

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

**CONTINENTAL
AIRLINES, INC.**

FAA Order No. 97-34

Served: October 23, 1997

Docket No. CP97NM0003

ORDER DENYING LEAVE TO FILE AN ADDITIONAL BRIEF

Complainant has filed a petition for leave to respond to issues raised in Continental's reply brief. Continental opposes the petition. After consideration of the arguments presented by the parties, Complainant's request to file an additional brief is denied.

A hearing was held in this matter on May 7, 1997. At the conclusion of the hearing, the law judge ruled that Complainant had not proven its case by the preponderance of the evidence. The law judge ruled that the FAA had not sustained its burden of proving that Continental violated the security directive, as alleged in the complaint. (Tr. 108.)

Continental challenged the validity of the security directive at the hearing. Continental argued that when the security directive was issued, the FAA should have given notice and an opportunity for comment as called for under the Administrative Procedure Act. (Tr. 9-10; 95-97.) Continental argued further that the security directive was arbitrary, capricious, and unreasonable because there was no evidence that such heightened security measures were necessary. (Tr. 10,

98-100.) Finally, Continental argued at the hearing that the FAA should not be allowed to bring an enforcement action for an alleged violation of the security directive because the FAA had failed to provide Continental with any guidance regarding implementation of the security directive even though such guidance was circulated within the agency. (Tr. 100-101.)

Regarding Continental's arguments about the validity of the security directive, the law judge stated:

I failed to reach Continental's argument regarding the validity or invalidity of the security directive, but . . . if . . . I did reach it, I would find there was insufficient basis in this record to invalidate that security directive on any legal grounds

(Tr. 108-109.)

Complainant appealed from the law judge's decision, arguing that it had proven its case by a preponderance of the evidence. Complainant argued that it could prove its case through circumstantial evidence and that the only reasonable inference from the evidence is that Continental failed to comply with the security directive.¹ In its reply brief,² Continental responded to Complainant's arguments relating to the issue of whether Complainant proved its factual contentions. In addition, Continental renewed its arguments challenging the validity of the security directive itself.

Subsequently, Complainant filed a Petition for Leave to Respond to Issues Raised in the Respondent's Reply Brief.³ Complainant argues that "[i]n revisiting

¹ Complainant's Appeal Brief at 9-14, dated July 28, 1997.

² The reply brief was filed on August 28, 1997.

³ Complainant filed the Petition for Leave to Respond to Issues Raised in Respondent's Reply Brief on September 17, 1997.

the previously rejected legal argument in its reply brief, . . . [Continental] has essentially appealed the ALJ's initial decision rejecting the argument."⁴ (Petition at 2.) Complainant seeks permission to respond to Continental's reply brief, arguing that "fairness requires that the primary litigants receive the opportunity to argue the dispositive legal issues," and that the issues raised by Continental have implications for other security cases. Hence, Complainant argues, good cause exists to permit Complainant to file an additional brief.

Continental objects to Complainant's request for leave to file a responsive brief.⁵ Continental argues that Complainant should have anticipated that Continental would renew these arguments and hence, Complainant should have addressed these issues in its appeal brief.⁶

Under Section 13.233(f) of the Rules of Practice in Civil Penalty Actions, a party may not file more than one appeal or reply brief. 14 C.F.R. § 13.233(f). It is provided further that the Administrator may grant a party's petition for leave to file an additional brief if the party demonstrates good cause for allowing additional argument. *Id.*

Good cause does not exist to grant Complainant's petition for leave to file an additional brief. As the Administrator has noted in past decisions, "the Federal Courts of Appeals constitute a more appropriate forum to attack existing

⁴ Complainant is correct. To the extent that Continental raised arguments in its reply brief on issues not raised in the appeal brief, Continental's brief is in its nature an untimely appeal brief.

⁵ Continental filed a document entitled "Objection of Respondent/Appellee to Complainant's Petition to File an Additional Brief" on September 23, 1997.

⁶ Continental also argues that Complainant's petition is untimely. The petition was filed 20 days after the reply brief was filed by mail. Section 13.233(f), which permits parties to file petitions for leave to file additional briefs, does not set a time limit for such petitions.

regulations as not consistent with the U.S. Constitution, the Administrative Procedure Act, and/or the agency's enabling act." *E.g.*, In the Matter of Continental Airlines, FAA Order No. 90-12 at 7 (April 20, 1990).⁷ For this reason, the Administrator has declined in the past to resolve questions regarding the constitutionality of existing regulations in civil penalty proceedings.⁸ In this case, Continental is not arguing that it did not have notice of the security directive's contents. Instead, it is arguing that the public should have been given notice and opportunity to comment before the security directive became effective. Whether notice and an opportunity to comment should have been afforded when the security directive was issued is a question that is better left for review by a Federal Court. Likewise, whether the security directive is justified has nothing to do with the particular facts of this case.⁹ This issue, too, is better directed to a Federal Court.

This case shall be decided on the issue of whether Complainant proved by a preponderance of the reliable, probative, and substantial evidence that Continental failed to comply with the security directive, as alleged in the complaint. Because

⁷ Parties with a substantial interest in an order issued by the Administrator of the Federal Aviation Administration may file a petition for review of that order in an appropriate Federal Court of Appeals. 49 U.S.C. § 46110.

⁸ See In the Matter of Northwest Airlines, FAA Order No. 90-37 (November 7, 1990); In the Matter of Continental Airlines, FAA Order No. 90-18 (August 22, 1990); In the Matter of Continental Airlines, FAA Order No. 90-12 (April 20, 1990). However, the Administrator has decided questions regarding whether an existing regulation as applied was overly vague. *E.g.*, In the Matter of USAir, FAA Order No. 96-25 (August 13, 1996); In the Matter of [Airport Operator], FAA Order No. 96-1 (January 4, 1996).

⁹ It is for a Federal Court to decide, based upon an appropriate agency record, whether the security directive is supported by substantial evidence or is arbitrary, capricious or an abuse of discretion.

both parties have briefed this issue, there is no need to permit additional briefs to be filed. Consequently, Complainant's request to file an additional brief is denied.

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration



VICKI S. LEEMON¹⁰
Manager, Adjudication Branch

Issued this 23rd day of October, 1997.

¹⁰ Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated October 27, 1992, under 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202 (see 57 Fed. Reg. 58,280 (1992)) and redelegated by the Assistant Chief Counsel for Litigation to the Manager, Adjudication Branch, by Memorandum dated August 6, 1993.