

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

**WESTAIR COMMUTER
AIRLINES, INC.
d/b/a UNITED EXPRESS**

FAA Order No. 96-16

Served: May 3, 1995

Docket No. CP94WP0019

DECISION AND ORDER

Respondent WestAir Commuter Airlines (WestAir) has appealed from Administrative Law Judge Burton S. Kolko's written initial decision¹ finding that WestAir violated Sections 108.5² and 108.10(a)(1)³ of the Federal Aviation

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

² Section 108.5, 14 C.F.R. 14 C.F.R. § 108.5, provides as follows:

§ 108.5 Security program: Adoption and implementation.

(a) Each certificate holder shall adopt and carry out a security program that meets the requirements of § 108.7 for each of the following scheduled or public charter passenger operations:

(1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.

(2) Each operation that provides deplaned passengers access, that is not otherwise controlled by a certificate holder using an approved security program or a foreign air carrier using a security program required by § 129.25, to a sterile area.

(3) Each operation with an airplane having a passenger seating configuration of more than 30 but less than 61 seats; . . .

(b) Each certificate holder that has obtained FAA approval for a security program for operations not listed in paragraph (a) of this section shall carry out the provisions of that program.

³ Section 108.10(a)(1), 14 C.F.R. 14 C.F.R. § 108.10(a)(1), provides, in pertinent part, as follows:

§ 108.10 Prevention and management of hijackings and sabotage attempts.

(a) Each certificate holder shall--

Regulations by failing to provide a ground security coordinator for three of its flights, as required by WestAir's FAA-approved security program. This decision denies WestAir's appeal and affirms the law judge's assessment of a \$6,500 civil penalty.

WestAir is an air carrier doing business as United Express. FAA security regulations require air carriers to adopt an FAA-approved security program and then to carry out that program. 14 C.F.R. § 108.5. The security regulations also require air carriers, as part of their security programs, to provide and use a ground security coordinator for each of their flights. 14 C.F.R. § 108.10(a)(1). Ground security coordinators serve an important purpose: their job is to help manage and prevent hijackings and sabotage attempts.⁴

WestAir does not dispute that on April 2, 1992, three of its flights departed from John Wayne International Airport in Orange County, California without a ground security coordinator present. However, WestAir has raised the following affirmative defense: WestAir had entered into a partnership agreement with United Airlines (United) under which United would provide complete station support, including a ground security coordinator, for each of WestAir's United Express flights departing from John Wayne Airport.

No hearing was held in this case. The law judge canceled the hearing after the parties informed him that their joint factual stipulations eliminated the need for

(1) Provide and use a security coordinator on the ground and in flight for each international and domestic flight, as required by its approved security program;

⁴ The purpose of the Section 108.10 requirement of a ground security coordinator is expressed in the title of Section 108.10, which is "Prevention and management of hijackings and sabotage attempts."

a hearing, and that they would simply submit the case on the basis of the parties' joint factual stipulations and written legal briefs. The parties stipulated to the following facts:

1. Respondent is now, and at all times mentioned herein, the holder of Air Carrier Operating Certificate No. WTAA033B, issued by the FAA.
2. Respondent has adopted an FAA-approved Air Carrier Standard Security Program ("ACSSP"). At all times pertinent hereto, said ACSSP was in effect and ACSSP required, in pertinent part, that a Ground Security Coordinator ("GSC") be provided for each flight, and specified certain minimum training requirements for each GSC. For domestic operations with aircraft having less than 61 seats, the requisite initial training consisted of 8 hours, and 4 hour of annual recurrent training.
3. On April 2, 1992, Respondent's flights Nos. 3565, 3553, and 3567 departed John Wayne International Airport, Orange County California ("the Airport"). All of said flights were domestic, utilizing aircraft having less than 61 seats. There was no trained GSC provided for these flights.
4. At all times pertinent hereto, Respondent was a party to a certain Expanded Partner Agreement ("the Agreement") with United Airlines ("UA"), pursuant to which Respondent is permitted by UA to operate as a "United Express" carrier.
5. The Agreement contemplated three types of stations--UA stations, United Express stations, and joint stations. At UA stations, UA agreed to provide, and did provide, all station support services and facilities to Respondent, including station support services at the Airport, consisting of the following: ground handling, small package dispatch, customer service/ticket counter; customer service/gates; receipt and dispatch and passenger security screening. At United Express stations, Respondent would provide said station support services and facilities as there was no UA presence. At joint stations, UA and Respondent would each provide their respective station support services and facilities.
6. At all times pertinent hereto, the Airport was a UA station. All ground handling, small package dispatch, customer service/ticket counter; customer service/gates; receipt and dispatch and passenger security screening was provided by UA. Other than its flight crews operating its aircraft, and maintenance personnel charged with the maintenance of its aircraft, Respondent had no

