

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

Served: December 13, 1991

FAA Order No. 91-58

\_\_\_\_\_  
In the Matter of:  
[Airport Operator]  
\_\_\_\_\_

)  
)  
) Docket Nos. CP90\*\*0151  
) CP90\*\*0157  
) CP90\*\*0158  
) CP90\*\*0186

DECISION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge \* \* \* 1/ in the above-captioned cases at the consolidated hearing held on March 26, 1991, in \* \* \* 2/ The law judge held in each of these cases that Respondent had violated Section 107.13(a)(1) of the Federal Aviation Regulations

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1/A copy of the law judge's oral initial decision is attached.

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 may not be disseminated beyond the parties to this proceeding.

(FAR), 14 C.F.R. § 107.13(a)(1),<sup>3/</sup> as alleged in the complaints. The law judge also affirmed the \$1,000 civil penalties sought by Complainant in each of these cases.

Each of the four consolidated cases arose out of an inspection of \* \* \*

Airport, which is owned and operated by Respondent, \* \* \*

. The inspection of \* \* \* Airport took place in \* \* \* as part of the Civil Air Security National Airport Inspection Program (CASNAIP). Under the CASNAIP, a team of FAA special agents drawn from field offices throughout the United States inspects and reviews the security measures in place at particular airports.

During the inspection of \* \* \* Airport, the FAA special agents found four separate lapses in airport security between February 8 and February 12, 1989. Each of the

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<sup>3/14</sup> C.F.R. § 107.13(a)(1) provides as follows:

§ 107.13 Security of air operations area.

(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.

security lapses involved an alleged failure on the part of the airport operator to control access to the air operations area (AOA).<sup>4/</sup>

In the first case,<sup>5/</sup> FAA Special Agent \* \* \* gained access to an Eastern Airlines aircraft through an open jetway door located in the passenger waiting room at the gate. At the time of the incident, an airline ticketing agent was standing at a podium checking in passengers at the gate. From his position at the podium, the ticketing agent could not observe the open jetway door, which was behind him and in back of a panel bearing flight information. Agent \* \* \*, who was not wearing an identification badge, walked past the ticketing agent at the podium, through the open door, and up the jetway ramp. He boarded an aircraft at the end of the ramp, walked the full length of the aircraft, and then exited the plane. He did not see any crewmembers or passengers on board the aircraft. He then walked back down the jetway ramp and informed the ticketing agent about what had just happened. While he was on the jetway ramp, Agent \* \* \* noticed an unlocked door leading to the paved surface of the AOA, but he

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<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).

<sup>5/</sup>Docket No. CP90\*\*0151.

did not exit through the door. There was no exclusive area agreement<sup>6/</sup> between the airport operator and Eastern Airlines.

The second case<sup>7/</sup> also involved an open jetway door. Several ticket agents employed by Southwest Airlines were checking in passengers at a gate and apparently were not watching an open and unguarded jetway door. \* \* \* , an FAA special agent who was not wearing an identification badge at the time, entered the jetway ramp and then went out a door which was halfway up the jetway ramp and opened onto the AOA. As he walked on the AOA, Agent \* \* \* noticed a passenger aircraft parked at one of the gates. About five minutes passed before Agent \* \* \* encountered a Southwest Airlines employee. He then returned to the Southwest Airlines terminal, although he was not directed to do so by the airline employee. There was no exclusive area agreement between the airport operator and Southwest Airlines.

In the third case,<sup>8/</sup> FAA Special Agents \* \* \* and \* \* \* gained access to the AOA through an open interior door in the lobby of the terminal belonging to \* \* \* , a

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<sup>6/</sup>Section 107.1(a)(3) of the FAR defines an "exclusive area" as "that part of an air operations area for which an air carrier has agreed in writing with the airport operator to exercise exclusive security responsibility under an approved security program or a security program used in accordance with § 129.25." 14 C.F.R. § 107.1(a)(3).

<sup>7/</sup>Docket No. CP90\*\*0157.

<sup>8/</sup>Docket No. CP90\*\*0158.

fixed-base operator (FBO).<sup>9/</sup> [The FBO's] operations include refueling of aircraft, sale of aircraft, repair and maintenance of aircraft, charter operations, and flight training. [The FBO] leases the land on which it built its terminal from Respondent. While the two FAA special agents were in the [FBO] terminal, they noticed an open, unattended interior lobby door leading to the ramp.<sup>10/</sup> The door had been blocked open and left unattended by a janitor, an employee of an independent contractor cleaning company hired by [the FBO]. Agents \* \* \* and \* \* \* went through the open door and yet another door which opened automatically. They walked through a maintenance aircraft parking area and past approximately eight aircraft parked on the ground.

