

provision of the Standard Security Program (SSP) which was adopted by Respondent pursuant to that regulation. Complainant sought a civil penalty of \$1,000 in CP89NM0037, \$10,000 in CP89NM0052, and \$1,000 in CP89NM0057. The law judge affirmed the civil penalty sought in each case.

In the Complaints filed in these cases, Complainant alleged that on three separate occasions, at specified security checkpoints at three separate airports, Respondent's security screener failed to detect an FAA-approved test object during a no-notice test conducted by the FAA. It was further alleged that Section XIII.D.1. of Respondent's security program requires Respondent, acting through its employees, contractors, and agents who perform screening functions, to detect each FAA-approved test object during each screening system operator test conducted by the FAA without notice and using FAA-approved test objects. It was alleged in each Complaint that Respondent violated section 108.5(a)(1) of the FAR, in that it failed to carry out Section XIII.D.1. of its security program.

Respondent presented the same arguments in its appeal briefs in each of these three cases. For the reasons discussed below, Respondent's appeals are denied, and the law judge's initial decision is affirmed.^{3/}

^{3/} On December 11, 1990, Respondent filed a document entitled "Notice and Motion for Stay" (Motion), in which Respondent explained that it and its affiliated companies filed voluntary petitions under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

[Footnote continues on next page]

Respondent argues in each of the three cases that:

1. Complainant improperly separated these cases from other cases initiated at the same time that alleged similar security violations in order to "circumvent" the \$50,000 jurisdictional limitation of section 905 of the Federal Aviation Act (49 U.S.C. App. §1475);
2. Many of the procedural rules included in the FAA's Rules of Practice governing these proceedings, in effect at the time of the hearing in these cases (14 C.F.R. Part 13, Subpart G), were contrary to section 905 of the Federal Aviation Act (49 U.S.C. § 1475) and the Administrative Procedure Act, and denied Respondent due process and equal protection of the law;
3. Respondent was denied an opportunity to develop a full and complete record on the issue of the separation of functions by agency personnel because Complainant refused to release information requested by Respondent in discovery pertaining to the identity of agency personnel involved in the initiation of these cases;
4. Complainant improperly applied the Rules of Practice (14 C.F.R. Part 13, Subpart G) to these proceedings because the alleged violations at issue occurred prior to the effective date of those rules;
5. Complainant has no authority to impose a civil penalty for alleged violations of the SSP because the SSP provisions have no regulatory effect;
6. Complainant did not fully follow the testing procedures set out in the SSP;

[Footnote continued from previous page]

³/Respondent requested that the 51 pending civil penalty actions against it, including the three cases at issue in this decision, be stayed indefinitely. Respondent's Motion was denied with regard to these three cases on the basis of a Bankruptcy Code exception that permits federal regulatory agencies to commence and continue enforcement proceedings against entities that file for bankruptcy protection. In the Matter of Continental Airlines, Inc., FAA Order No. 91-2 (January 4, 1991). As noted in that decision, presumably, Complainant will not attempt to collect the civil penalties assessed in each of the cases against Respondent, if or when the Administrator's decisions become orders assessing civil penalty. Id., at 8, n. 10.

7. Complainant failed to follow its own enforcement policy;

8. Complainant's policy of seeking a civil penalty for every failure to detect a test object is a standard of perfection which is arbitrary and capricious; and

9. The law judge's initial decision is not supported by a preponderance of the evidence.

The above arguments have been addressed and have been found unavailing in the following cases: In the Matter of Continental Airlines, Inc., FAA Order No. 90-0012 (April 25, 1990); In the Matter of Continental Airlines, Inc., FAA Order No. 90-18 (August 22, 1990); and In the Matter of Continental Airlines, Inc., FAA Order No. 90-19 (November 7, 1990).^{4/} The first five issues listed above have been addressed in all three of the decisions cited above. The latter four issues have been addressed in FAA Order No. 90-18 and FAA Order No. 90-19.^{5/}

^{4/} Strictly speaking, issue number 7 regarding Complainant's enforcement policy was only addressed directly in FAA Order No. 90-19, at 20-24. The issue of whether Complainant failed to produce a relevant memorandum on Complainant's enforcement policy was addressed in FAA Order No. 90-18, at 10-11.

^{5/} On the face of issue number 9, it would not appear that previous decisions could be dispositive of whether, in these cases, the law judge's initial decisions were supported by a preponderance of the evidence. However, Respondent's argument in these cases is identical to arguments which were rejected in FAA Order No. 90-18 and FAA Order No. 90-19. Essentially, Respondent asserts that there is no direct evidence to support the conclusion that the images of the test objects appeared on the screen during the tests in question. There is only evidence that the images of the test objects were visible when the screening procedures were repeated immediately after the test failures. In the cases at issue, as in FAA Order No. 90-18 and FAA Order No. 90-19, Respondent has failed to rebut the strong circumstantial evidence that indicates that the test objects were discernible on the x-ray screens the first time they passed through the metal detectors.

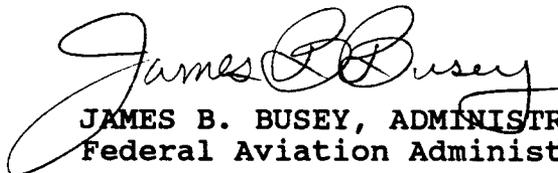
I realize that at the time Respondent filed its appeal briefs in these cases, the above cited decisions had not yet been served. Therefore, Respondent's briefs in these cases could not and do not reflect the fact that the arguments put forth have been repeatedly found unpersuasive. In light of the fact that there are no new issues in these cases, and that the facts of these cases have not been distinguished in any way from the cases cited herein, Respondent's appeals are denied. FAA Order No. 90-0012, FAA Order No. 90-18, and FAA Order No. 90-19 should be consulted for a discussion of the issues raised in Respondent's appeals in the instant cases.^{6/}

THEREFORE, in light of the foregoing, Respondent's appeals are denied, and the law judge's initial decision is

^{6/} With regard to issue 4, FAA Order No. 90-0012 and FAA Order No. 90-18 may be read to suggest that an action is initiated with the filing of the Complaint. In fact, section 13.16(d) of the Rules of Practice, 14 C.F.R. § 13.16(d) (1989), makes clear that a civil penalty action is initiated when the Notice of Proposed Civil Penalty is served. This distinction would not have changed the result in FAA Order No. 90-0012 or FAA Order No. 90-18. In these cases, the Notices of Proposed Civil Penalty were served after Rules of Practice in Civil Penalty Cases went into effect.

affirmed.^{7/} Civil penalties in the following amounts are hereby assessed:^{8/}

1. In Docket No. CP89NM0037, \$1,000;
2. In Docket No. CP89NM0052, \$10,000; and
3. In Docket No. CP89NM0057, \$1,000.


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of April, 1991.

^{7/} 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 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, Respondent 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.

^{8/} Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described 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 (1990) (to be codified at 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)).