management personnel or employees at the Airport. All station services and facilities, including the furnishing and training of GSC's, were those of UA and were furnished to Respondent exclusively by UA. In essence, with the exception of piloting and maintaining Respondent's aircraft, UA handled Respondent's entire operations at the Airport.

7. Respondent had no knowledge that UA failed to provide a GSC for the flights in question.
8. Complainant has already found UA to have been in violation for its failure to provide a trained and qualified GSC at the Airport on April 2, 1992, the same date upon which the instant case arose. In FAA Case No. 92WP710021, Complainant issued an Order Assessing Civil Penalty to UA in the amount of \$4,000.00 for violations of Federal Aviation Regulations ("FAR"s) §§ 108.5(a) and 108.10(a)(1), the same regulations that Complainant has alleged against Respondent in the instant case. A copy of Complainant's said Order Assessing Civil Penalty is attached hereto and made a part hereof as Exhibit A. UA paid the assessed civil penalty.
9. The Agreement was neither given to, nor approved by, the FAA, nor was it required to be.
10. The FAA was not a party to the Agreement.
11. The Agreement was not part of either Respondent's or UA's respective ACSSP's, nor was it required to be.
12. Respondent's ACSSP permits Respondent to elect to use an employee of another carrier or appropriate private contractor, who has had the requisite initial and recurrent training, to act as GSC for a flight or a series of flights departing a specific airport.

(Joint Stipulations at 1-4.)

After considering the parties' joint stipulations and their briefs, the law judge held that WestAir had indeed violated the regulations, as alleged in the complaint. The law judge concluded that WestAir was fully responsible for the lack of a ground security coordinator for the flights at issue. Noting that air carriers are held to the highest degree of care, the law judge stated that regulators are entitled to hold certificate holders such as WestAir responsible for any failures to comply

with the regulations. According to the law judge, “[t]he relationships between [WestAir] and the various entities with which it contracts . . . cannot vitiate this essential link.” (Initial Decision at 2.) Otherwise, the law judge reasoned, an air carrier could avoid liability by contracting out the various services that the government and passengers expect it to provide, leaving nothing more than an empty shell to regulate. It made no difference to the law judge that WestAir had contracted with another air carrier in this case; as a matter of public policy, the law judge stated, a common carrier’s security responsibilities are too critical to permit it to transfer its obligations to another.

As for the sanction, the law judge found that the \$6,500 penalty requested by Complainant was fair and reasonable. He found no mitigating factors present. Regarding WestAir’s claim that Complainant was “double charging” by assessing civil penalties against both United and WestAir, the law judge did not agree because the United sanction was for a United flight and not for the WestAir flights at issue here. The law judge noted that United’s fine was \$4,000 for its one flight, while WestAir was only being assessed approximately \$2,166 per flight. As a result, the law judge did not believe that the \$6,500 sought by Complainant was too high.

In its appeal brief, WestAir argues that the law judge’s findings of violations “are not supported by the evidence and are not in accordance with applicable law, precedent, and public policy.” (Appeal Brief at 9.) To support this argument, WestAir argues that it carried out the relevant provision of its security program requiring a ground security coordinator by making the necessary contractual arrangements with United, as permitted by its security program. WestAir further states that it had every reasonable expectation that United would honor its

contractual obligations, and that it had no knowledge of United's failure to have a ground security coordinator present. According to WestAir, the violations that occurred in this case were not those of WestAir, and even if they were, they are excused by United's violations and contractual breach.⁵

Contrary to WestAir's claim, the law judge's decision is well supported.

