

Complainant correctly points out that even an inoperable gun can be used to threaten a passenger or a flight crewmember. The issue, however, in this case is not so much whether the weapon was operable or inoperable, but whether it would have at least appeared to be menacing enough to be considered deadly or dangerous.^{1/}

As explained in Order 90-26, a gun is presumptively a deadly or dangerous weapon. However, Respondent in this case offered evidence that this particular gun was not deadly or dangerous.^{2/} Since it is fundamental that Complainant has the burden of proof in these cases,^{3/} it follows that Complainant also had the burden of overcoming Respondent's evidence as to the actual or apparent condition of the gun. This case is troubling, not because the decision of

^{1/} Indeed, as the law judge noted:

It's not a question of whether the weapon can be fired or whether you can actually injure someone with it. . . . It's whether a reasonable person would believe that it was capable of inflicting serious harm.

^{2/} Respondent offered evidence that the weapon at issue was nothing more than a harmless antique which was in obvious disrepair.

^{3/} See Section 13.224 of the Rules of Practice, 55 Fed. Reg. 27548, 27583 (July 3, 1990) (to be codified as 14 C.F.R. 13.224).

October 11, 1990, may place an undue burden upon the prosecution, but because the decision was required to be made on an incomplete record. I do not know what the actual condition of the weapon was, and, indeed, it may have been in a condition far better than that described in Respondent's evidence. More importantly, it may have been in sufficiently good condition that it readily would have been mistaken for an operable gun. But the record contains no evidence that that is the case, and this case can be decided only on the evidence in the record.

Complainant's suggestion, that there should be an irrebuttable presumption that anything and everything that bears any resemblance to a gun be considered to be a deadly or dangerous weapon, is unnecessary to the preservation of aviation safety and security, and is therefore rejected. Similarly, Complainant's concern that the effect of my decision in this matter is that the agency attorney must always be prepared to offer evidence that the gun in question was in fact operable is not well founded. The agency attorney need be prepared only to offer evidence that the gun in question did appear to be an operable gun, or that a reasonable person would have mistaken it for an operable gun, and need do so, only if the respondent introduces credible

evidence to rebut the presumption that a gun is a deadly or dangerous weapon.^{4/} In my view, requiring the agency attorney to carry that minimal burden of proof is neither unreasonable nor inappropriate.

THEREFORE, for the reasons stated above, Complainant's petition for reconsideration is denied.


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day of December, 1990

^{4/} I recognize that when this standard is applied, it must be taken into account that a passenger or crewmember threatened by a gun may see the gun only briefly and have no opportunity for a close examination of it.