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<sup>9/</sup>A fixed-base operator is "one who provides services [at an airport] similar to those that a service station provides for those who operate automobiles." City of Pompano Beach v. FAA, 774 F.2d 1529 (11th Cir. 1985), citing Guthrie v. Genesee, 494 F. Supp. 950, 952 n. 1 (W.D.N.Y. 1980), quoting Pinehurst Airlines, Inc. v. Resort Air Services, Inc., 476 F. Supp. 543, 553 (M.D.N.C. 1979).

<sup>10/</sup>A ramp is "a defined area, on a land airport, intended to accommodate aircraft for purposes of loading or unloading passengers or cargo, refueling, parking, or maintenance." FAA Glossary, Order 1000.15A, p. 33. The phrase "air operations area," is more expansive. Not limited to portions of an airport designed and used for surface maneuvering, the term "air operations area" also includes portions of an airport designed and used for landing and taking off. See fn. 4, supra.

Agents \* \* \* and \* \* \* saw a person who appeared to be a mechanic hooking up a tow bar to an aircraft. When they asked him what he was doing, he asked them if they were passengers. They responded in the affirmative, and the mechanic directed them back to the waiting area. They walked back to the waiting area where they were approached after a time by another individual to whom they identified themselves as Civil Aviation Security Inspectors.

In the last of these consolidated cases,<sup>11/</sup> Agents \* \* \* and \* \* \* gained access to the AOA by driving an unmarked car through a gate leading onto a construction site at the airport. The two FAA special agents approached the construction gate in their car. While they were stopped for a few moments on a side road observing the gate, they noticed what appeared to be a privately owned, unmarked truck parked to one side of the gate. Seated inside the truck was an individual wearing a construction helmet. The agents saw several vehicles pass through the gate. They testified that the individual at the gate did not get out of his truck when any of these vehicles passed through the gate. The agents then drove through the open gate in their car at a slow speed. Neither the agents nor their car displayed any indicia of authorization to enter the gate. After they drove through

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<sup>11/</sup>Docket No. CP90\*\*0186.

the gate, the individual at the gate got out of his truck and looked at their car as it drove away. The agents drove around the interior perimeter of the airport at 5 miles per hour, past the runways, the AOA, the \* \* \* area, the \* \* \* , and the [FBO] terminal. While the airport communication log report indicates that the agents were apprehended by \* \* \* police approximately 13 minutes after entry on the AOA, the agents testified that they entered the AOA at about 1:30 p.m. and were not stopped by \* \* \* police officers until about 25 minutes later.

The construction gate through which the agents passed was under the control of \* \* \* , a contractor hired to build a taxiway near one of the terminals. [The contractor], in turn, had hired [a security company] to control gate access to the construction area. The parties have stipulated that [the contractor] and [the security company] were independent contractors rather than Respondent's employees.

In his decision, the law judge held that Complainant had proven a violation of Section 107.13(a)(1) of the FAR in all four cases. In the two open jetway door cases (Docket Nos. CP90\*\*0151 and CP90\*\*0157), the law judge found that it was entirely within Complainant's prosecutorial discretion to take enforcement action against the airport operator instead of, or in addition to, the air carriers. The law judge stated that,

in the absence of any exclusive area agreements between the airport operator and the air carriers, the airport operator bore primary responsibility for the security of the air carrier areas. Consequently, he found Respondent liable for those breaches in security.

In the case involving the FBO terminal (Docket No. CP90\*\*0158), the law judge determined that the FBO's efforts to maintain security at its terminal did not absolve Respondent of its primary responsibility for security. He therefore found Respondent liable for the security violation in that case.

Finally, in the construction gate case (Docket No. CP90\*\*0186), the law judge noted that the only factual dispute concerned the length of time it took to apprehend the security agents. The violation alleged in the complaint, the law judge explained, did not concern a failure to promptly detect unauthorized intrusions into the AOA as required by Section 107.13(a)(3) of the FAR, but a failure to control access under Section 107.13(a)(1). According to the law judge, access to the AOA was gained by putatively unauthorized personnel who could have engaged in substantial mischief. The law judge therefore found Respondent liable for failing to prevent the agents from entering the gate at the construction site.

