

sterile area at Buffalo International Airport, Buffalo, New York, with a disassembled P-38 pistol in his carry-on luggage.

The law judge held that the disassembled pistol was a "deadly or dangerous weapon" within the meaning of Section 107.21(a)(1). However, he held further that Respondent did not violate Section 107.21(a)(1) because Respondent attempted to declare the weapon to two security screeners at the screening checkpoint before his luggage entered the x-ray screening compartment. Based upon a review of the entire record of this case, and for the reasons cited below, I find that the initial decision of the law judge was in error and must be reversed.

The testimony given at the hearing established that on January 2, 1988,^{3/} Respondent arrived at a Buffalo International Airport security gate intending to board a Continental Airlines flight to Burlington, Vermont, with two pieces of carry-on luggage, each containing parts of a disassembled P-38 pistol. One of the bags also contained an empty ammunition clip. Respondent testified that he arrived at the security gate with a boarding pass and a preassigned seat approximately 20 minutes before the flight departure

^{3/} Complainant listed the date of the violation in the complaint as having been on or about January 22, 1988. However, the stipulation of facts agreed to by the parties, and entered as a joint exhibit at the hearing, listed the applicable date as January 2, 1988.

time. He described his luggage as a big "samsonite three suiter" and a large garment bag. Respondent explained that he had disassembled and packed his pistol in two separate bags "knowing that in an airport [the pistol] should be rendered inoperable." Respondent could not recall which parts of his pistol he had placed in each bag. Respondent testified that he had planned to declare his gun at the screening checkpoint and to have his luggage checked at the gate because the airline ticket counter was very crowded, and he was afraid that he would miss his flight. Respondent also testified that he had thought that the security checkpoint was the appropriate place to declare his weapon based on a prior experience several years ago in which his carry-on luggage containing several hand tools had been stopped inside the x-ray compartment of a gate security checkpoint, and then checked on board the plane by an airline representative.^{4/}

The record shows that the screening checkpoint in question was operated by two security screeners, one standing at the beginning of the luggage conveyor belt and the other operating the x-ray screening device. Respondent testified that when he arrived at the checkpoint, the area was crowded

^{4/} It is not clear from the record whether Respondent had originally intended to check his carry-on bags at the ticket counter but changed his mind after seeing the long line there, or whether he had always intended to bring his bags to the gate. In either case, as explained later in this decision, Respondent would have violated Section 107.21(a)(1).

and chaotic. According to Respondent, as he reached for one of his bags to place it on the conveyor belt, he said to the first screener: "I have a weapon to declare." However, at that moment, the first screener's attention was diverted to another person who had asked a question, and Respondent's luggage moved down the conveyor belt towards the x-ray compartment. Respondent testified that he then tried unsuccessfully to declare the weapon to the second screener who was operating the x-ray device, but at that time it was very noisy at the checkpoint. He acknowledged at the hearing that probably neither screener heard him declare his pistol. Immediately after the luggage entered the x-ray device, an alarm sounded at the screening checkpoint.

An airport police officer testified that when he responded to the screening checkpoint alarm, both of Respondent's bags were inside the x-ray compartment. The screeners, neither of whom was available to testify at the hearing, told the police officer that there appeared to be a weapon inside Respondent's luggage. One of the screeners, according to the police officer, told him that Respondent had not stated that he had a weapon inside his luggage until after the alarm had sounded. Respondent and his luggage were taken to the police base where a search of his bags produced the disassembled P-38 pistol and the empty ammunition clip. Respondent's gun was confiscated, and he was fined

\$25.00.^{5/} The police officer testified that once the gun was assembled and pointed at someone, it could place a person in a dangerous situation. He stated that there were signs at the screening checkpoint indicating that no weapons or chemicals were allowed past that point.

