

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: November 6, 1991

FAA Order No. 91-54

In the Matter of:)
ALASKA AIRLINES, INC.)

) Docket Nos. CP89NM0296,
) CP89NM0299, CP89NM0307,
) CP89NM0470

ORDER

Complainant filed a Notice of Interlocutory Appeal as of Right on August 14, 1991, pursuant to 14 C.F.R. § 13.219(c) (1991),^{1/} challenging a written order of Administrative Law Judge Robert Barton.^{2/} In that order, issued on August 13, 1991, the law judge denied Complainant's motion to quash the subpoena compelling Raymond Salazar, the former Director of

^{1/} Section 13.219(c) of the Rules of Practice, 14 C.F.R. § 13.219(c) (1991), provides:

Interlocutory appeals of right. If a party notifies the administrative law judge of an interlocutory appeal of right, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. A party may file an interlocutory appeal with the FAA decisionmaker, without the consent of the administrative law judge, before an initial decision has been entered in the case of:

(1) A ruling or order by the administrative law judge barring a person from the proceedings.

(2) Failure of the administrative law judge to dismiss the proceedings in accordance with § 13.215 of this subpart.

(3) A ruling or order by the administrative law judge in violation of § 13.205(b) of this subpart.

^{2/} A copy of the law judge's order is attached.

the Federal Aviation Administration's (FAA) Office of Civil Aviation Security and presently the Manager of the FAA's Center for Management Development (CMD), to provide testimony by oral deposition. He also denied Complainant's motion to stay the deposition and Complainant's written request for interlocutory appeal. Additionally, he found that Complainant had obstructed the taking of the deposition scheduled for August 13, 1991, and imposed the following sanction:

Complainant is ordered to produce Mr. Salazar for deposition at a place, time and date set by and convenient to Respondent. Respondent does not have to obtain another subpoena or issue another notice of deposition. However, Respondent should notify me of the new date, and the deposition should be held before August 25, 1991. The Complainant shall bear the costs of the deposition, including the need for an expedited copy. Further sanctions may be imposed if the FAA fails to comply with this order.

In the Notice of Interlocutory Appeal as of Right, Complainant argued that by requiring Complainant to bear the costs of the deposition, including the premium for expedited transcription, the law judge had violated Section 13.205(b) of the Rules of Practice, 14 C.F.R. § 13.205(b) (1991).^{3/}

^{3/} Section 13.205(b) of the Rules of Practice, 14 C.F.R. § 13.205(b) (1991), provides in pertinent part:

Limitations on the power of the administrative law judge. The administrative law judge shall not issue an order of contempt, award costs to any party, or impose any sanction not specified in this subpart. If the administrative law judge imposes any sanction not specified in this subpart, a party may file an interlocutory appeal of right with the FAA decisionmaker pursuant to § 13.219(c)(4) of this subpart.

Complainant subsequently filed, on August 23, 1991, its Addition to Notice of Interlocutory Appeal as of Right, or, in the Alternative, Motion to Add to Notice of Interlocutory Appeal as of Right, in which Complainant argues that the law judge also violated Section 13.205(b) of the Rules of Practice by ordering Complainant to produce Mr. Salazar at a place, time and date set by, and convenient to Respondent and by authorizing Respondent to reschedule the deposition without issuing a new notice of deposition. Complainant added that the law judge's order was unfair to Mr. Salazar because of the personal and professional disruption that it would cause.

Pursuant to 14 C.F.R. § 13.219(c)(3), the only question before me at this time is whether the sanction imposed by the law judge against Complainant is permissible under the Rules of Practice. In my view, it is not. The powers of the law judges are based upon the Administrative Procedures Act, and the law judges are vested with enumerated powers only to the extent that such powers have been given to the agency itself. 5 U.S.C. § 556(c). Simply stated, law judges cannot exercise powers which exceed the authority of the agency, and since, as Administrator, I would not have the authority to impose a sanction such as the one at issue here, it follows that the law judge was similarly without such authority. Moreover, the fact that this specific sanction was beyond the authority of the law judge is explicitly provided in Section 13.205(b) of the Rules of Practice. Consequently, Complainant's interlocutory appeal of right is granted.

