

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: January 4, 1991

FAA Order No. 91-2

_____)	
In the Matter of:)	Docket Nos.
)	CP89NE0031; CP89NE0036;
)	CP89EA0058; CP89EA0047;
)	CP89EA0028; CP89EA0045;
CONTINENTAL AIRLINES, INC.)	CP89NM0029; CP89NM0037;
_____)	CP89NM0052; CP89NM0057

ORDER DENYING MOTION FOR STAY

On December 11, 1990, Respondent Continental Airlines, Inc., ("Respondent") filed a document entitled "Notice and Motion for Stay," in which Respondent explains that it and its affiliated companies have filed voluntary petitions under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware. Respondent noted further that the filing of a petition under Chapter 11 operates as an automatic stay to the commencement or continuation of any judicial, administrative or other proceedings against Respondent. 11 U.S.C. § 362. Relying upon section 362, Respondent seeks an indefinite stay of the 51 civil penalty actions against it.

It should be noted preliminarily, that not all of the 51 cases against Respondent for which Respondent seeks an indefinite stay are before me at this time. The Administrator, as the FAA decisionmaker in these cases, does not have jurisdiction over any civil penalty assessment authority case

unless and until an appeal of an initial decision is filed, an interlocutory appeal of right is filed, or a motion for interlocutory appeal for cause is granted by a law judge. Sections 13.219 and 13.233 of the Rules of Practice [55 Fed. Reg. 27548, 27580-81, 27584-85 (July 3, 1990) (to be codified at 14 C.F.R. §§ 13.219 & 13.233)]. Therefore, I will only consider this motion with regard to the ten cases which have been appealed to the Administrator pursuant to Section 13.233 of the Rules of Practice. ^{1/}

^{1/} The cases that are (or have been) before the Administrator on appeal are as follows:

FAA Docket No. CP89NE0031: Respondent's appeal of the law judge's decision in this matter was denied in FAA Order No. 90-0012, which was served on April 25, 1990. That order should now be considered to be an order assessing a civil penalty of \$10,000 due to the passage of more than 60 days without a petition for review having been filed in an appropriate United States Court of Appeals. Sections 13.16(b)(4), 13.233(j)(2) & 13.235 of the Rules of Practice [55 Fed. Reg. 27548, 27574, 27575 (July 3, 1990) (to be codified at 14 C.F.R. §§ 13.16(b)(4), 13.233(j)(2), & 13.235)].

FAA Docket No. CP89NE0036: The Administrator affirmed on appeal the initial decision of the law judge in this case in FAA Order No. 90-18, served on August 22, 1990. Respondent petitioned the Administrator for reconsideration of Order No. 90-18 arguing that Complainant could not have prevailed but for the existence of certain procedural rules which subsequently were amended. The Administrator stayed the effectiveness of Order No. 90-18. Subsequently, by Order No. 90-38, served on November 7, 1990, the Administrator denied Respondent's petition for reconsideration. Unless a petition for review is filed in an appropriate United States Court of Appeals within 60 days of the date of service of Order No. 90-38,

(Footnote 1 continued on next page.)

In its "Opposition to Motion for Stay," Complainant argues that the automatic stay provision does not arise in these cases, explaining that the exceptions set forth in 11 U.S.C. §§ 362(b)(4) and (b)(5) provide authority for the commencement and continuation of enforcement proceedings by federal regulatory agencies.

Section 362(a)(1) of the Bankruptcy Act provides that the filing of a petition under Chapter 11 operates as a stay of:

(1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title

11 U.S.C. § 362(a)(1). However, as Complainant points out,

(Footnote 1 continued from previous page.)

Order No. 90-18 will become an order assessing a civil penalty of \$1,000. Sections 13.16(b)(4), 13.233(j)(2), & 13.235 of the Rules of Practice, supra.