The law judge found that a special agent employed by the Federal Aviation Administration's (FAA) Civil Aviation Security Division of the Eastern Region qualified as an expert witness on civil aviation security. The agent testified that when he assembled the pistol before the hearing it was missing a pin, but that the pistol could still be fired once when loaded.^{6/} According to the special agent, a person familiar with the gun could assemble it for firing without the ammunition clip within several minutes to less than an hour. The special agent testified that even when unloaded, the P-38 pistol could, if pointed at an unsuspecting person, be used to persuade that person to perform acts against his or her will.

The law judge found that although Respondent's pistol was disassembled when it was discovered, it was, nonetheless, a "deadly and dangerous weapon" pursuant to Section

^{5/} In the complaint, Complainant reduced the \$1,000 civil penalty originally sought in the Notice of Proposed Civil Penalty to \$975 to offset the \$25 fine paid by Respondent to the airport authorities.

^{6/} It is not clear from the record whether the pin was also missing at the time of this incident.

107.21(a)(1). Once assembled and loaded, the law judge found, the pistol could inflict deadly harm at least once. Even when not assembled, the law judge held, the lower portion of the weapon could be used as a bludgeon, and would appear to the untrained eye as potentially deadly or dangerous.^{7/}

The law judge also concluded based upon the testimony of Respondent, whom he found to be a credible witness, that Respondent had attempted to declare his gun to both security screeners at the screening checkpoint before his luggage entered the x-ray compartment, but his declaration was either not heard or not understood.^{8/} According to the law judge, up to the point that the luggage actually entered the x-ray machine, Respondent had the ability to withdraw his luggage from the conveyor belt or to indicate that it contained a weapon. Respondent's testimony, according to the law judge, established that he did not intend to submit his luggage for screening undeclared. Based upon these findings, the law

^{7/} Neither party has appealed from the law judge's finding that the disassembled pistol found in Respondent's luggage was "a deadly or dangerous weapon" pursuant to Section 107.21(a)(1), and the record contains no evidence that would require reversal of that finding. See In the Matter of Waddell, FAA Order No. 90-26 (October 13, 1989); petition for reconsideration denied, FAA Order No. 90-43 (December 24, 1990).

^{8/} The law judge found that Respondent's testimony concerning the facts of the incident was not rebutted because neither screener testified as to what had transpired, and because based on his observation of Respondent on the stand, he had no reason to disbelieve Respondent's testimony.

judge concluded that Respondent had not violated Section 107.21(a)(1).

Complainant contends on appeal that the law judge erred in basing his finding that Respondent did not violate Section 107.21(a)(1) on Respondent's intention to declare his weapon when he submitted his luggage for screening. Complainant argues that Section 107.21(a) does not contain an intent element. According to Complainant, the inspection in this case began when the baggage entered the x-ray machine and, therefore, the violation of Section 107.21(a)(1) occurred when Respondent's luggage containing the gun entered the x-ray machine. Complainant further contends that a \$1000 civil penalty^{9/} should be assessed because it is agency policy, as set forth in FAA Order 2150.3A, Compliance and Enforcement Program, that \$1000 is the appropriate civil penalty in gun cases when the gun is unloaded and there is no available ammunition.

In this case, clearly, the inspection of the carry-on bags had begun by the time that they entered the x-ray machine. It makes no difference whether Respondent, as he testified, expected that the screeners would call an airline attendant who would check the luggage containing the gun for

^{9/} The agency attorney apparently ignored the fact that Complainant sought a \$975 civil penalty in the complaint. According to Section 13.16(h) of the Rules of Practice, the Administrator, in his capacity as the FAA decisionmaker, "shall not assess a civil penalty in an amount greater than that sought in the complaint." 14 C.F.R. § 13.16(h).

him.^{10/} It was Respondent's responsibility to declare and check his gun. See 14 C.F.R. § 108.11(d).^{11/} In no case should he have submitted the bags containing the gun for screening at the security checkpoint for passengers with carry-on bags. By waiting to declare his pistol until after he arrived at the security checkpoint, Respondent, at the very least, impermissibly assumed the risk that his declaration would not be heard or understood by security personnel and that the gun would not be detected during screening. Indeed, if the security agents had not detected the disassembled weapon in Respondent's luggage, Respondent

^{10/} As I have previously held, intent to carry a deadly or dangerous weapon on or about an individual's person or in his accessible property is not a required element of a violation of Section 107.21(a)(1). See e.g., In the Matter of Degenhardt, FAA Order No. 90-20 at 4 (August 16, 1990); In the Matter of Schultz, FAA Order No 89-5 at 10 (November 13, 1989). See also United States v. Gutierrez, 624 F. Supp. 759, 761-62 (E.D.N.Y. 1985) holding that § 107.21(a)(1) imposes strict liability upon the commission of the acts proscribed regardless of the absence of fault or wrongdoing.