This case arises from four complaints filed between August 15 and November 28, 1989, in which it was alleged that Respondent had violated Section 108.5(a)(1) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 108.5(a)(1), by failing to comply with certain provisions of Respondent's Standard Security Program (SSP). Complainant alleged that on four occasions at the same airport Respondent's security screeners failed to detect different FAA-approved test objects. Complainant sought a \$10,000 civil penalty in each case.

The following is a chronology of the pertinent subsequent history of this matter:

- 6/24/91 A subpoena was issued to Raymond Salazar, at Respondent's request, compelling him to give testimony by oral deposition.
- 7/3/91 Complainant filed a Motion to Squash (sic) Subpoena.
- 7/12/91 The law judge orally denied Complainant's motion.
- 7/23/91 Complainant filed a Written Request for Interlocutory Appeal regarding the law judge's denial of the 7/3/91 motion to quash subpoena.
- 7/25/91 A telephone conference was held, during which the law judge denied Complainant's interlocutory appeal.
- 7/25/91 Another telephone conference was held, during which Complainant made an oral motion to quash subpoena, arguing that Complainant would neither introduce the so-called "Salazar memo" (containing sanction guidance for test object failure cases) into evidence nor rely on the policies enunciated therein. The law judge vacated the notice of deposition of Mr. Salazar, which had been scheduled for July 26.

- 7/29/91 The law judge issued a written order denying Complainant's motions to quash subpoena.
- 7/31/91 The law judge issued a written order, explaining the denial of the motions during the telephone conferences. He explained that he vacated the notice of deposition and the subpoena in order to give Respondent an opportunity to articulate reasons which would justify the deposition in view of Complainant's stipulation regarding the Salazar memo.
- 7/31/91 Respondent issued a notice of oral deposition of Mr. Salazar to take place on 8/13/91, and a memorandum explaining its need for Mr. Salazar's testimony.
- 8/7/91 Complainant filed a Motion to Quash Subpoena (and on 8/9/91, Complainant filed Motion to Supplement Motion to Quash Subpoena).
- 8/12/91 The law judge's clerk informed the parties during a telephone conference that the law judge had denied Complainant's Motion to Quash Subpoena, and that a written order would be issued on 8/13. The clerk also indicated that the law judge would deny any request for interlocutory appeal.
- 8/12/91 Complainant filed a Motion to Stay Deposition, because, agency counsel argued, a determination of whether to file a written request for interlocutory appeal could not be made until after agency counsel read the basis for the law judge's decision.
- 8/13/91 The law judge's clerk informed Complainant at about 5:00 pm that the Motion to Stay Deposition was denied, and that all requests for interlocutory appeal would be denied immediately.
- 8/13/91 Complainant filed a Written Request for Interlocutory Appeal.
- 8/13/91 The law judge issued an order, explaining the basis for his denial of the Motion to Quash. He also denied the (8/12/91) Motion to Stay Deposition and the (8/13/91) Written Request for Interlocutory Appeal. The law judge imposed sanctions against Complainant for obstructing the taking of the deposition which had been scheduled for 8/13/91.

- 8/14/91 Complainant filed a Notice of Interlocutory Appeal as of Right.
- 8/20/91 Complainant sent a letter to the law judge, requesting that he certify for interlocutory appeal the underlying substantive issues concerning the proposed deposition.
- 8/21/91 The law judge denied the request set forth in Complainant's 8/20/91 letter.
- 8/23/91 Complainant filed Addition to Notice of Interlocutory Appeal as of Right, or in the Alternative, Motion to Add to Notice of Interlocutory Appeal as of Right.
- 8/26/91 The law judge postponed the hearings scheduled for the week of August 27, 1991.

Section 13.205(b) of the Rules of Practice restricts the sanction authority of the law judges. "The administrative law judge shall not issue an order of contempt, award costs to any party, or impose any sanction not specified in this subpart." 14 C.F.R. § 13.205(b). By ordering Complainant to pay for the cost of the deposition, including the cost of expedited copy, the law judge acted contrary to that prohibition. Likewise, by ordering Complainant to produce Mr. Salazar at a place set by, and convenient to Respondent, the law judge authorized Respondent to require Complainant to pay to transport Mr. Salazar to a location determined by Respondent with no consideration of the convenience of the deponent or the cost to Complainant. This, too, would be a sanction prohibited by Section 13.205(b). The Rules of Practice do provide for certain sanctions for the failure of a party to comply with discovery orders, but the sanctions imposed by the law judge

in this case are not included in that list of permissible sanctions. See 14 C.F.R. § 13.220(n) (1991).^{4/}