FAA Docket Nos. CP89EA0058; CP89EA0047; CP89EA0028; CP89EA0045; CP89NM0029: The Administrator denied Respondent's appeals from the initial decisions in these cases in FAA Order No. 90-19, served on November 7, 1990. Civil penalties in the following amounts were assessed: CP89EA0058: \$5,000; CP89EA0047: \$5,000; CP89EA0028: \$4,000; CP89EA0045: \$1,000; CP89NM0029: \$7,500. Here too, unless a petition for review is filed in an appropriate United States Court of Appeals within 60 days of November 7, 1990, Order No. 90-19 will become an order assessing civil penalty in the previously-mentioned amounts.

FAA Docket Nos. CP89NM0037; CP89NM0052; CP89NM0057: At the conclusion of the consolidated hearing held in these cases, the law judge affirmed the allegations in the complaints and sustained the following civil penalties: CP89NM0037: \$1,000; CP89NM0052: \$10,000; CP89NM0057: \$1,000. Respondent has appealed from these initial decisions.

Section 362(b)(4) provides that the filing of a bankruptcy petition does not operate as a stay "of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(4).^{2/}

Congress explained the intent of the (b)(4) exception as follows:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S. Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5838 (emphasis added); H. Rep. No. 595, 95th Cong., 2d Sess. 343, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6299 (emphasis added).

It has been held that the (b)(4) exception permits the commencement and continuation of enforcement proceedings by federal regulatory agencies. NLRB v. Evans Plumbing Co., 639 F.2d 291 (5th Cir. 1981). As was explained in such cases

^{2/} Complainant cites the (b)(5) exception as well in support of its position, but that exception, which pertains to the enforcement of a judgment, other than a money judgment, is inapplicable.

as In re Commerce Oil, 847 F.2d 291, 295 (6th Cir. 1988), and NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 941-43 (6th Cir. 1986), in determining whether a governmental unit's action is regulatory in nature and, therefore, within the (b)(4) exception, the courts have applied two tests: 1) the pecuniary purpose test and 2) the public policy test. Under the pecuniary purpose test, the question is whether the governmental action relates primarily to the protection of the government's pecuniary interest in the debtor's property rather than to public safety. If the governmental action relates primarily to the accomplishment of public safety goals, then the (b)(4) exception applies. Under the public policy test, government proceedings which adjudicate private rights are not excepted from the stay, while proceedings to implement public policy are exempt from the stay under the (b)(4) exception. In re Commerce Oil Co., 847 F.2d at 295; NLRB v. Edward Cooper Painting, Inc., 804 F.2d at 942. Under either test, the civil penalty proceedings involved herein are excepted from the automatic stay under the (b)(4) exception.

Pursuant to Sections 901 and 905 of the Federal Aviation Act of 1958, as amended, the FAA has the authority to assess a civil penalty for a violation of the Act or of any rule, regulation, or order issued thereunder. 49 U.S.C. App. §§ 1471(a)(1) & 1475(a). In the cases included in this Order, the Administrator and/or a law judge held that Respondent violated Section 108.5(a)(1) of the Federal Aviation

Regulations (FAR), 14 C.F.R. § 108.5(a)(1),^{3/} because Respondent's agents or employees either failed to detect FAA-approved test objects during screening^{4/} or to prevent unauthorized individuals from gaining access to its airplanes or air operations areas.^{5/}

Section 108.5(a) of the FAR was promulgated pursuant to Sections 315(a) and 316(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. §§ 1356(a) & 1357(a). Section 315(a) makes it the Administrator's responsibility to prescribe regulations requiring that "all passengers and all property intended to be carried in the aircraft cabin in air transportation or intrastate air transportation be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier . . . prior to boarding the aircraft" 49 U.S.C. App. § 1356(a). Section 316(a) requires the Administrator to prescribe

^{3/} Section 108.5(a)(1), 14 C.F.R. § 108.5(a), provides in pertinent part:

Each certificate holder shall adopt and carry out a security program that meets the requirements of section 108.7 for each of the following scheduled or public charter passenger operations: (1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.

