

UNITED STATES STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

Served: February 21, 1992

FAA Order No. 92-13

In the Matter of:  
DELTA AIR LINES, INC.

Docket No. CP89-0360

AGC-10

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DECISION AND ORDER

Complainant has appealed from the oral initial decision issued by Administrative Law Judge Robert L. Barton at the conclusion of the hearing held in this matter on August 5, 1991, in \*\*\* .<sup>1/</sup> In his initial decision, the law judge held that Complainant did not establish that Delta Air Lines, Inc., ("Respondent") had failed to carry out a provision of its security program in violation of Section 108.5(a)(1) of the Federal Aviation Regulations (FAR) (14 C.F.R. § 108.5(a)(1)).<sup>2/</sup> For the reasons set forth below, the initial decision of the law judge is reversed.<sup>3/</sup>

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

<sup>2/</sup> Section 108.5(a)(1) of the Federal Aviation Regulations provides in pertinent part: "[e]ach certificate holder shall adopt and carry out a security program...."

<sup>3/</sup> Portions of this decision have been redacted for security reasons under 14 C.F.R. Part 191. All unredacted

[Footnote 3 continues on next page.]

The facts of this case are not in dispute. Respondent admitted in its answer that on July 30, 1988, Respondent's x-ray screening device operator failed to detect an FAA-approved test object \*\*\* during an FAA screening system operator test at a screening checkpoint at \*\*\*.

Respondent further admitted that Section XIII of its air carrier security program required that it detect each FAA-approved test object during each FAA screening system operator test. In its answer, Respondent did not admit that it had violated Section 108.5(a)(1), as alleged by Complainant.

At the hearing, the only evidence offered by Complainant was the FAA screening checkpoint test evaluation form for the test conducted on July 30, 1988. The form indicated that Respondent's x-ray screening device operator failed to detect the FAA-approved test object during the test. \*\*\* , the Manager of the FAA Civil Aviation Security Field Office at \*\*\* , testified that the evaluation form contained two notes entered by the FAA inspector who conducted the test. They were: "[t]est device visible" and

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[Footnote 3 continued from previous page.]

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 and those carriers bound by the Standard Security Program, all of whom have been given both unredacted and redacted copies.

"[x]-ray unit not capable of reading \*\*\*

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Mr. \*\*\* explained that if an x-ray screening device operator at a screening checkpoint fails to detect a test object, it is put through the machine a second time to determine whether it is visible. If the test object is visible the second time, the x-ray screening device operator failed the test.

Mr. \*\*\* testified further that the particular FAA-approved test object had the following components:

\*\*\*

. Even though the \*\*\* was not visible, Mr. \*\*\* testified, the other components of the test object would have been visible on the x-ray screen.

Respondent argued that the test could not have been fair and reasonable because the \*\*\* component of the test object was not visible on the x-ray screen. Specifically, Respondent argued that the test object could not have been recognized as a test object unless the \*\*\* was visible. Alternatively, Respondent argued, the sanction in this case should be limited to \$1,000 because Complainant did not establish a record of prior test failures.<sup>5/</sup>

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<sup>4/</sup> The FAA Civil Aviation Security Inspector who conducted the FAA approved test in this case did not testify at the hearing.

<sup>5/</sup> Complainant sought a \$10,000 civil penalty in this case. Mr. \*\*\* testified that it was FAA policy to assess a

[Footnote 5 continues on next page.]

In his initial decision, the law judge held that Complainant had to prove, as part of its prima facie case, that the test had been conducted in a fair and reasonable manner. This finding seems to be based in part upon Complainant's counsel's concession that it had the burden to establish fairness and reasonableness as part of its prima facie case.<sup>6/</sup>

The law judge also held that Respondent had not waived the issue of the fairness of the test by failing to raise it as an affirmative defense in the answer. The law judge noted that Complainant did not present any witness with personal knowledge of the test in this case, or testimony as to the general practice of the FAA in conducting such tests.<sup>7/</sup> In the law judge's view, the notation on the evaluation form that the \*\*\* had not been visible raised the question of whether the test object had been visible on the x-ray screen. For these reasons, the law judge held that Complainant did not establish by a preponderance of the evidence that Respondent had violated Section 108.5(a)(1).

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[Footnote 5 continued from previous page.]

\$10,000 civil penalty when an air carrier had not passed more than 95% of the previous screening system operator tests. A \$1,000 civil penalty was assessed when the air carrier's test pass rate exceeded 95%.

<sup>6/</sup> The record shows that in response to the law judge's questions, the agency attorney stated during oral argument that Complainant must prove that the test was fair and reasonable as part of its prima facie case.

<sup>7/</sup> Contrary to the law judge's statement in the initial decision, Mr. \*\*\* did testify about FAA practice in conducting screening system operator tests.

