

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

**CONTINENTAL AIRLINES,
INC.**

FAA Order No. 98-6

Served: April 7, 1998

Docket No. CP97NM0003

DECISION AND ORDER¹

Complainant Federal Aviation Administration (FAA) (Complainant) has appealed² the law judge's decision,³ which concluded that Complainant failed to prove that Respondent Continental Airlines (Continental) failed to comply with a security directive, an alleged violation of 14 C.F.R. § 108.18(a) (1996).⁴

On June 18, 1996, an FAA inspector, posing as a prospective passenger, ***. On the day of the flight, June 20, 1996, the undercover inspector went to

¹ Portions of this order have been redacted for security reasons under 14 C.F.R. Part 191.

² Complainant's appeal is filed under 14 C.F.R. Part 13, Subpart G.

³ The portion of the hearing transcript containing the law judge's oral initial decision is attached.

⁴ Section 108.18(a) provides as follows:

Each certificate holder required to have an approved security program for passenger operations shall comply with each Security Directive issued to the certificate holder by the Director of Civil Aviation Security, or by any person to whom the Director has delegated the authority to issue Security Directives, within the time prescribed in the Security Directive for compliance.

Continental's ***, presented his ticket, and checked a piece of baggage. ***. An FAA security directive was in effect at the time prohibiting airlines from ***.

Complainant alleged in its complaint that Continental's employees failed to ***. It is undisputed that Continental's employees loaded the baggage onto the aircraft for the flight and flew it to the destination, even though ***.

After a hearing, the law judge found that Continental's employees failed to ***, pursuant to Continental's passenger baggage matching procedures. The law judge nonetheless held that Complainant had failed to sustain its burden of proof because the record contained no direct evidence that Continental ***. (Tr. 107, 108.) The law judge found that without at least some direct evidence of ***, Complainant had failed to present even a *prima facie* case. (Tr. 108.) The law judge noted that Complainant could have met its burden by ***.

In its appeal brief, Complainant argues that the law judge erred in finding that Complainant can prove its case only through direct evidence. (Appeal Brief at 9.) According to Complainant, it may prove its case using circumstantial evidence, and in this case, the only reasonable inference one can draw from the evidence is that Continental failed to ***. (*Id.* at 10, 13.)

Continental's counterargument is that the law judge did consider Complainant's circumstantial evidence, and simply found it insufficient to meet Complainant's burden of proof.⁵ Continental emphasizes, citing the burden of proof

⁵ In its reply brief, Continental also renews its challenge, first presented at the hearing, to the validity of the security directive. Specifically, Continental argued at the hearing that: (1) under the Administrative Procedure Act (APA), Complainant should have given the public notice and an opportunity to comment; (2) the directive was arbitrary, capricious, and unreasonable because there was no evidence that heightened security measures were necessary; and (3) Complainant should not be permitted to bring an action for an alleged violation of the directive because Complainant failed to provide Continental with any

rule of 14 C.F.R. § 13.224,⁶ that the burden of proof is solely Complainant's. (Reply Brief at 18.)

In addition, Continental argues that even if the law judge could have ruled differently, Complainant is not entitled to reversal unless Complainant can demonstrate that the law judge's findings are "clearly erroneous and not supported by any evidence." (Reply Brief at 21.) Continental asserts that if the Administrator reverses the law judge without a showing that the law judge's findings are clearly erroneous, a hearing before a law judge would be "merely an empty gesture" (Reply Brief at 21) and "a transparent fraud" (*Id.* at 18). According to Continental, the only evidence in the record concerning Continental's treatment of the baggage was that the FAA inspectors had no knowledge or information of any kind. (Reply Brief at 16.)

Nowhere do the Rules of Practice state that the Administrator may only reverse a law judge's findings if they are "clearly erroneous and unsupported by any evidence." Notably absent from Continental's reply brief is any citation of legal authority to support the "clearly erroneous and unsupported by any evidence" standard of review Continental advocates.

guidance regarding implementation of the directive even though such guidance was circulated within the agency.