^{4/} See FAA Docket Nos. CP89EA0045, CP89NM0029, CP89NE0036, CP89NM0037, CP89NM0052, CP89NM0057.

^{5/} See FAA Docket Nos. CP89NE0031, CP89EA0058, CP89EA0047, CP89EA0028.

regulations "necessary to protect persons and property aboard aircraft operating in air transportation or intrastate air transportation against acts of criminal violence and aircraft piracy." 49 U.S.C. App. § 1357(a).

The purpose of the proceedings in these cases is to review the allegations of violations of Section 108.5(a) of the FAR and the appropriateness of the sanctions sought in the complaints by Complainant. These proceedings are an integral part of the FAA's efforts to make transportation by air safe from terrorist activity. The public interest requires that these proceedings not be stayed in order to ensure that Respondent and other air carriers recognize that they cannot violate the safety regulations and then avoid a finding of violation and the assessment of a civil penalty simply by filing a petition under Chapter 11.^{8/} Thus, to deter Respondent and others from failing to carry out their security programs, the proceedings in these cases must continue until there is a final order, or an order assessing civil penalty, in each case. See In the Matter of Shultz, FAA Order No. 89-0005

^{8/} In Administrator v. Apollo Airways, Inc., NTSB Order No. EA-2372 (August 1, 1986), the National Transportation Safety Board (NTSB) held that the Bankruptcy Act did not provide a shield against an action by the FAA to suspend the respondent's air carrier operating certificate for 30 days, in part relying upon the (b)(4) exception. The NTSB wrote, "[w]e agree with the Administrator that safety regulation must continue despite the financial condition of the carrier." Id., at 19, fn. 8.

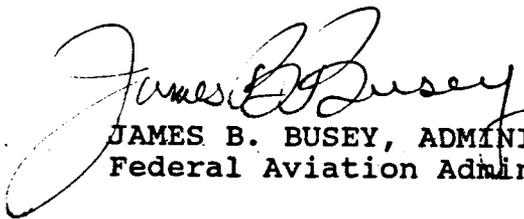
(November 13, 1989) at 13 (discussion of the deterrent effect of a civil penalty). The conduct of disciplinary proceedings against alleged violators of the safety regulations and the deterrence of future violations of the FAR are undoubtedly within the regulatory power of the FAA.^{9/} See In re Commerce Oil, 847 F.2d at 296 (detering illegal activity included as an exercise of the state's regulatory power to effectuate public policy).

These proceedings do not adjudicate private rights, but as explained above, serve to enforce public policy. Likewise, the primary purpose of these proceedings is not to protect Complainant's interest, if any, in Respondent's property.^{10/} Therefore, under either the pecuniary purpose or the public policy test, the (b)(4) exception applies.

^{9/} It has been clearly established that the FAA has the authority to suspend any type of certificate, including an air carrier operating certificate, as a disciplinary measure, due to the deterrent effect of suspensions. E.g., Go Leasing, Inc. v. NTSB, 800 F.2d 1514, 1519-20 (9th Cir. 1986).

^{10/} Complainant noted in its Opposition to the Motion for Stay that with regard to the \$10,000 civil penalty assessed in Order No. 90-0012, Complainant "will not, at this time, attempt to collect the civil penalty assessed against Respondent." See fn. 1, supra. Presumably, Complainant will not attempt to collect the civil penalties assessed in each of the other cases, if or when each of the Administrator's decisions becomes an order assessing civil penalty. Sections 13.16(b)(4), 13.233(j)(2) & 13.235 of the Rules of Practice [55 Fed. Reg. 27548, 27574, 27575 (July 3, 1990) (to be codified at 14 C.F.R. §§ 13.16(b)(4), 13.233(j)(2), 13.235)].

THEREFORE, with regard to the above-captioned cases,
Respondent's Motion for Stay is denied.



JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 4th day of January, 1991.