to do so.

cancellation of the Royale flight; the lack of any unlawful intent <sup>8/</sup> on Respondent's part; the credibility of Respondent's reason for retrieving his checked bag (to obtain his medication); Respondent's age (74); his lack of any violation history; and imposition of the \$500 civil penalty for Respondent's violation of FAR section 108.11(c).

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<sup>8/</sup> Although Complainant has not challenged the law judge's finding that the violations were inadvertent, I am not totally comfortable with that finding. I have no problem with the finding that Respondent intended that his bag containing the loaded weapon would be a checked bag and not a carry-on bag. To that extent, the fact that it subsequently became a carry-on bag and was presented at the security checkpoint in violation of section 901(d) of the Act and section 107.21(a) of the FAR, was inadvertent. However, the law judge's finding also includes, at least by implication, that the presence of the loaded weapon in Respondent's bag was also due to inadvertence. While the gun may have been placed in the bag some days before the day it was presented at the security checkpoint, it appears from the record that Respondent intentionally put it there, at least at that time.

Since Complainant did not challenge Respondent's position that he simply forgot that the gun was there when he hurriedly packed for his trip to New Orleans, the record does not explore how he could have placed clean shirts in the lower compartment of his bag without noticing that the gun was there. Additionally, and perhaps more significantly, in light of Respondent's testimony that it is his practice to carry the gun when he travels by car, the record is disturbingly silent on whether Respondent has a different practice when he travels by air. He was not asked whether he knew it was unlawful to carry an undeclared weapon in air transportation or what had been his practice in previous air travel situations. I am concerned that Respondent intended to carry his loaded weapon in his checked baggage, and the only thing inadvertent here was the fact that the bag later became a carry-on bag. However, as that issue has not been raised in this appeal, I will not disturb the law judge's finding of inadvertence in that regard.

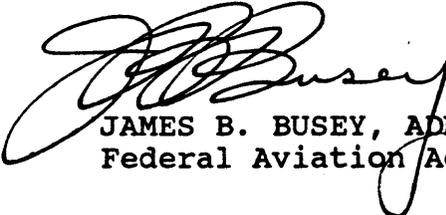
The agency's policy regarding appropriate sanctions in enforcement cases is set forth in FAA Order 2150.3A, Compliance and Enforcement Program. That Order contains a comprehensive Sanction Guidance Table which lists the appropriate sanction for various violations, including violations involving concealment of a deadly or dangerous weapon which would be accessible in flight in air transportation. Id., at Appendix 4, ¶10. The Sanction Guidance Table prescribes a civil penalty of \$1,000 when the weapon is unloaded and ammunition is not accessible; \$2,000 when the weapon is unloaded but ammunition is accessible; and \$2,500 when, as in this case, the weapon is loaded. Id.<sup>9/</sup> I should emphasize that, while other penalties in the Sanction Guidance Table are expressed in terms of a range of potential sanctions, and the agency attorney has discretion even to seek a sanction outside of the prescribed range, the prescribed penalties for these weapons violations are fixed.

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<sup>9/</sup> In addition, the Sanction Guidance Table calls for a civil penalty of \$5,000 to \$10,000 when there is an effort to conceal the weapon to avoid detection, and a \$10,000 civil penalty, plus referral for criminal prosecution, when there is a threatening overt act or when the concealed weapon is an incendiary or explosive.

As was made clear by the FAA when this strict enforcement policy was established and publicly announced, there are no other mitigating or aggravating factors appropriate to consider within the three categories of weapons violations described above, and the sanction amounts are to be strictly adhered to.<sup>10/</sup> Accordingly, the law judge's reduction of the civil penalty for Respondent's violation of section 107.21(a) and section 901(d) of the Act, based on what he saw as the "unique circumstances" of this case, was improper. Therefore, I will reinstate the full \$2,500 civil penalty.<sup>11/</sup>

THEREFORE, in light of the foregoing, Complainant's appeal is granted, and a civil penalty in the amount of \$3,000 is hereby assessed.<sup>12/</sup>

  
JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 13<sup>th</sup> day of September, 1990.

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<sup>10/</sup> It should also be noted that under the Act, violators are subject to a maximum \$10,000 civil penalty for each such violation. 49 U.S.C. App. §1471(d).

<sup>11/</sup> This strict enforcement policy applies only to the weapons violations discussed in this decision for which fixed civil penalties are prescribed in the Sanction Guidance Table contained in FAA Order No. 2150.3A. This decision should not be read to preclude the consideration of valid mitigating or aggravating factors in other cases.

<sup>12/</sup> Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described in footnote 6 above), or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. §1486), this decision shall be considered an order assessing civil penalty. See, 55 Fed. Reg. 27574 and 27585 (1990) (to be codified at 14 C.F.R. §§13.16(b)(4) and 13.233(j)(2)).