UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: AMERICAN AIRLINES, INC.
FAA Order No. 2002-16

Docket No. CP98SW0049

Served: May 20, 2002

DECISION AND ORDER[1]

Complainant initiated a civil penalty enforcement action against American Airlines alleging that American failed to control and protect baggage tags ("bag tags").[2] By order dated June 30, 2000 (attached), Acting Chief Administrative Law Judge Ronnie A. Yoder dismissed the proceeding with prejudice. Complainant is appealing from the ALJ's order. Complainant's appeal is denied.

I.

On September 18, 1998, Complainant filed the redacted complaint[3] in which Complainant alleged that American had violated 14 C.F.R. § 108.5(a)[4] by failing to carry

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[1] The Administrator's civil penalty decisions, as well as indexes of the decisions, the Rules of Practice in civil penalty actions, and other information, are available on the Internet at the following address: http://www.faa.gov/agc/cpwebsite. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and Westlaw. Additional information is available on the website.

[2] Portions of this decision have been redacted under 49 C.F.R. Part 1520.

[3] The agency attorney also filed a motion entitled "Motion to Seal Docket, or in the Alternative, Motion to Seal Documents and Pleadings Containing Sensitive Security Information." The ALJ sealed the docket by order dated December 7, 1998, finding that the case involved documents and testimony containing sensitive security information.

out Section VII.D of the Air Carrier Standard Security Plan (ACSSP)[5] and sought a $10,000 civil penalty. In its answer, filed on October 14, 1998, American stated that it lacked knowledge and information sufficient to form a belief as to the truth of the allegations contained in the complaint and, therefore, denied the allegations.

On December 6, 1999, the ALJ conducted a prehearing telephone conference regarding this case as well as a factually similar case against American, Docket No. CP98SW0046.[6] After stating preliminarily that American did not have sufficient information to dispute the alleged facts in these cases (PHC 2),[7] American's attorney stated that he could not contest the allegation that an FAA agent obtained American baggage tags[8] * * *. (PHC 14.) He explained that he had requested a copy of an FAA order, policy statement, or memoranda stating that FAA personnel should not take enforcement action in instances in which carriers had * * *.

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[4] Section 108.5(a) of the Federal Aviation Regulations provides: "Each certificate holder shall adopt and carry out a security program that meets the requirements of § 108.7 ...." 14 C.F.R. § 108.5(a).

[5] This provision of the ACSSP provided as follows:

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[6] The cases were not joined. The Administrator is issuing a separate decision in FAA Docket No. CP98SW0046 today.

[7] "PHC" refers to the transcript of the prehearing telephone conference held on December 6, 1999.

[8] American's attorney was referring to the tags that American affixes to baggage carried on its airplanes.

Counsel represented that the Boston Globe had reported that it had obtained an FAA memorandum dated September 11, 1998, referring to such a no-enforcement order. (PHC 2, 12.) He then suggested that perhaps the FAA had decided that there could be no violation without proof that unauthorized persons had obtained unsecured baggage tags * * *. (PHC 5.) American's attorney argued, "quite frankly, I think we've been singled out for unfair treatment with this prosecution given that there's a standing FAA policy not to prosecute these cases." (PHC 11.) He told the ALJ, "I want a copy of the order, I want a copy of the memo that went to the Southwest Region and I want a copy of all the backup that went into developing that memo." (PHC 15-16.)

The agency attorney explained that in September 1998 -- after the incident in this case had occurred -- some employees in FAA's Southwest Region's Security Division participated in a telephone conference during which they were instructed not to prepare any legal enforcement actions for bag tag cases. The agency attorney stated, "But I've been told there is no memorandum, there's certainly no order out there." (PHC 8.)[9] He added, "And I would suggest to Your Honor that it is nowhere near binding on these cases that we're discussing." (*Id.*)

The ALJ stated:

> Yes, ... I don't see that we've got a fact case here that has to be tried. We've got a case that has to do with what the ACSSP means. We have a tangential question about whether some order exists that's binding on me that I don't know about, and I assure you I tend not be bound by orders that I don't know about, and we have merely the question of whether the facts stated in the Complaint are true and if you [agency attorney] submit an affidavit that they're

[9] The agency attorney did not participate in that telephone conference. (PHC 16.)