While it may be true that WestAir had every reasonable expectation that United would honor its contractual obligations, and that it had no knowledge of the failure to have a ground security coordinator present, WestAir remains responsible for the security violations at issue. The record fails to show any attempt on WestAir's part to monitor whether United was keeping its agreement to provide trained ground

⁵ WestAir has two other arguments that can be disposed of without a great deal of difficulty. First, WestAir argues that neither the complaint nor the initial decision specify which provision of Section 108.5--paragraph (a) or paragraph (b)--WestAir allegedly violated. WestAir states that paragraph (b) must be the appropriate paragraph, because "all of WestAir's aircraft, at the pertinent time, had 30 or fewer seats and because this case does not involve access by deplaned passengers into a sterile area not otherwise controlled by a certificate holder." (Appeal Brief at 11.) The record does not contain any evidence supporting these factual assertions. No hearing was held in this case and the parties' joint stipulations do not address whether WestAir's aircraft had 30 or fewer seats and whether deplaned passengers had access to an uncontrolled sterile area. However, contrary to WestAir's claim, the parties' joint stipulations indicate that paragraph (a) rather than paragraph (b) applies. Joint Stipulation No. 8 provides as follows: "Complainant issued an Order Assessing Civil Penalty to UA in the amount of \$4,000.00 for violations of Federal Aviation Regulations § 108.5(a) . . . (Emphasis added.) In any event, it makes no difference which paragraph applies, because both paragraph (a) and (b) require that an air carrier carry out the provisions of its security program. This is the requirement that Complainant alleged WestAir failed to meet. The complaint fairly apprised WestAir of the agency's position regarding this alleged violation. It stated that WestAir violated "Section 108.5, in that WTAA (WestAir) failed to carry out its FAA-approved security program." (Complaint, ¶ II.a.) Moreover, if WestAir had a genuine question regarding whether Complainant was alleging a violation of paragraph (a) or paragraph (b) of Section 108.5, WestAir could have filed a motion for more definite statement under 14 C.F.R. § 13.218(f)(3).

As for WestAir's claim that Complainant did not allege a violation of a specific provision of Section 108.10 (Appeal Brief at 11), this is incorrect. The complaint expressly provided in ¶ 2(b) that WestAir violated "Section 108.10(a)(1), in that WTAA [WestAir] failed to provide a Security Coordinator on the ground for each flight as required by its approved security program (emphasis added)."

security coordinators for WestAir's flights. WestAir conceded in its appeal brief that "it is charged with a statutory mandate to perform its services and fulfill its regulatory responsibilities with the highest possible standard of care." (Appeal Brief at 8.) As the law judge pointed out, an air carrier's responsibilities are too critical to permit it to transfer its obligations to another. It makes no difference that WestAir's reliance was on another air carrier.

In In the Matter of USAir, FAA Order No. 92-70 at 3-4 (December 12, 1992), the Administrator indicated that the duty of care of an air carrier is non-delegable, and held that the acts of USAir's pushback operator were attributable to USAir. WestAir argues that USAir is distinguishable because it involved the negligence of an uncertificated entity, the pushback operator, whereas the instant case involves the negligence of another air carrier (United) with its own, more rigorous security program. However, it makes little difference that United has its own security program if United's security program applies only to United flights and not to WestAir flights.⁶

⁶ Note also that Item #4 of the parties' joint stipulations states that: "At all times pertinent hereto, Respondent was a party to a certain *Expanded Partner Agreement* ('the Agreement') with United Airlines ('UA'), pursuant to which Respondent is permitted by UA to operate as a 'United Express' carrier." (Emphasis added.) If, as the name of their agreement suggests, WestAir and United were partners, then WestAir should not be surprised that it is being held liable for the negligence of United. One distinguishing characteristic of partnerships is joint and several liability. See, e.g., RecoverEdge v. Pentecost, 44 F.3d 1284, 1296-97 (5th Cir. 1995) (noting that a partner's improper acts or omissions can be imputed to an innocent partner). WestAir could have included a provision in its partnership agreement whereby United would indemnify WestAir for any civil penalties it incurred due to United's lapses. Indeed, the partnership agreement of WestAir and United may already contain such a provision. It is impossible to tell because WestAir has declined to make the partnership agreement a part of the record, stating as its reason that "[t]he agreement between Respondent and United has not been produced . . . as it contains certain proprietary, commercial, and financial information which is privileged and confidential." (Respondent's Memorandum Concerning Request for Hearing and Fifth Affirmative Defense, at 3, n.2.) In addition, WestAir may have the option of seeking recovery of the civil penalties it has incurred in this case by filing a civil suit against United for breach of contract.

