

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

Served: February 11, 1991

FAA Order No. 91-4

\_\_\_\_\_  
In the Matter of: )  
 )  
[AIRPORT OPERATOR] )  
 )  
\_\_\_\_\_ )

Docket No. CP89 0220

DECISION AND ORDER

Respondent, [airport operator]  
("Respondent"), has appealed from the oral initial  
decision<sup>1/</sup> issued by Administrative Law Judge Burton S.  
Kolko at the conclusion of the hearing held in this matter on  
February 21, 1990 in .<sup>2/</sup> In his  
decision, the law judge held that Respondent violated section

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<sup>1/</sup> An excerpt of the transcript containing the law judge's  
decision is attached.

<sup>2/</sup> Portions of this decision have been redacted for  
security reasons, pursuant to 14 C.F.R. Part 191. All  
unredacted copies of this decision must be treated in a  
confidential manner. Unredacted copies of this decision may  
not be disseminated beyond the parties to this proceeding,  
all of whom have been given unredacted copies in addition to  
redacted copies.

Neither party in this matter moved for the hearing record  
to be closed. Agency counsel must be alert to the need for  
protective measures to prevent the release of security  
information which, under Part 191, must not be made public.  
By separate action, I am closing the record of this case.

107.13(a)(2) of the Federal Aviation Regulations (FAR),  
14 C.F.R. 107.13(a)(2),<sup>3/</sup> based upon the undisputed  
evidence that while on the

air operations area (AOA)<sup>4/</sup> FAA inspectors observed  
13 individuals who, contrary to the requirements of the  
airport's approved security program (ASP), were not  
displaying their identification badges on their outer  
garments. These individuals were employees of firms which  
service the airport and the air carriers. The law judge  
sustained the \$9,750 civil penalty sought in the complaint.  
After consideration of the entire record in this proceeding,  
including the briefs submitted by the parties, I deny  
Respondent's appeal and affirm the law judge's decision in  
its entirety.

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<sup>3/</sup> Section 107.13(a)(2) provides in pertinent part:

(a) Except as provided in paragraph (b) of this  
section, each operator of an airport serving scheduled  
passenger operations where the certificate holder . . .  
is required to conduct passenger screening under a  
program required by section 108.5(a)(1) . . . of this  
chapter . . . shall use the procedures included . . . in  
its approved security program, to perform the following  
control functions:

(2) Controlling movement of persons and ground  
vehicles within each air operations area, including, when  
appropriate, requirements for the display of  
identification.

<sup>4/</sup> "Air Operations Area" is defined as "a portion of an  
airport designed and used for landing, taking off, or surface  
maneuvering of airplanes." 14 C.F.R. 107.1(b)(2).

This case arises from a Civil Air Security National Airport Inspection Program (CASNAIP)<sup>5/</sup> inspection of the AOA at \_\_\_\_\_, which is owned and operated by Respondent, conducted by four FAA special agents between 3 and 4 o'clock on the afternoon of \_\_\_\_\_,

. During the inspection, the agents observed 13 individuals, employed by companies providing services to the airport and the air carriers, who were not displaying their badges on their outer garments. All but one of those individuals had their badges with them. The person who did not have his badge asserted that he had lost it.

Complainant alleged that Respondent failed to use the procedures included in its approved security program to control the movement of persons and ground vehicles within the AOA, including the requirements for the display of identification. Respondent's approved security program, portions of which were introduced by Complainant as Exhibit C-2, provided in pertinent part:

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<sup>5/</sup> Under the CASNAIP, teams of FAA inspectors evaluate the security procedures implemented by airports and air carriers.

Three of the four FAA special agents who participated in the inspection of the AOA testified at the hearing on behalf of Complainant. They explained that Special Agents Isgrigg and Smith started at the \_\_\_\_\_ and proceeded toward the \_\_\_\_\_, while two other agents, Special Agents Gomez and Cooper, started at the other end of the airport and headed toward the \_\_\_\_\_.

Special Agent John Isgrigg testified specifically about 7 individuals not displaying their identification badges on their outer garments. None of these individuals was employed by air carriers. He explained that he challenged \_\_\_\_\_ employees Marion Jarquin and Jeffrey Gould for failure to display their badges. He explained that at the time, Jarquin "was engaged in some activities around the aircraft, around the service truck." Isgrigg next noticed two \_\_\_\_\_ employees, Fred Galindo and Michael Jung, who also had their badges with them, but not displayed. When he approached them, they were driving tugs. Isgrigg also challenged Martin A. Gallo, an \_\_\_\_\_ employee, who was standing with a group of people near the \_\_\_\_\_.

Isgrigg found \_\_\_\_\_ employee Maurice Kelly not wearing his badge, and standing at the \_\_\_\_\_ by his company truck. Each of these employees had his badge with him but was not wearing it when he was seen by Isgrigg. Finally, Isgrigg also challenged \_\_\_\_\_ employee Marvin Johnson, who claimed that he had lost his badge.