> true and there is no contrary affidavit, that would provide a basis for a decision on the submission.
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> Why don't I give you folks a couple weeks to ... see if you can get it resolved. If you can't what I'd like is for you to file the statement, [agency attorney], setting forth the circumstances with respect to the suit *and the reference to an order or memorandum, circumstances with respect to the telephone conversation and the existence of a memorandum or order* and an affidavit from persons knowing about the facts of the Complaint, that they are true.

(PHC 21-22) (emphasis added.)

The agency attorney agreed to file an affidavit attesting to the facts, but objected to the order to file a statement about the telephone conference and whether any memorandum or order existed. The attorney objected that such a memorandum or order, if it existed, would be irrelevant and a matter of prosecutorial discretion. He argued further that, as an officer of the court, he should not be required to provide such a written statement when he had stated on the record that no pertinent memorandum or order signed by the Administrator, the Deputy Chief Counsel, or anyone else involved in enforcement at the FAA existed. (PHC 22-24.) Despite these objections, the ALJ ordered the agency attorney to file a statement regarding the telephone conference and any order, policy, or memorandum about bag tag cases.

On January 5, 2000, the agency attorney filed a Motion for Decision with a supporting affidavit by an FAA special agent, declaring the truth and correctness of the allegations in the complaint.[10] He did not, however, include in the statement any

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[10] The agency attorney asserted in the motion that no genuine issue of material fact existed in this matter and, as a result, Complainant was entitled to a judgment as a matter of law. (Motion for Decision at 3.) Complainant argued that American's argument about the meaning of the ACSSP's requirement that "* * *" was contrary to the common meanings of the words "* * *" and "* * *." (The agency attorney cited the dictionary definitions of these words.) (Motion for Decision at 4.) The agency attorney wrote: "* * *." (Motion for Decision at 4-5.) The agency attorney described American's interpretation of this ACSSP provision as "warped" and defying common sense. (Motion for Decision at 5.)

information regarding the telephone conference and whether a memorandum or order existed regarding a "no enforcement" policy in bag tag cases. Subsequently, American moved for the dismissal of the case, arguing that Complainant had defied the ALJ's order.[11]

On March 20, 2000, the ALJ issued an Order to Show Cause, directing Complainant to file a statement "regarding the circumstances with respect to the telephone conference and whether there is or is not a memorandum or order against enforcement of such baggage tag cases and a response indicating why it did not file that statement as directed in the prehearing conference." The ALJ warned he would dismiss the proceeding with prejudice if Complainant failed to file this statement by April 3, 2000.

Complainant responded to the ALJ's order to show cause and renewed its motion for decision on March 30, 2000. Complainant argued:

> Prior to the prehearing conference, when this article was brought to the attention of the Agency Attorney by American, he [the agency attorney] contacted the Security Division of the FAA and a search for such a "memo" or "order" was conducted. At the pre-hearing conference, the Agency Attorney explained that there was apparently an internal telephone conference in which enforcement of bag tag case[s] was discussed. However, the ALJ and American were told also that "... there is no memorandum, there's certainly no order..." PHC at 8. That should be a sufficient response. The mere mention of a "policy" in the newspaper does not establish Agency policy nor establish a duty to investigate the veracity of such an article.
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> The Agency position about the Boston Globe article presented ... in the pre-hearing conference has not been shown, and is not believed to be in error, and absent some showing to the contrary, that remains the Agency Attorney's position.

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[11] American Airlines, Inc.'s Motion to Dismiss and Opposition to FAA's Motion for Decision, dated January 18, 2000.

FAA Response to "Order to Show Cause of Acting Chief Administrative Law Judge" and Renewal of FAA Motion for Decision, at 2. The agency attorney wrote that he considered any further investigation as unnecessary, that the ALJ lacked the authority to order additional investigation, and that American bore the burden of proving its affirmative defense. He also argued that it was within the prosecutor's discretion to decide whether to initiate an enforcement action, and such discretionary decisions are not subject to review. (*Id.*, at 2-4.)

II.