WestAir also argues that Complainant is precluded from maintaining this action against WestAir because Complainant already assessed a \$4,000 civil penalty against United concerning virtually identical facts and circumstances. WestAir argues as follows:

The single violation, if proven, warrants only one civil penalty action, although Complainant is not precluded from proceeding against multiple respondents. However, after having taken and concluded enforcement action against United, Complainant should now be precluded from maintaining this separate action against WestAir.

(Appeal Brief at 15.) According to WestAir, under United States v. American Airlines, et al., 23 Av. Cas. ¶ 17,360 (CCH) (W.D. Tex. 1991) (No. SA-89-CA903), the matters complained of, if true, constitute but one violation of the regulations.

In the American Airlines case relied on by WestAir, the FAA sought to impose a \$10,000 civil penalty on each of four separate air carriers who jointly shared a single terminal and security screening checkpoint after an FAA inspector carrying a simulated dynamite bomb was able to pass through the screening checkpoint without being stopped. The United States District Court for the Western District of Texas held that the failure to detect the simulated bomb constituted a single violation, and that the FAA's decision to cite each airline equally was not arbitrary and capricious. The court imposed a civil penalty of \$2,500 upon each of the four air carriers.

The American Airlines case does not support WestAir's argument. It indicates only that under certain circumstances, more than one air carrier may be held responsible for the same violation. In American Airlines, there was a single incident at a security checkpoint. This is not the case here. Rather, the instant case involves the failure to provide a ground security coordinator for several

separate flights. In the instant case, there are several violations that are separate and distinct, even though they may have occurred relatively closely in time. The Federal Aviation Act, as amended, authorizes the finding of a separate violation for each flight involving the violation. *See* 49 U.S.C. § 46301(a)(4), providing that “[a] separate violation occurs under this subsection for each day the violation continues or, if applicable, *for each flight involving the violation.*” (Emphasis added.)

Complainant is not precluded from seeking a civil penalty against WestAir for WestAir’s three flights simply because United had already been assessed a civil penalty for the single United flight. The civil penalties sought from United and WestAir are for distinct violations.

WestAir’s next argument is that the sanction is unwarranted by the facts and circumstances, as well as by applicable FAA policy. To support this argument, WestAir quotes the italicized portion of the following provision found in FAA Order No. 2150.3A:

Sanctions. Enforcement sanctions should be applied as consistently as possible, but this should not imply blind adherence to a fixed penalty for every violation. While agency directives providing guidance on sanctions must be observed, each case requires an individual determination of appropriate enforcement action. Field inspectors should feel free to recommend actions which, in their professional judgment, will appropriately serve the purposes of the compliance and enforcement program.

FAA Order No. 2150.3A, ¶ 201(g) (emphasis added).

There is no indication in the record that Complainant and the law judge blindly adhered to a fixed penalty for all cases involving the failure to provide a ground security coordinator. WestAir cites no other cases showing that Complainant has a pattern of seeking a \$6,500 civil penalty in all such cases, regardless of the facts and circumstances of the individual case. A review of the

record indicates that Complainant and the law judge properly made an individual determination as to the appropriate sanction amount for this case. Under the Federal Aviation Act, as amended, WestAir was subject to a penalty of up to \$10,000 for each violation. Here, where there were three separate violations, Complainant could have sought a civil penalty of up to \$30,000. Instead, Complainant sought, and the law judge assessed, a civil penalty of only \$6,500, or about \$2,166 per violation. In contrast, United was assessed a civil penalty of \$4,000 per violation.

WestAir also claims, again citing FAA Order No. 2150.3A, that Complainant and the law judge improperly compounded the civil penalty. The exact provision referred to by Westair to support this assertion is as follows:

(3) Compounding sanctions for multiple or continuing acts or omissions. Under the FA Act, each separate violation, or each day of a continuing violation, may be counted separately in determining the appropriate sanction. It is not always appropriate simply to multiply the sanction for a single violation by the number of flights or days.