As stated in an earlier order in this case, the Federal Courts constitute a more appropriate forum for Continental's challenge to the validity of the security directive. In the Matter of Continental Airlines, FAA Order No. 97-34 at 3-4 (October 23, 1997) (denying Complainant's request to file an additional brief rebutting Continental's challenge to the validity of the security directive). As a result, the instant decision does not address the validity of the security directive. Rather, it addresses solely the issue of whether a preponderance of the reliable, probative, and substantial evidence supports the law judge's decision.

⁶ 14 C.F.R. § 13.224(a) provides that "[e]xcept in the case of an affirmative defense, the burden of proof is on the agency."

Rather, under the Rules of Practice, reversal may be appropriate if the law judge's findings of fact are unsupported by a preponderance of reliable, probative, and substantial evidence. 14 C.F.R. § 13.233(b)(1). Reversal may also be appropriate if the law judge's conclusions of law are not in accordance with applicable law. 14 C.F.R. § 13.233(b)(2). Finally, the Rules of Practice indicate that reversal may be appropriate if the law judge committed prejudicial errors during the hearing or proceedings. 14 C.F.R. § 13.233(b)(3) & (j).⁷

As Continental correctly notes, in FAA civil penalty proceedings, the burden of proof is, in the first instance, on Complainant. (See 14 C.F.R. § 13.224(a), providing that except in the case of an affirmative defense, the burden of proof is on the agency.) However, once Complainant establishes a *prima facie* case, if the respondent wishes to raise an affirmative defense, the burden of proof then shifts to the respondent. (See 14 C.F.R. § 13.224(c), providing that a party who has asserted an affirmative defense has the burden of proving it.) In determining whether a matter constitutes an affirmative defense, appropriate considerations are policy,

⁷ 14 C.F.R. § 13.233 provides, in pertinent part, as follows:

(b) *Issues on appeal.* A party may appeal only the following issues:

1. Whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence;
2. Whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and
3. Whether the administrative law judge committed any prejudicial errors during the hearing that support the appeal.

See also 49 U.S.C. § 46301(d)(7)(B) (providing that the Administrator shall consider the same factors only).

14 C.F.R. § 13.233(j) provides that the Administrator will determine "if the law judge committed prejudicial error in the proceedings" and "may affirm, modify, or reverse the initial decision, make any necessary findings, or ... remand the case for any proceedings that [the Administrator] determines may be necessary."

fairness, and probability. 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil, § 1271 (1969 & Supp.).

In this case, all three considerations operate in favor of considering *** an affirmative defense, given that:

1. Policy: Continental can more easily show the affirmative of *** than Complainant can show the negative of no ***;
2. Fairness: the relevant information -- *i.e.*, regarding whether Continental *** -- is within Continental's control;
3. Probability: under the circumstances, it is improbable that *** took place, as the law judge noted several times at the hearing (Tr. 84, 108).

Counsel for Continental argued at the hearing that Complainant's inspectors could have ***. It appears that the law judge accepted this argument, because he stated in his initial decision as follows:

Well, there's many ways that the FAA could deal with the practicalities involved here. There could be any number of, I would say, *** to where a person could testify that, I put ***.

(Tr. 107.) However, ***.

In the case at hand, Complainant offered evidence of the ticket purchase, ***, and the shipment of the baggage. Complainant also offered in evidence a letter from Continental admitting that it failed to follow its passenger/baggage match procedures. With that evidence it established a *prima facie* case. Once Complainant established a *prima facie* case, any claim that Continental's employees *** should have been regarded as an affirmative defense. Under this approach, if Continental wished to claim that its employees actually ***, it should be held responsible for raising the matter in its answer, which it did not do, and also for

showing, by a preponderance of reliable, credible, and substantial evidence, that its employees ***, which it also failed to do.

Even if the matter did not constitute an affirmative defense, so that Complainant bore the burden of proving a negative (that Continental did *not* ***), the law judge still erred in finding that Complainant failed to sustain its burden of proof. The burden of proof in FAA civil penalty cases is a *preponderance* of reliable, probative, and substantial evidence. 14 C.F.R. § 13.223 (emphasis added). A preponderance of the evidence means simply that it is more probable than not that the violation occurred. *See, e.g., Blossom v. CSX Transportation*, 13 F.3d 1477, 1480 (11th Cir. 1994) (preponderance of evidence means that claim of party bearing burden of proof is more likely true than not -- *i.e.*, that scale tips, however slightly, in favor of party with burden of proof). The law judge himself stated, "Now we all think, or we're probably willing to bet that ***" (Tr. 84.) He also stated, "just as a probability, we could all say, ***" (Tr. 108.)