By order dated June 30, 2000, the ALJ dismissed the complaint with prejudice. He wrote:

> Under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, and FAA regulations, the agency attorney must comply with agency policy and the Judge's orders. In civil penalty cases the administrative law judge sits for the Administrator; and the Judge must know what the Administrator's policies are in order to apply them. In any event, it is the Judge, not the parties, who must regulate the course of the hearing – subject to appropriate review by the Administrator.
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> We also reject Complainant's arguments that the information sought is irrelevant because Respondent has the burden of proving its affirmative defense. Complainant acknowledged that a discussion of "bag tag" enforcement took place. Since the Judge, not FAA staff, determines what agency policy is, the circumstances of the telephone conference, and the existence or non-existence of an order or memorandum is relevant information. In addition, since the information that could prove Respondent's affirmative defense is under Complainant's control, Complainant's non-compliance with the Judge's orders may establish an evidentiary inference that the facts are adverse to Complainant's position and may be grounds for dismissal of the action. It is the Judge, not the agency attorney, who controls the proceeding and determines the relevance of evidence.

(Order of Acting Chief Administrative Law Judge at 2-4) (footnotes omitted.) The ALJ concluded that Complainant had "no valid basis for its refusal to comply with the Judge's

orders," and dismissed the proceeding with prejudice as the sanction for counsel's failure to file the statement required by the ALJ or to show good cause for not complying. (*Id.*, at 4.)

Complainant appealed from this order of dismissal with prejudice.

III.

Complainant argues on appeal that the ALJ lacked the authority under 14 C.F.R. § 13.205(a) to dismiss the case based upon Complainant's failure to provide a supplemental written statement regarding the circumstances of an internal FAA telephone conference. The agency attorney argues that the ALJ exceeded his authority to regulate the course of the hearing because the ALJ did not need the written statement to determine whether American violated 14 C.F.R. § 108.5(a), and if there had been a violation, what an appropriate penalty would be. The agency attorney argues:

> In ordering the Agency Attorney to "set forth in writing on the record what the circumstances with respect to the telephone conference and whether there is or is not a memorandum and order" when the Agency Attorney has already stated "on the record" after an investigation that no such order or memorandum exists, constitutes an unnecessary and improper expansion of powers by the ALJ contrary to case precedent.

Complainant's Appeal Brief at 12 (emphasis in the original.)

Complainant's argument is not compelling. "[C]oncerning matters of agency law and policy, administrative law judges are subject to the agency." In the Matter of Northwest Airlines, FAA Order No. 90-37 at 8 (November 7, 1990) (*quoting* Association of Administrative Law Judges v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984)).[12] In

[12] It was held in that case that the Administrator may reverse an initial decision issued by an ALJ on appeal if the ALJ failed to follow the agency's sanction policy set forth in Appendix 4, the Sanction Guidance Table, included in FAA Order No. 2150.3A, which is an order signed by the Administrator. In the Matter of Northwest Airlines, FAA Order No. 90-37 at 8-10 (November 7, 1990).

light of the summary of the Boston Globe article provided by American's counsel at the prehearing conference, the ALJ had reason to believe that an order or a document referring to an order or policy about baggage tag cases may have existed. The ALJ apparently was not satisfied by agency attorney's responses at the prehearing conference regarding whether such an agency policy existed.[13] To make certain -- in a more formal way -- whether the Administrator had issued any policy guidance that the ALJ was required to enforce, the ALJ ordered the agency attorney to provide a written statement regarding the telephone conference and any written policy, order or memorandum. While the ALJ thus required a higher degree of formality, the request was not burdensome. As the ALJ emphasized, he required a written submission only on "the circumstances ... with respect to the telephone conference and whether there is or is not a written memorandum or order. *That's all.*" (PHC 22-23) (emphasis added.)

The ALJ did not exceed his authority in directing the agency attorney to submit a written statement. The ALJ has the authority to regulate the course of the hearing. 14 C.F.R. § 13.205(a)(6).[14] If the ALJ was not satisfied with the agency attorney's oral representations at the prehearing conference, it was certainly within his authority to

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[13] It would have been preferable, however, for the ALJ to have explained at the prehearing conference why he was not satisfied with the oral representations made by agency counsel.