Strict Liability

On appeal, Respondent argues that the law judge improperly imposed a standard of strict or absolute liability on it for lapses in security that were actually the fault of independent third parties (i.e., the air carrier ticket agents who failed to notice or challenge the FAA special agents when they went through open jetway doors; the janitor who left open the electric door leading to the AOA; and the security guard who failed to challenge the agents at the construction gate). According to Respondent, Section 107.13(a)(1) of the FAR does not impose absolute or strict liability on airport operators for the independent misconduct of third party airport tenants. "To control" within the meaning of Section 107.13(a)(1), argues Respondent, does not mean "to prohibit" or "to eliminate." Respondent points out that when the FAA originally promulgated Section 107.13, the FAA noted in the preamble to the final rule as follows:

A small number of commentators on section 107.13 would substitute the word "controlling" for "preventing" in paragraph (a) which requires control of access to each air operations area, including methods for "preventing" entry by unauthorized individuals and ground vehicles. Section 107.13(a) merely requires items described in the Security Program to be put into use. It does not impose absolute liability for unauthorized entry on the airport operator. Therefore, the FAA believes the suggested substitution is not necessary.

43 Fed. Reg. 60786, 60789 (1978). Respondent also argues that by imposing an absolute liability standard on the airport

operator in these cases--contrary to the standard set forth in the preamble--the FAA has engaged in substantive rulemaking without complying with the notice and comment rulemaking requirements of the Administrative Procedure Act (APA).

In response, Complainant argues that absolute liability was not imposed on the airport operator in these cases. According to Complainant, an airport operator must implement the procedures in its approved security program to satisfy the requirements of Section 107.13. In these cases, the ease with which the special agents intruded onto the AOA on four separate occasions during the course of the CASNAIP investigation demonstrates that the airport operator was not adequately implementing its security program. Simply stated, Complainant asserts, this is not a case of liability without fault. Moreover, since the airport operator did not enter into any exclusive area agreements under Section 107.13(b), the airport operator was solely responsible for access to the AOA. Finally, Complainant argues that because an operator has the ultimate authority over its employees and tenants, holding an airport operator accountable for violations of airport security regulations is the most appropriate method to ensure compliance with approved airport security programs.

Respondent is correct that Section 107.13(a)(1) is not intended to impose absolute liability for unauthorized entry on airport operators. In the Matter of [Airport Operator], FAA

Order No. 91-41 (October 31, 1991); In the Matter of [Airport Operator], FAA Order No. 91-18 (June 3, 1991) (citing 43 Fed. Reg. 60786, 60789 (1978)), appeal docketed, No. 91-70464 (9th Cir. July 29, 1991). Nevertheless, this regulation does require that the airport operator put into use the procedures, facilities, and equipment described in its security program. In the Matter of [Airport Operator], FAA Order No. 91-4 (February 11, 1991). Where the airport operator fails to adequately do so, the case cannot be said to be one of liability without fault.

Section 107.13(a)(1) places the responsibility for using the procedures, facilities, and equipment in the airport security program to control access to the AOA squarely on the airport operator. Placing this responsibility on the airport operator is justified, as Complainant has noted, because the airport operator has ultimate authority over its employees and tenants, and consequently, is in the best position to control the secured area of its airport. At the time of this inspection, an airport operator could only be relieved of this responsibility under Section 107.13(a)(1) by delegating it to an air carrier through a written exclusive area agreement.<sup>12/</sup>

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<sup>12/</sup>After the security violations alleged in the complaints in these consolidated cases took place, Congress created another means by which an airport operator's responsibility for

[Footnote continues on next page]

14 C.F.R. § 107.13(b). In the instant case, however, Respondent had not entered into any exclusive area agreements with the air carriers involved. Indeed, Respondent's security program expressly states that airport management is not relieved of its responsibility to maintain the security of the areas used by the airlines. Specifically, Section I.H.1. of Respondent's security program provides as follows:

\* \* \*

(Emphasis added.)