^{11/} 14 C.F.R. § 108.11(d) provides in pertinent part:

§ 108.11 - Carriage of weapons.

(d) No certificate holder may knowingly permit any person to transport nor may any person transport, or tender for transport, any unloaded firearm in checked baggage aboard an airplane unless -

(1) The passenger declares to the certificate holder, either orally or in writing before checking the baggage, that any firearm carried in the baggage is unloaded; ...

(4) The baggage containing the firearm is carried in an area, other than the flightcrew compartment, that is inaccessible to passengers.

would have, regardless of his intentions, introduced a deadly or dangerous weapon into the sterile area, which is the very situation that Section 107.21(a)(1) is intended to prevent. Thus, I find that Respondent violated Section 107.21(a)(1) of the FAR.

The proper sanction for Respondent's violation of Section 107.21(a)(1) remains to be determined. In its appeal brief, Complainant argues that a civil penalty of \$1000 should be assessed.^{12/} However, in the complaint, Complainant only alleged that Respondent violated Section 107.21(a)(1). As explained in In the Matter of Webb, FAA Order No. 90-10 (March 19, 1990), a violation of Section 107.21(a)(1) subjects the violator to a maximum penalty of \$1000 under the authority of Section 901(a)(1) of the Federal Aviation Act, as amended, (the Act), 49 U.S.C. App. § 1471(a)(1),^{13/} in contrast to Section 901(d) of the Act, 49 U.S.C. App. § 1471(d), which carries a maximum civil penalty of

^{12/} See footnote 9.

^{13/} Section 901(a), 49 U.S.C. App. § 1471(a)(1), provides in pertinent part:

Any person who violates...any provision of title III, VI, V, VI, VII, or XII...or any rule, regulation, or order issued thereunder...shall be subject to a civil penalty of not to exceed \$1,000 for each such violation.

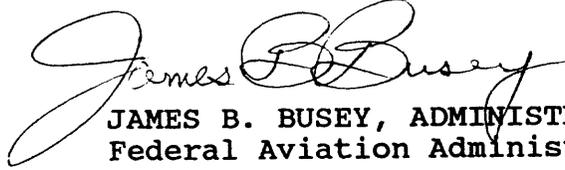
\$10,000.^{14/} Complainant did not allege in the complaint that Respondent had violated Section 901(d) of the Act. In Webb, I held that Complainant is bound by the allegations contained in the complaint, and that Complainant may not rely upon the higher sanction authority of Section 901(d) of the Act if a violation of Section 901(d) of the Act was not alleged.

In light of foregoing, a question arises whether Respondent should be assessed a civil penalty of \$975 based upon a finding of a violation of Section 107.21(a)(1) of the FAR alone. This issue was not briefed by either party. Accordingly, pursuant to Section 13.233(j)(1) of the FAR (14 C.F.R. § 13.233(j)(1)), I am providing the parties with an opportunity to submit arguments on this sanction issue in light of the Webb decision and the record. Briefs must be submitted by both parties within 30 days of the

^{14/} Section 901(d), 49 U.S.C. App. § 1471(d), provides in pertinent part:

[W]hoever while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air operation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight shall be subject to civil penalty of not more than \$10,000 which shall be recoverable in a civil action brought in the name of the United States.

service date of this order to the Appellate Docket Clerk,
Federal Aviation Administration, 800 Independence Avenue, SW,
Room 924A Washington, DC 20591.


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 25th day of October, 1991.