

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

DETROIT METROPOLITAN-
WAYNE COUNTY
AIRPORT

FAA Order No. 97-23

Served: June 5, 1997

Docket No. CP95GL0069

DECISION AND ORDER¹

This case arises from a violation of Respondent's security program. The violation occurred when an unauthorized individual gained access to a restricted area of the airport. Respondent has appealed from the law judge's initial decision,² which assessed Respondent a \$1,000 civil penalty for violating 14 C.F.R. §§ 107.13(a)(1) and (3).³ This decision affirms the law judge's initial decision.

¹ Portions of the attached law judge's decision have been redacted for security reasons under 14 C.F.R. Part 191. Unredacted copies may not be disseminated beyond the parties to this proceeding.

² A copy of the written initial decision is attached.

³ Section 107.13(a) provides in pertinent part:

[E]ach 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.

...

On November 18, 1993, a man drove to the airport to pick up his sister-in-law. (Tr. 11.) It was dark when he arrived. (Tr. 27.) He inadvertently parked at the wrong terminal. (Tr. 14.) Instead of driving to the other terminal, the man decided to walk. (Tr. 14.) He testified at the hearing that he walked through an opening in a fence that appeared to him to be designed for pedestrian traffic. (Tr. 15.) About 5 minutes later (Tr. 34), the man passed through a vehicle checkpoint at which a guard was supposed to be stationed (Tr. 149, 165), but no one challenged him. (Tr. 16, 18.)

The man testified at the hearing that while he was in the restricted area, several vehicles passed by, including a number of tugs that transport luggage, and two Jeep-type vehicles with yellow lights on top. (Tr. 19, 44.) None of the drivers of these vehicles, however, stopped to challenge him.⁴ (Tr. 20.)

After a while, the man saw a sign indicating that unauthorized persons were not permitted in the area. (Tr. 20.) He also saw airplanes very close to him, behind a retaining wall. (Tr. 57.) He testified that "If you looked straight up you could see the wings of the plane" (Tr. 20.) At this point, he realized that he was lost and flagged down a tug operator who drove him to the correct terminal. (Tr. 21, 22.) The man was in the restricted area for about 20 minutes. (Tr. 115.)

(3) Promptly detecting and taking action to control each penetration, or attempted penetration, of an air operations area by a person whose entry is not authorized in accordance with the security program.

14 C.F.R. §§ 107.13(a)(1) and (3).

⁴ Respondent has contended that the man was not challenged because he happened to be wearing the same colors as those of an air carrier in the area.

The operator of the tug reported the incident to airport security officials, who released the man after questioning. (Tr. 22-25.) Respondent sought a warrant against the man for trespass, but the local prosecutor denied the request for lack of criminal intent. (Tr. 156.)

The law judge determined that the man breached security in violation of Sections 107.13(a)(1) and (3) when he passed the vehicle checkpoint. (Initial Decision at 3.) The law judge stated:

The Airport's Security Program, upon which the FAA based its approval, called for a manned shack at the checkpoint (1 Tr. 165; 2 Tr. 191-92). The Security Program further obligated security personnel at manned checkpoints to screen vehicle traffic to permit only authorized individuals with proper identification through, and to ban non-emergency foot traffic (Exh. C-1, pp. 19-20; 1 Tr. 94-96.) While the evidence was conflicting as to whether a guard was actually present when [the man] walked through (*Cf.* 1 Tr. 37 *with* 2 Tr. 218-19), the evidence is consistent, clear, and credible on the salient point: he was not challenged (1 Tr. 34-36; 2 Tr. 219).

[The unauthorized individual] should have been stopped and questioned. He did not have proper identification, was unauthorized, and was traveling on foot. While Respondent claims that the colors of [his] outer clothing were somewhat similar to [a nearby air carrier's] colors (2 Tr. 321-32), its argument does not show that failure to stop and challenge [the man] was reasonable under the circumstances. On the contrary, [the man] invited inquiry. He was walking through a vehicle-only checkpoint from the direction of a passenger parking lot. He walked leisurely at first, and later hesitantly, like one uncertain of where he was going (1 Tr. 58-59). His demeanor should have drawn a challenge. Respondent's witnesses conceded that an assigned guard who permits a pedestrian to amble through unchallenged has committed a dereliction of duty.

(Initial Decision at 3-4.) The law judge found no mitigating circumstances, and assessed the maximum civil penalty of \$1,000.

Respondent argues that by assessing a civil penalty in this case, the law judge improperly imposed absolute liability on it. Respondent further argues that

the law judge ignored evidence of Respondent's compliance with its security program, including the following:

- The airline tug operator, when flagged down by the unauthorized individual, immediately escorted him to an authorized area and reported the incident to airport security.
- Airport police and operations personnel routinely patrol the airport's parameters, as well as its restricted areas.
- Respondent seeks legal action against all trespassers.