The law judge's decision that Respondent did not have to re-notice the deposition was not inconsistent with Rule 13.220(j)(3) of the Rules of Practice, 14 C.F.R. § 13.220(j)(3),^{5/} which requires that a notice of deposition be issued. This rule does not require that a notice of deposition be issued every time that the deposition of the

^{4/} Section 13.220(n) of the Rules of Practice, 14 C.F.R. § 13.220(n) (1991), provides:

Failure to comply with a discovery order or order to compel. If a party fails to comply with a discovery order or an order to compel, the administrative law judge, limited to the extent of the party's failure to comply with the discovery order or motion to compel, may:

- (1) Strike that portion of a party's pleadings;
- (2) Preclude prehearing or discovery motions by that party;
- (3) Preclude admission of that portion of a party's evidence at the hearing; or
- (4) Preclude that portion of the testimony of the party's witnesses at the hearing.

^{5/} Section 13.220(j)(3) of the Rules of Practice, 14 C.F.R. § 13.220(j)(3) (1991), provides in part:

Notice of deposition. A party shall serve a notice of deposition, stating the time and place of the deposition and the name and address of each person to be examined, on the person to be deposed, on the administrative law judge, on the hearing docket clerk, and on each party not later than 7 days before the deposition. A party may serve a notice of deposition less than 7 days before the deposition only with the consent of the administrative law judge.

same person is rescheduled, although the issuance of a new notice by the party seeking the rescheduled deposition would be both courteous and prudent. I agree with the law judge that, in this particular case, there was no need for another notice of deposition, assuming, of course, that the law judge did not intend to relieve Respondent of its obligation to inform Complainant of the date, time and place of the deposition by some other reasonable means.^{6/}

Complainant asserts in its appeal brief that ". . . it would be beneficial to have the decisionmaker make his views known on whether he thinks the Complainant did something which would warrant a penalty (sanction)." (Appeal brief at 20). Complainant also "suggests that it might be beneficial to these proceedings for the Administrator to comment on footnote 4 of [In the Matter of] American Airlines [FAA Order No. 89-6 (December 21, 1989)] and for the Administrator to comment on the appropriate way to process a dispute over the proposed oral deposition of a person." (Appeal brief at 27-28).

I stated in the American Airlines decision:

Generally speaking, law judges should not permit interlocutory appeals to resolve discovery matters. To the extent that a party is disadvantaged by a law judge's discovery ruling, and should that ruling effect the

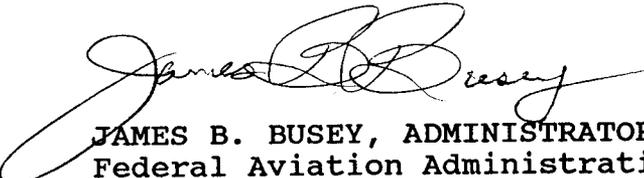
^{6/} There is no longer any need for me to rule on Complainant's argument that Mr. Salazar had personal obligations to attend to during the end of August. However, law judges should always encourage the parties to reach an agreement on the date, time and place of a deposition.

ultimate decision issued by the law judge, there will be an adequate opportunity to raise the discovery issue should that decision be the subject of an appeal on the merits.

In the Matter of American Airlines, FAA Order No. 89-6 at 4-5, n. 4. Indeed, except for the question concerning the appropriateness of the sanctions imposed by the law judge, this is the type of discovery dispute that should be handled by the law judge. I cannot accept Complainant's argument that the general guidance set forth in the above-quoted footnote should not apply when there is a dispute over whether an oral deposition should be held.

In addition, due to the fact that this matter is before me on interlocutory appeal of right, the scope of my review is quite constrained. Hence, I decline to address any of the other issues which have been amply briefed in the numerous pleadings in these cases.

THEREFORE, the law judge's order is reversed to the extent that he exceeded his authority in imposing a sanction, as explained in this decision, and these cases are remanded to the law judge for further proceedings.


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 5th day of November, 1991.