Isgrigg testified that, in his opinion, none of these persons was engaged in the type of activities that would excuse them from the requirement to display their identification badges. He explained that, for example, a person would not be required to wear his badge

Special Agent Cooper testified that he approached employees Thomas Mayville and Doyle Pruitt because they were not wearing their badges on their outer garments. is a company which provides food services to the airport and the airlines. Mayville and Pruitt, who were wearing business suits, were getting out of a white van when they were noticed by the FAA special agents. Cooper explained that he and Special Agent Gomez observed Mayville and Pruitt for about 5 seconds before approaching them. He explained further that Mayville and Pruitt presented their badges upon request.

Special Agent Everett J. Smith testified that during the inspection of the AOA, he encountered 5 individuals who were not displaying their identification badges on their outer garments. He testified that everyone whom he approached during the inspection was "primarily around the edge of the terminal building doing various things such as smoking or sitting down eating lunch or just standing around." He

explained further that he and Isgrigg did not approach anyone who was doing anything, "such as working on aircraft or any portion of anything that would have to do with safety." He challenged Alexander Diaz, an employee of , Lowell Masareta, an employee of , and Pedro Sebeho and James Kemp, employees of . Along with Special Agent Isgrigg, he also challenged Marvin Johnson. None of these individuals worked for the air carriers.

Each FAA inspector testified that during the inspection of the AOA, he did not notice any airport security guards neglect to challenge any individual who was not displaying a badge on his outer garment. Isgrigg testified further that he could not recall seeing any airport police or other agents of the airport on the AOA during his inspection.

, currently the manager of the airport's license and permit bureau, testified for Respondent. At the time of this inspection, was the airport liaison officer responsible for working with the local Civil Aviation Security Field Office on security matters. testified that at the time of the inspection, badges reflecting that a person was authorized to be on the AOA were issued by the airport itself, as well as by the airlines and by some of the tenants. Badges not issued by the airport had to be approved by the airport. In the case at hand, the airport had issued the badges held by the employees of , , and . The badges of the

employees were issued by                    but were approved by the airport.

Horn explained that individuals trying to gain access to the AOA

. He

explained that

. In addition, he explained,

.                    testified that none of the individuals mentioned by Complainant's witnesses were providing services to the airport itself.

During oral argument, Complainant stated that although its inspectors had spotted 33 individuals on the AOA without their badges, Complainant in this matter was seeking to hold the airport responsible only for the 13 individuals who were employed by companies servicing the air carriers.<sup>6/</sup>

Respondent replied that the air carriers, not the airport operator, should be held responsible when employees of companies providing services to the air carriers do not display their badges. Respondent argued further that it was

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<sup>6/</sup> It was alleged in the complaint that the "agents' survey resulted in thirty-three instances of personnel on the AOA, of which thirteen were non-air carrier personnel, who were not displaying I.D. badges on their outer garments . . . . "

inappropriate to hold the airport responsible each time an individual on the AOA removed his badge.

In his oral initial decision, the law judge affirmed the allegations in the complaint and sustained the \$9750 civil penalty sought therein. He held that he could not find as a matter of law that it was unreasonable for Complainant to hold the airport operator responsible for violations of the airport's approved security program by individuals providing services to air carriers.

On appeal, Respondent argues that the approved security program requirements for badge display and challenging of individuals not displaying their badges are so closely connected that the airport operator should not be held liable for not following those procedures unless Complainant proves that individuals with access to the AOA noticed, but did not challenge, individuals not wearing identification badges. Respondent also argues that it was error for the law judge to hold the airport operator liable for these violations simply because the airport operator controlled badge issuance. Respondent argues further that although the approved security program requires challenging unbadged individuals on the AOA, the law judge's decision would require the airport operator to become aware instantaneously of the removal of a badge by a person required to wear one and then to challenge that person immediately. This could only be accomplished, argues Respondent, by

. To require such an \_\_\_\_\_, Respondent insists, would be unreasonable and unduly burdensome on Respondent. Finally, Respondent argues that "[a]bsent proof of how the cited persons accessed the AOA, what activities they engaged in just prior to inspection, or when or why they removed their badges, the evidence does not establish a violation of the badge display rule." Respondent writes that the FAA special agents merely assumed that the cited persons were not engaged in activities which warranted badge removal because the special agents spoke to the cited persons for no more than 5 seconds.<sup>7/</sup>

In response, Complainant asserts that the responsibility for ensuring implementation of the airport's approved security program rests squarely with Respondent, relying upon Part 107 of the FAR, 14 CFR Part 107, the language of the approved security program itself, and the testimony of \_\_\_\_\_

. Complainant also maintains that it was not necessary to prove that there was a failure to challenge because the allegations contained in the complaint dealt only with the fact that these individuals were on the AOA without displaying their badges. Complainant states that Respondent should be held responsible for the actions of airport vendors

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<sup>7/</sup> Respondent here mischaracterizes the testimony. Special Agent Cooper testified that he observed Pruitt and Mayville for about 5 seconds before he approached them.

and tenants, because, as it asks, "[i]f the airport operator is not responsible, who is?" Complainant notes that Respondent could have delegated responsibility to a particular air carrier by the terms of the approved security program, but had not done so. Finally, Complainant asserts that it proved its case by the preponderance of the evidence, insisting that "[e]ven a momentary lapse constitutes a violation."