Respondent argues that it should not be held liable for the errors or omissions of independent third parties. However, as it has previously been held, in the context of airport

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[Footnote continued from previous page]

12/security can be delegated: the airport tenant's security program. Section 316(g) of the Federal Aviation Act (P.L. 101-370) authorizes the Administrator to approve airport tenant's security programs, provided that they incorporate the measures by which the tenant will comply with the security requirements imposed by the FAA on the airport operator. 49 U.S.C. App. § 1357(g). An airport tenant's security program must contain methods by which the airport operator will: (1) monitor and audit the tenant's compliance with the security requirements, and (2) penalize the tenant financially for security violations. 49 U.S.C. App. § 1357(g)(2). Under the new statutory provision, if the tenant violates a security requirement, and if the airport operator has carried out the measures in its security program to assure compliance, then the airport operator cannot be held liable for the security violation. 49 U.S.C. App. § 1357(g).

security, airport tenants and their employees must be treated as agents of the airport operator unless otherwise formally agreed. In the Matter of [Airport Operator], FAA Order No. 91-41 (October 31, 1991). This principle extends to independent contractors as well. Thus, for airport security purposes, independent contractors hired by either the airport operator or by an airport tenant must be treated as agents of the airport operator.<sup>13/</sup>

In the two incidents in which the FAA special agents gained access to the AOA through open jetway doors (Docket Nos. CP90\*\*0151 and CP90\*\*0157), Complainant alleged that Section I.H.1. of Respondent's security program was violated. Section I.H.1. provides that airport management is not relieved of its responsibility to maintain the security of the airline areas. When the jetway doors were left open and unattended, Respondent failed to maintain the security of these areas. In addition, Section II.F.2.d. of Respondent's security program provides

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<sup>13/</sup>This is consistent with general tort law principles, where the general rule of nonliability of an employer for the negligence of an independent contractor or the contractor's employees does not apply where the employer is under a statutory [and presumably regulatory] duty to perform the work. See, e.g., Tropea v. Shell Oil Company, 307 F.2d 757, 771 (2d Cir. 1962), citing May v. 11 1/2 East 49th Street Co., 269 A.D. 180, 54 N.Y.S.2d 860 (1945), aff'd per curiam, 296 N.Y. 599, 68 N.E.2d 881 (1946). See also 41 Am Jur. 2d Independent Contractor § 38 (1968).

that police and air carrier employees<sup>14/</sup> are required to challenge and identify all persons not wearing identification badges.<sup>15/</sup> The special agents should have been challenged before they walked through the jetway doors. For both of these reasons, the law judge correctly found Respondent liable for these security breaches.

In the incident occurring at the FBO terminal (Docket No. CP90\*\*0158), where the FAA special agents entered the AOA through an electrically operated door left open by a janitor, Complainant once again alleged that Section I.H.1. of Respondent's security program was violated. Section I.H.1., however, does not apply to FBO's; it applies only to air carriers. \* \* \* , the FBO in this case, is not an air carrier. Because Complainant has not cited, nor can I find any other provision in the airport security program which would

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<sup>14/</sup>I am not troubled by the fact that this provision requires that the police and air carrier employees, rather than Respondent itself, do the challenging. The police are employees of Respondent, \* \* \* . As for the air carrier employees, as stated above, in the context of airport security, airport tenants and their employees must be treated as agents of the airport authority unless otherwise formally agreed. In the Matter of [Airport Operator], FAA Order No. 91-41 (October 31, 1991).

<sup>15/</sup>Complainant's failure to cite to this provision in the two complaints concerning the open jetway doors does not require reversal of the law judge's finding of a violation. Respondent has not alleged prejudice as a result of Complainant's failure to cite to this section in its security program. Furthermore, Respondent can be presumed to know the contents of its own security program.

apply to this incident, I have no choice but to reverse the law judge's finding of a violation of Section 107.13(a)(1) in this case. While I do not condone the security breach at issue, the regulation alleged to have been violated requires only that the airport operator use the procedures, facilities, and equipment in its approved security program to control access to the AOA. Where, as in this case, Complainant can point to no procedure, facility, or equipment in the security program that Respondent should have but failed to use, the violation cannot stand.

Finally, concerning the incident in which the two FAA special agents drove their car onto the AOA through a construction gate (Docket No. CP90\*\*0186), Complainant failed in the complaint to cite to any procedure, facility, or equipment in the airport security program that Respondent should have but failed to use. However, Section II.F.2.e. of Respondent's security program states that ground vehicles entering the area must be identified and approved on a need basis to enter the AOA. I am satisfied that Respondent failed to use this procedure, as required by Section 107.13(a)(1), and therefore I affirm the law judge's finding of a violation in this case.<sup>16/</sup>

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<sup>16/</sup>Complainant's failure to cite in its complaint to a provision in Respondent's security program does not require a finding of no violation because no prejudice has been alleged and Respondent can be presumed to know the contents of its own security program.