(Appeal Brief at 7.) Respondent also suggests that the unauthorized intruder may have:

- walked past the checkpoint when the guard was occupied with a telephone call or a vehicle passing through the gate; or
- gained access by some other means than as he testified.

(Appeal Brief at 6.) Respondent asks the Administrator to reverse the law judge's finding of liability. Failing that, Respondent argues, the Administrator should at least reduce the \$1,000 civil penalty imposed by the law judge because the detection of the unauthorized individual, along with the events that followed, are mitigating factors. (Appeal Brief at 7.)

Respondent is correct in stating that 14 C.F.R. § 107.13(a) does not impose absolute liability on airport operators. In the Matter of [Airport Operator], FAA Order No. 96-1, 1996 FAA LEXIS 1074 (January 4, 1996). This is not a case, however, in which the law judge imposed liability without fault. At several critical points, airport personnel failed to stop and challenge the unauthorized individual. Given the ease with which the unauthorized individual entered and traversed the restricted area without being stopped and challenged, Respondent failed to control

access to the restricted area adequately, and thus failed to implement properly its airport security program. As the law judge explained in his decision:

The nub of the fault found lies in Respondent's inability in this instance properly to carry out the Security Program, not in the fact of the breach. . . . In this case . . . the ease in which the perimeter was penetrated warrants the conclusion that the Airport was not using its Security Program adequately to control access.

(Initial Decision at 5.) Thus, contrary to Respondent's assertions, fault is present in this case.⁵

As for the penalty amount, there are no mitigating factors in this case that would justify a reduction in the \$1,000 civil penalty. Although the tug operator, after being flagged down by the unauthorized individual, did act properly, and Respondent did seek a warrant for trespass, these actions are insufficient to mitigate Respondent's previous failures to control access. The Administrator has indicated that a civil penalty may be reduced on the basis of corrective action, but only where there is sufficient, specific evidence of swift or comprehensive action⁶ that is positive in nature, such as sending employees to special training, or instituting programs to ensure compliance with the safety regulations.⁷ The tug

⁵ As Complainant points out, the breach occurred not by a covert entry over a fence, or by a stowaway in the back of a properly admitted truck, but from an unsophisticated visitor who was walking from one terminal to another. (Reply Brief at 2.)

Although Respondent has suggested that the unauthorized individual may have gained access by some other means than as he testified, this is speculative. There is no evidence in the record indicating that the man entered the restricted area in any manner other than as he stated. The law judge, who had the opportunity to observe the demeanor of each of the witnesses, found the man's testimony to be credible. Respondent has provided no persuasive reason to override the law judge's credibility assessment.

⁶ In the Matter of Delta Air Lines, FAA Order No. 92-5 at 7, 1992 FAA LEXIS 289, at *5 (January 15, 1992).

⁷ See In the Matter of Toyota Motor Sales, USA, Inc., FAA Order No. 94-28, 1994 FAA LEXIS 275, at *17 (September 30, 1994), *clarified*, FAA Order No. 95-12, 1995 FAA LEXIS 378 (May 10, 1995), *petition for review voluntarily dismissed*, Toyota Motor Sales, USA, Inc. v. Federal Aviation Administration, No. 95-1341 (D.C. Cir. June 5, 1996), and In the Matter of TCI

operator's actions and Respondent's attempt to obtain an arrest warrant do not constitute the type of corrective action that would justify a reduction in the civil penalty.

Given all the circumstances of this case, the law judge did not err in assessing the maximum civil penalty of \$1,000.⁸

For the above-stated reasons, this decision affirms the law judge's initial decision and assesses a \$1,000 civil penalty.⁹



BARRY L. VALENTINE
Acting Administrator
Federal Aviation Administration

Issued this 22 day of MAY, 1997.

Corporation, FAA Order No. 92-77 at 22, 1991 FAA LEXIS 281, at *27 (December 22, 1992) (both holding that a decision not to handle hazardous materials in the future does not represent the type of positive corrective action that warrants consideration in determining the penalty.)

⁸ Also, Respondent's compliance disposition is a cause for concern. The following matters are relevant regarding compliance disposition: (1) an FAA security agent testified at the hearing that a member of Respondent's management had informed her that Respondent had directed its employees not to discuss with FAA security agents any incident that might result in civil penalty action (Tr. 84-86, 107); (2) Respondent declined to provide the FAA with the name of the guard who was allegedly on duty at the vehicle checkpoint that evening (Tr. 87); (3) the FAA security agent who testified at the hearing stated that security officials for Respondent had informed her that Respondent would arrest any FAA security agent who breached an airport perimeter door to test the system (Tr. 98); (4) the Federal Security Manager at the airport, an FAA employee, testified that one of Respondent's employees had received a written reprimand and that another employee had been terminated for reporting a stowaway incident to the FAA (Tr. 194, 196, 197); and (5) the Federal Security Manager testified that in the past, Respondent had not reported security-related incidents to the FAA (Tr. 198).

⁹ 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) (1996).