A. Substantial compounding of penalties is warranted where a failure to comply is deliberate.

B. Substantial compounding of penalties is warranted where a failure to comply reflects a continuing or repeated failure to discover violation (sic) which, with the exercise of due diligence, should have been discovered and corrected.

FAA Order 2150.3A, ¶ 207(c)(3). This portion of FAA Order No. 2150.3A does not support WestAir's position either.⁷ It expressly states that each separate violation

⁷ Note that the portions of FAA Order No. 2150.3A that WestAir relies upon are no longer in effect. In Change 18, which was issued on April 20, 1994, the FAA revised Chapter 2, which was previously titled "Enforcement Objectives and Policy" but is now titled "Compliance and Enforcement Policy and Objectives." As stated in the agency's explanation of changes, "[t]he revised chapter emphasizes voluntary compliance and an *increased flexibility in the exercise of discretion and judgment by investigating personnel* to choose enforcement remedies that would best promote future regulatory compliance." FAA Order No. 2150.3A, Change 18, ¶ 2 (emphasis added). The revised chapter, which is currently in effect, does not include either of the provisions in FAA Order No. 2150.3A (Sections 201(g) or 207(c)(3)) relied upon by WestAir.

In a previous case, the Administrator indicated that where the agency had changed its policy regarding the appropriate sanction, even after a case was initiated, it was appropriate to apply the new policy rather than the old. See In the Matter of Grant, FAA

may be counted separately in determining the appropriate sanction. In addition, by providing that it is not *always* appropriate simply to multiply the sanction for a single violation by the number of flights, the cited guidance suggests that in at least some (if not many) cases, it is appropriate to multiply the sanction for a single violation by the number of flights. Moreover, the cited provision states that *substantial* compounding is appropriate where the failure to comply is deliberate or reflects a continuing or repeated failure to discover a violation. It is unclear that the compounding in this case can be considered substantial, given that the maximum civil penalty was \$30,000 and the law judge assessed a civil penalty of only \$6,500. Assuming, *arguendo*, that the compounding in this case was substantial, there is still no indication in the record that WestAir exercised due diligence in monitoring its security program. As Complainant points out:

WTAA [WestAir] does not argue that it made any effort whatsoever to monitor whether UA [United] was actually providing trained ground security coordinators for WTAA's flights. Indeed, WTAA's brief suggests that it was reasonable for it to blindly rely on UA for contractual services that, in WTAA's view, relieved WTAA of all responsibility for compliance with its own security program.

(Reply Brief at 12.)

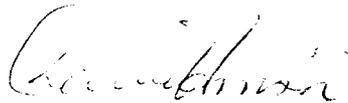
WestAir points out that although the single United flight probably boarded more passengers and generated more revenue than the three WestAir flights combined, it was assessed a \$6,500 civil penalty while United was only assessed \$4,000. However, WestAir concedes that it is simply speculating about the number of passengers on the flights at issue and the amount of revenue generated. There is no evidence in the record concerning these matters. Moreover, although the number

Order No. 94-5 (March 10, 1994) (finding that there appeared to be no reason to continue to assess the higher penalties for gun violations called for under the former policy).

of lives put at risk may reflect the seriousness of the violation, civil penalties are not ordinarily assessed simply by calculating the amount of revenue generated by each flight. In addition, per flight, United's penalty was higher than WestAir's.

A civil penalty of \$6,500 is appropriate in this case. It highlights the serious nature of an air carrier's failure to ensure that the safeguards in its security program are in place. As noted in the American Airlines case discussed above, "the omnipresent threat of terrorist activity underscores the need for the strictest possible enforcement of laws protecting the traveling public . . ." 23 Av. Cas. (CCH) at ¶ 17,362. Under the circumstances, WestAir's argument that a \$6,500 civil penalty is excessive is rejected.

WestAir's appeal is denied, and the law judge's assessment of a \$6,500 civil penalty is affirmed.⁸



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 3rd day of May, 1996.

⁸ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1995).