Although Continental suggests that the law judge simply found the circumstantial evidence *in this particular case* insufficient, the record does not support this idea. Nowhere in the initial decision did the law judge acknowledge that Complainant may use circumstantial evidence to sustain its burden of proof. On the contrary, the law judge required direct evidence to sustain the burden of proof,⁸ although the governing case law indicates that direct evidence is not

⁸ *See, e.g.,* Tr. 85, where the law judge states, "There's really not any direct evidence." Then, when Complainant's counsel disagreed, pointing to the admissions in Continental's letter (that Continental had not followed its passenger/baggage matching procedures and it could not refute the allegations), the law judge again states, "That's not direct evidence. Direct evidence is somebody who has maintained, more or less, what I would call, for lack of a better term, a chain of custody of this piece of luggage."

Finally, in his initial decision, the law judge stated, referring to ***, "There is no direct evidence of that in the record." (Tr. 107.)

required. *See, e.g., In the Matter of Florida Propeller & Accessories*, FAA Order No. 97-32 at 7, 1997 FAA LEXIS 1280, at *10 (October 8, 1997) (stating that “Complainant may use circumstantial evidence to sustain its burden of proof”); *In the Matter of Hampton Air Transport Systems*, FAA Order No. 97-11 at 4, 1997 FAA LEXIS 48, at *5 (February 20, 1997) (stating that “[c]ircumstantial evidence can be reliable, probative, and substantial”).

As the law judge himself noted (Tr. 85, 106), Continental admitted in a letter to Complainant that it failed to perform its passenger/baggage match procedures, which involved ***,⁹ and that it could not refute the allegations. (Complainant’s Exhibit 5.) It strains credulity to assert that Continental’s employees might have ***. Hence, a preponderance of the reliable, probative, and substantial evidence in this case, circumstantial or not, indicates that Continental did not ***.

It is unnecessary to delay the resolution of this case by remanding it to the law judge to determine the appropriate sanction amount. The matter is straightforward and the record clear. Complainant requested a civil penalty of \$7,500 in the complaint. According to FAA Order No. 2150.3A, which contains sanction guidance, a penalty in the maximum range is appropriate when an air carrier fails to comply with its security program. (Complainant’s Exhibit 6;¹⁰

⁹ Although Continental suggests that the testimony regarding Continental’s exact system of marking is somehow suspect, stating that “one interesting aspect of this ... argument is that all the testimony is from the FAA” (Reply Brief at 17), Continental’s brief is devoid of any citations to the record that cast doubt in any way on the testimony of Complainant’s witnesses regarding Continental’s system of ***.

¹⁰ FAA Order No. 2150.3A, Appendix 4, at 7.

Tr. 71.)¹¹ The same order indicates that for air carriers like Continental, a maximum penalty is in the range of \$7,500 to \$10,000.¹² (*Id.*) Complainant indicated at the hearing that due to the corrective action taken by Continental, it decided to seek the lowest penalty in the maximum range. (Tr. 90.) Given the seriousness of an air carrier's failure to comply with a security directive, a maximum penalty is appropriate. At the same time, Complainant is correct that the corrective action taken by Continental -- administering refresher training and instituting a requirement that *** (Complainant's Exhibit 5) -- justifies imposing the lowest penalty in the maximum range.

For the reasons stated above, the law judge's decision is reversed, a violation of 14 C.F.R. § 108.18(a) is found, and a civil penalty of \$7,500 is assessed.¹³

[original signed by Jane F. Garvey]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of March, 1998.

¹¹ An FAA security inspector also testified at the hearing that a maximum penalty was appropriate due to the seriousness of the violation, which left the aircraft and passengers vulnerable to terrorist attack. (Tr. 41.)

¹² Although a change to the order containing sanction guidance reduces the penalty ranges for smaller air carriers (*see* FAA Order No. 2150.3A, Appendix 1, Change 10, January 16, 1992), this change does not affect Continental.

¹³ Unless Continental 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) (1997).