

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: September 30, 1991

FAA Order No. 91-40

In the Matter of:)

[AIRPORT OPERATOR])
_____)

) Docket No. CP90**0342
)
)
)

DECISION AND ORDER

Complainant has appealed from the oral initial decision^{1/} issued by Administrative Law Judge Henry B. Lasky at the conclusion of the hearing held in this case on April 12, 1991, in * * * .^{2/} The law judge held that Respondent did not violate Section 107.13(a)(1) of the Federal

^{1/} A copy of the law judge's initial decision is attached. This case was consolidated with a related case [CP90**0343] for hearing. (See FAA Order No. 91-41.) Accordingly, the law judge's initial decision contains discussion of both cases.

^{2/} 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.

Aviation Regulations (FAR) (14 C.F.R. § 107.13(a)(1)),^{3/} as alleged in the Complaint. Accordingly, the law judge dismissed the case against Respondent.

The incident giving rise to this case occurred during a Civil Aviation Security National Airports Inspection Program (CASNAIP) inspection in * * * . During that inspection, two FAA special agents gained access to the airport's air operations area (AOA) through an unmanned electronically-operated vehicle gate. The agents were able to drive their unmarked car through the gate after it was automatically opened for an exiting vehicle. The driver of that vehicle did not wait for the gate to close before driving away.^{4/} The agents drove around the AOA for approximately 15 minutes before exiting

3/ Section 107.13(a)(1) of the FAR 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 or foreign air carrier is required to conduct passenger screening under a program required by § 108.5(a)(1) or § 129.25(b)(1) of this chapter as appropriate shall use the procedures included, and the facilities and equipment described, in its approved security program, to perform the following control functions:

(1) Controlling access to each air operations area, including methods for preventing the entry of unauthorized persons and ground vehicles.

4/ The agents had initially attempted to gain access by calling one of the tenants listed on the speaker phone at the gate, and asking for entrance to the AOA. Although the person who answered the phone indicated that the gate would be opened, the agents did not wait, but rather drove into the AOA as soon as they saw the open gate left by the exiting vehicle. The tenant did have the capacity to open the gate by remote control from its facility, but there was no evidence that the tenant actually did open the gate in this case.

through another gate. They were not challenged while on the AOA.

After notification of the incident, Respondent's manager of airport operations took action to reduce the amount of time the gate remained open, * * *

, and to remove the gate's remote access capability.

The law judge found that Respondent did not violate Section 107.13(a)(1) because the unauthorized entry onto the AOA in this case was due to "an inherent problem with the security program of the gate," not Respondent's failure to implement the security program.

On appeal, Complainant asks me to find that Respondent violated Section 107.13(a)(1) and to reinstate the \$1,000 civil penalty sought in the Complaint. Complainant argues that Respondent's corrective actions after this incident demonstrate that there was no inherent problem with its security program, but rather, that Respondent simply did not implement that program effectively. Respondent replies that Complainant is attempting to hold it absolutely liable for the unauthorized access in this case, citing the fact that the FAA approved Respondent's security program, including the provision for this gate, in 1985 and no problems with unauthorized access through the gate had been identified until this incident. Respondent asserts that a problem would have become apparent earlier if it were not properly implementing its security program. Respondent concludes that the unauthorized access in this case was not due to inadequate implementation of its security program, but to the

exiting vehicle's failure to stop at the gate while the gate closed behind it. Moreover, Respondent argues that its corrective actions should not be considered in any determination of liability. For the reasons discussed below, Complainant's appeal is granted in part, and a civil penalty of \$500 is assessed.

Respondent's security program provides that access to the AOA from the location at issue in this case is controlled by an electronically-operated gate. However, the fact that the gate remained open long enough after the exiting vehicle had departed to allow the FAA special agents to gain unauthorized access to the AOA illustrates that the gate, as it was programmed to operate at that time, was not an effective control. While it is true that the FAA approved the use of such a gate to control access at that point, that approval did not relieve Respondent of the responsibility of insuring that the gate operated to accomplish that goal. Respondent failed in that responsibility. It is simply fortuitous that no incident occurred to bring this problem to the FAA's attention until three years after Respondent's security program was approved.

Thus, contrary to Respondent's assertion, this is not a case of liability without fault.^{5/} Rather, Respondent is being

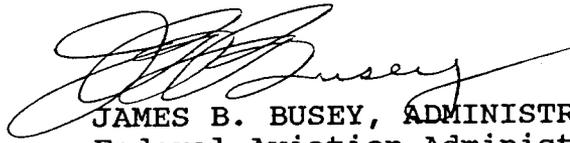
^{5/} Section 107.13(a) does not impose absolute liability for unauthorized entry on the airport operator. In the Matter of [Airport Operator], FAA Order No. 91-18 (June 3, 1991), appeal docketed, No. 91-70464 (9th Cir. July 29, 1991), citing, 43 Fed. Reg. 60786, 60789 (1978).

held accountable for the ineffective implementation of its security program with regard to this gate. This conclusion, moreover, is not based in any way on Respondent's subsequent corrective actions.

Although I have not considered Respondent's corrective actions with regard to the issue of liability, I have considered them in determining what civil penalty is appropriate in this case. By adjusting the timing of the electronic gate, * * *

, and removing the remote access capability for opening the gate, Respondent has clearly reduced the potential for future unauthorized access to the AOA. Because it appears from the record that these factors were not considered in determining what sanction to seek in this case, I have reduced the \$1,000 civil penalty sought in the Complaint to \$500.

THEREFORE, for the reasons stated above, Complainant's appeal is granted in part, and the law judge's initial decision is reversed. A civil penalty of \$500 is hereby assessed.^{6/}


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this *4th* day of *September*, 1991.

^{6/} Unless Respondent files 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 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1991).