Respondent's argument that "to control" access to the AOA, within the meaning of Section 107.13(a), does not mean "to prohibit" or "to eliminate" does not persuade me to reach a different conclusion. This is not a case in which the special agents were stopped and challenged before they entered the AOA, but used such unforeseeable and overwhelming force or cunning that they were able to proceed onto the AOA in spite of the utmost care taken by Respondent to implement its security program. Given the ease with which the special agents proceeded onto the AOA, Respondent cannot be heard to argue in this case that although it ultimately failed to prevent access to the AOA, it did in fact control access.

The statements in the preamble to the final rule that Respondent has cited--that Section 107.13(a) merely requires items in the Security Program to be put into use and does not impose absolute liability on the airport operator--do not conflict with this analysis. The drafters of the rule did not intend that airport operators should be held liable for failing to prevent access to the AOA when they had adequately implemented their security programs. Here, however, the airport security program was not implemented adequately.

In summary, Respondent failed, in three of the four consolidated cases, to adequately use the procedures, equipment, and facilities in its security program to control access to the AOA, and as a result, the special agents gained

access to the AOA. As Complainant has pointed out, the ease with which the agents intruded onto the AOA through the jetway doors and through the construction gate in these three cases demonstrates that the airport security program was not adequately implemented by Respondent. Thus, contrary to Respondent's assertions, fault on the part of Respondent has been shown.<sup>17/</sup>

#### Unauthorized Persons

Respondent also argues on appeal that the case should be dismissed because the FAA special agents who entered the AOA were not "unauthorized persons" within the meaning of Section 107.13(a)(1). Respondent points out that in the preamble to the final rule, the FAA defined the term "unauthorized person or ground vehicle" as follows:

For the purpose of § 107.13, an unauthorized person or ground vehicle is one whose entry is not approved by the airport operator or by the air carrier, for an exclusive area.

43 Fed. Reg. 60789 (December 28, 1978).

It is undisputed that Respondent had issued Special Agents \* \* \* and \* \* \* identification badges permitting their entry into the AOA. At the time of the security violations alleged

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<sup>17/</sup>Because I find that absolute liability was not imposed in this case, I need not discuss Respondent's argument that by imposing absolute liability on the airport operator, the FAA engaged in substantive rulemaking without complying with the notice and comment requirements of the APA.

in the complaints, the agents were carrying their identification badges on their persons, but they were not displaying them.

Respondent's argument on appeal is unavailing. Whether the agents were authorized by airport personnel to enter the AOA is not relevant in determining whether Respondent violated Section 107.13(a)(1). The crux of a violation of this regulation is the airport operator's failure to use the procedures, facilities, and equipment in its security program to control access to the AOA. A person need not be actually unauthorized in order to demonstrate an airport operator's failure to use its security program to control access to the AOA. In the instant case, the FAA special agents, for all appearances, were not authorized to enter the AOA, and yet they did so several times during the investigation of Respondent's airport with a disturbing lack of difficulty.<sup>18/</sup>

THEREFORE, in light of the foregoing, the law judge's decision is affirmed in part and reversed in part. The law judge's decision is affirmed concerning the jetway door and construction gate cases (Docket Nos. CP90\*\*0151, CP90\*\*0157, and CP90\*\*0186). The decision concerning the electrically

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<sup>18/</sup>See also In the Matter of Continental Airlines, Inc., FAA Order No. 90-19 at 15 (November 7, 1990), rejecting the air carrier's argument that because the FAA special agent who found the alleged security violations had an identification card which authorized him to be anywhere on the airport, he was not "unauthorized."

operated door at the FBO facility (Docket No. CP90\*\* 0158) is reversed. I hereby assess civil penalties in the following amounts:

- (1) Docket No. CP90\*\*0151 - \$1,000;
- (2) Docket No. CP90\*\*0157 - \$1,000; and
- (3) Docket No. CP90\*\*0186 - \$1,000.<sup>19/</sup>



BARRY LAMBERT HARRIS  
Acting Administrator  
Federal Aviation Administration

Issued this 5<sup>th</sup> day of December, 1991.

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<sup>19/</sup> Unless Respondent files a petition for reconsideration 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).