1. Was it error for the law judge to hold Respondent liable for the failure of individuals to wear their badges while on the AOA?

I affirm the law judge's determination that Respondent is liable for the failure of the individuals cited by Special Agents Isgrigg, Cooper and Smith to display their badges while on the AOA. Respondent's responsibility in this regard stems from section 107.13 of the FAR, which requires each airport operator to use the procedures in its approved security program, including, when appropriate, the requirements for the display of identification to control the movement of persons within each AOA. The badge display requirement in the approved security program is clearly designed to control not only access to the AOA, but also the movement of individuals on the AOA. It is not enough for Respondent simply to put that badge display requirement into its approved security program. To satisfy the requirement that it use the procedures regarding identification display

in its approved security program, the airport operator must implement those procedures. Respondent's efforts to implement the badge display procedures, as described by , clearly were inadequate in light of the number of employees of airport vendors and tenants detected during the one-hour long inspection by the four-person team of FAA special agents.

Respondent's argument that the air carriers should be held responsible, rather than the airport operator, when employees of companies providing services to the air carriers fail to display their badges, is not persuasive. Section 107.13(a)(2) places the responsibility to use the procedures included in the approved security program on the airport operator. While an airport operator can delegate this responsibility to an air carrier with regard to an air carrier's exclusive area, 14 C.F.R. 107.13(b), Respondent had not done so prior to the CASNAIP inspection. Consequently, Complainant could have elected to hold Respondent responsible for the violations of the air carrier employees as well.<sup>8/</sup>

The requirements for the display of badges and for challenging individuals not wearing their badges are integral parts of Respondent's measures to control movement on the

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<sup>8/</sup> There is no need to decide at this time whether an air carrier could also be held liable for the failure of any of its employees, or of any employee of a company providing services to it, to display his badge while on the AOA.

AOA. Respondent must satisfy each requirement. If the challenge procedures in effect are insufficient to ensure that individuals on the AOA display their badges, Respondent must take additional steps. It appears that at the time of the inspection, Respondent did have its challenge procedures in place, which included the requirement that

Respondent argues that the only way that it could ensure that everyone on the AOA is displaying a badge, as required,

. As Respondent notes, this would be quite a burden. The implementation of an escort system, however, is not Respondent's only alternative in light of this decision. Respondent assumes that this problem of individuals not displaying their badges while on the AOA arises from individuals removing their badges once on the AOA. Thus, Respondent ignores what may be a more likely source of the problem, i.e.,

. With that in mind, there are certainly alternative solutions short of the imposition of . The fact that starting some time after this incident, Respondent began to revoke the badges of individuals found on the AOA without their badges

is itself evidence that measures less burdensome than an  
can be implemented by Respondent. In addition,  
Respondent could

2. Did Complainant prove its case by the preponderance of the evidence?

Complainant proved its case by the preponderance of the evidence with regard to the 13 individuals discussed by the FAA special agents at the hearing. The evidence that these individuals were on the AOA without their badges displayed was ample and undisputed. Nonetheless, Respondent argues that Complainant failed to prove that these 13 individuals did not have a valid excuse for not wearing their badges on their outer garments. Respondent's argument is rejected.

Complainant introduced sufficient evidence indicating that the 13 individuals not displaying their badges were not engaged in any activity which would have justified the removal of their badges. These individuals were not engaged in any activity in which the display of a badge on their outer garments would have been either impracticable or unsafe. Instead, as the testimony of Complainant's witnesses

demonstrated, the 13 individuals in question were doing such things as standing around, eating lunch and/or driving tugs or vans. Hence, Complainant satisfied its burden of going forward. See section 13.224 of the Rules of Practice (55 Fed. Reg. 27548, 27583 (July 3, 1990)) (to be codified at 14 C.F.R. 13.224). With the introduction of that evidence, it became Respondent's burden to rebut the evidence.

Respondent, however, failed to refute that testimony.

THEREFORE, in light of the foregoing, the law judge's decision is affirmed and Respondent's appeal is denied.<sup>9/</sup>

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<sup>9/</sup> I have also 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 I 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, it 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.

A civil penalty in the amount of \$9750 is hereby assessed.<sup>10/</sup>

JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 21st day of December, 1990.

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<sup>10/</sup> Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described in the footnote 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 (July 3, 1990) (to be codified at 14 C.F.R. 13.16(b)(4) and 13.233(j)(2)).