On appeal, Complainant argues that the law judge erred in determining that it was required to prove that the screening system operator test was fair and reasonable as an element of its prima facie case. Respondent, Complainant argues, should have raised the issue of the fairness of the test as an affirmative defense. Complainant requests reversal of the initial decision and remand of the case to the law judge for a finding on the issue of the appropriate sanction.<sup>8/</sup>

Respondent, in its reply brief, renews its argument that the test was not fair or reasonable because the screener could not have recognized the test object if the \*\*\* was not visible.<sup>9/</sup>

It was held in In the Matter of Continental Airlines, Inc., FAA Order No. 90-18 (August 22, 1990), that the issue of whether the test object \*\*\* was visible on the screen during the test was an issue to be raised by Respondent as an affirmative defense. See also, In the Matter of Continental Airlines, Inc., FAA Order No. 90-19 (November 7, 1990) (pertaining to two x-ray screening device

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<sup>8/</sup> Although the request that this case be returned to the law judge is not improper, there is no need to do so. Both parties addressed the issue of sanction at the hearing. The appropriate sanction may be determined from the record.

<sup>9/</sup> Respondent also argues that Complainant on appeal is bound by the admission of its counsel at the hearing that it was part of Complainant's prima facie case to establish that the test was fair and reasonable. However, the Administrator, acting in his role as the decisionmaker on appeal, is not bound by the legal conclusions expressed by agency attorneys, who serve as prosecutors in these cases.

tests, one with a \*\*\* ). Respondent's suggestion here that the test was not fair because the \*\*\* was not visible is very similar to the argument presented in those cases. Indeed, the present case highlights the reason why that burden properly falls to a respondent. Respondent admitted in this case that its screening device operator failed to detect the FAA-approved test object, and that Section XIII of its air carrier security program required that it detect each object during each test. Given that Respondent only denied that the sum of those admitted facts constituted a violation of Section 108.5(a)(1), the issue before the law judge was purely one of law. Theoretically, Complainant could have rested its case without offering any witnesses at all.

The finding that Respondent may only raise the issue of whether the test was fair and reasonable as an affirmative defense is reinforced by the inclusion of the make-up of this test object in the Standard Security Program (SSP).<sup>10/</sup> See In the Matter of Continental Airlines, Inc., FAA Order No. 90-18 at 17, n.9 (August 22, 1990). The SSP description does not include \*\*\* as one of the components of the \*\*\* test object. Id. Thus, Respondent was on notice of the test object components that its screeners were required to recognize as a \*\*\* . Also, there is

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<sup>10/</sup> The Standard Security Program was developed jointly by the Federal Aviation Administration and the air carrier industry.

nothing in the record that suggests that the test in this case was conducted in a manner other than described by Mr. \*\*\* . If that were the case, it is reasonable to assume that Respondent would have offered evidence of the deviation from standard FAA testing procedure.

On the question of whether the test object was detected, and if so, whether it was recognizable as a \*\*\* , the evidence is clear that, except for the \*\*\* , it was detected. Though the law judge noted that because the \*\*\* was not visible there was a question as to whether the test object \*\*\* itself was visible, the evidence on this point is quite clear. The very same exhibit which contained the evidence, "[x]-ray unit not capable of reading \*\*\* ", also contained the notation, "[t]est device visible."

In addition, air carriers can be held to know the content of their security programs. See In the Matter of Continental Airlines, Inc., FAA Order No. 90-12 at 13 (April 25, 1990).<sup>11/</sup> In this case Respondent is held to know that the description of the test object \*\*\* in the security program does not include a \*\*\* component. Likewise, Respondent's security program specifically requires that its x-ray screening devices be calibrated so as to detect \*\*\* , and this too Respondent is required to know. Finally, the record contains no evidence that the test object was not in fact recognizable as a \*\*\* . Instead, Respondent

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<sup>11/</sup> See also In the Matter of Airport Operator, FAA Order No. 91-58 at 14 n.15 (December 13, 1991), in which it was stated that an airport operator can be presumed to know the contents of its own security program.

relied purely upon the argument of its counsel that this was the case.

Turning to the issue of sanction, Complainant did not establish a record of prior test failures by Respondent. The only evidence presented on this issue by Complainant was Mr. \*\*\*' testimony that another test had been conducted on October 20, 1987, involving the same air carrier. No explanation was provided as to whether Respondent passed or failed that test or any other tests through July 30, 1988. As a result, on this record, it is impossible to determine whether Respondent had a history of prior test failures. Consequently, Complainant did not establish that the \$10,000 civil penalty sought in the complaint is appropriate. A civil penalty of \$1,000 is the only sanction supported by the record.

In light of the foregoing, Complainant's appeal is granted in part, and the initial decision of the law judge is reversed. A civil penalty in the amount of \$1,000 is assessed.<sup>12/</sup>



BARRY LAMBERT HARRIS  
Acting Administrator  
Federal Aviation Administration

Issued this 5<sup>th</sup> day of February, 1992.

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<sup>12/</sup> Unless Respondent files a petition for reconsideration within 60 days of service of this decision (under 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).