[14] Section 13.205(a)(6) of the Rules of Practice provides that an ALJ may "[r]egulate the course of the hearing in accordance with the rules of this subpart." 14 C.F.R. § 13.205(a)(6). It has been held, for example, that an ALJ may, in regulating the course of the hearing, place reasonable limits on cross-examination and on the length of closing arguments. In the Matter of Werle, FAA Order No. 97-20 (May 23, 1997). An ALJ, however, may not impose monetary sanctions against a party for failure to comply with a discovery order because the Rules of Practice do not provide for monetary sanctions in such situations, and 14 C.F.R. § 13.205(b) specifically prohibits an ALJ from awarding costs to a party. In the Matter of KDS Helicopters, FAA Order No. 91-17 (May 30, 1991).

regulate the course of the hearing to require the agency attorney to submit a written statement.[15]

The Administrator expects that the parties will comply with orders issued by an ALJ during the hearing stage of a proceeding. Ignoring an ALJ's orders cannot be countenanced in an orderly system of adjudication. Parties who disregard the ALJ's orders do so at their own peril because the Administrator on appeal will uphold any reasonable sanctions permitted by the Rules of Practice that the ALJ imposes against a party for that behavior.

Dismissal of the complaint was a reasonable sanction in this matter and consistent with the Rules of Practice. The ALJ's order at issue here was in the nature of a discovery order. Section 13.220(n) permits an ALJ to strike the relevant portion of a party's pleadings when a party fails to comply with a discovery order or an order to compel production. 14 C.F.R. § 13.220(n)(1). In this case, Complainant alleged that American had committed one violation of Section 108.5(a). The ALJ would have been justified in striking that allegation when Complainant failed to comply with the ALJ's order to produce a written statement because Complainant's non-compliance would have hindered American's preparation of its affirmative defense and the ALJ's ability to evaluate the merits of the complaint. Given the ALJ's authority to dismiss the sole allegation of a

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[15] It is difficult to understand the agency attorney's indignation about being ordered to file a written statement. If the agency attorney was willing to make oral representations at the prehearing conference about the telephone conference and the non-existence of relevant agency orders, he should not have had a problem filing a written statement about these matters.

The agency attorney's concern that the ALJ was seeking irrelevant information also did not justify ignoring the ALJ's order to prepare a written statement. If the ALJ used information that the agency attorney considered irrelevant as a basis for ruling against Complainant, the agency attorney could have presented that argument to the Administrator on appeal.

violation, he also had authority to dismiss the complaint – in effect an indistinguishable sanction in these circumstances.

Other factors also support the ALJ's dismissal of the case. No less severe sanctions were available under the Rules of Practice to obtain compliance with his order. A lesser sanction, moreover, probably would have been insufficient to bring about compliance. Despite the ALJ's warning in the order to show cause that the complaint would be dismissed if the agency attorney failed to submit a written statement about the circumstances of the telephone conference and the existence of any orders or memoranda, the agency attorney opted not to comply.

Failure to comply with an ALJ's order may not justify dismissal of the complaint with prejudice in all cases in which an attorney or party fails to comply with an ALJ's order. In this case, however, dismissal was appropriate.

Complainant's other arguments must be rejected as well. Complainant argued that "[t]he mere mention of a 'policy' in the newspaper does not establish Agency policy nor establish a duty to investigate the veracity of such an article." (Complainant's Appeal Brief at 13.) So far as that statement goes, Complainant is correct. But in this case the ALJ did not find that the Boston Globe article constituted an agency policy or in and of itself gave rise to a duty to investigate. The ALJ simply wanted a clear statement as to whether a memorandum or order existed, and it was this order that gave rise to additional duties on the agency attorney. The ALJ explained that if something did exist, then he would examine it to determine whether it was binding on him or only provided

guidance for the exercise of prosecutorial discretion, in which case it would not be "a matter of decisional concern." (PHC 24.)[16] As for Complainant's argument that American had the burden to prove its affirmative defense, that is, of course, true. Any such documents, however, would have been in the FAA's control, and therefore, the ALJ's order was not unreasonable.

In light of the foregoing, the ALJ's order dismissing this case with prejudice is affirmed.

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of May, 2002.

[16] As the ALJ explained to American's counsel, "unless it's demonstrated that there is an order ... which is binding on me, not one that affects merely the Enforcement Office, then it's going to be irrelevant to the conduct of this proceeding." (PHC 18-19.)