

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

[AIRPORT OPERATOR]

FAA Order No. 96-1

Served: January 4, 1996

Docket No. CP94**0089

DECISION AND ORDER

[The airport operator] has appealed from Administrative Law Judge * * * 's oral initial decision¹ assessing a \$1,000 civil penalty for a violation of the Federal Aviation Regulations.² This case arose when FAA security inspectors found gaps, under or near two vehicle gates at the airport, that were large enough to permit unauthorized individuals to slip through into the air operations area.³ Complainant alleged that the airport operator violated Section 107.13(a)(1), which requires airport operators to use the equipment and facilities in their security programs to control access to air operations areas.⁴ According to Complainant, the airport

¹ A copy of that portion of the hearing transcript containing the law judge's initial decision is attached.

² Portions of this decision have been redacted for security reasons, pursuant to 14 C.F.R. Part 191. All unredacted copies of this decision must be treated in a confidential manner. Unredacted copies may not be disseminated beyond the parties to this proceeding.

³ The airport security program at issue defines the "air operations area" as the part of the airport used for landing, taking off, or surface maneuvering of airplanes. (Complainant's Exhibit 2.)

⁴ Section 107.13(a)(1), 14 C.F.R. § 107.13(a)(1), provides as follows:

operator failed to carry out Section II.2.A of its Security Program, which requires the airport operator to * * *. (Complainant's Exhibit 2.) Section II.2.A specifies * * *. (*Id.*) After a hearing, the law judge assessed a civil penalty of \$1,000, the maximum penalty for a violation of this nature. This decision affirms the law judge's finding of violation and assessment of a \$1,000 civil penalty.

During an airport inspection on June 27, 1990, an FAA security inspector noticed a gap at the bottom of Vehicle Gate * * * under which an average-sized person could easily slide. (Complainant's Exhibit 3.) There was a similar gap between Vehicle Gate * * * and the security fence. When the inspector notified the airport's security manager, the security manager stated that the airport would immediately correct the problem. (Tr. 72-73.)

About a month later, on July 30, 1990, an FAA security inspector noted during a perimeter check that the airport operator had not yet repaired Vehicle Gates * * *. The inspector contacted the head of security for the airport operator (the supervisor of the airport employee contacted previously), who stated that his office had submitted work orders on the two gates. In a report of the inspection, the FAA security inspector noted that the two gates were "repeated write-ups." (Complainant's Exhibit 4.)

(a) . . . [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.

During an airport inspection about a month later, on September 8, 1990, the FAA security inspector noticed that the airport had still not fixed Vehicle Gates * * *. The inspector again notified the head of security for the airport operator.

Several months later, on November 30, 1990, several FAA security inspectors conducted a planned monthly inspection. In the course of their inspection, they found that the airport had still not repaired Vehicle Gates * * *. One of the inspectors, who weighed 185 to 190 pounds (Tr. 62), slid under Gate * * * to demonstrate that unauthorized persons could gain access to the air operations area too easily. (Tr. 32.) The inspector stayed in the air operations area for approximately 5 minutes before sliding back under the gate. (Tr. 33.) The inspector was also able to gain access to the air operations area at Gate * * * by stepping on a post and sliding between the gate and the security fence surrounding the airport.⁵ Although the inspector was not wearing a uniform or displaying any sort of badge, no one challenged him when he entered the air operations area at either gate. (Tr. 33.)

When the inspectors notified the airport's head of security of the incident, his response, once again, was that his office had submitted work orders on both gates. At this point, the FAA security inspectors opened the formal investigation that led to the instant civil penalty action. In a written report of the incident, the security inspector noted that the airport had failed to correct the violations despite repeated requests and warnings from the inspectors.

⁵ The fence surrounding the airport was about six feet tall with barbed wire extending further on the top. (Tr. 76-78.)

About a month or two after the November 30, 1990, incident,⁶ the airport operator closed up the gaps by installing a speed bump under Gate * * * and adding barbed wire at Gate * * *. The inspectors considered the repairs satisfactory.

(Tr. 106, 115-16.)

After a hearing, the law judge issued an oral initial decision finding that the airport operator had violated Section 107.13(a)(1) as alleged. The law judge stated that the inspector was of average shape and size, and yet without apparent great effort he was able to slide under Gate * * * and to climb the post at Gate * * *.

(Tr. 133-34.) The inspector did not use extraordinary means of gaining access, said the law judge. He did not parachute onto the air operations area, use an electric utility hoist truck to jump into the area, or blow open a door with dynamite.

(Tr. 131-33.) Because the airport took too long to correct the problems and the civil penalty was relatively small anyway, the law judge found no reason to lower the \$1,000 penalty sought by Complainant. (Tr. 135-36.) Dissatisfied with the law judge's decision, the airport operator filed the instant appeal with the Administrator.⁷

In its appeal brief, the airport operator argues that it did not violate Section 107.13(a)(1) because the gates at issue were vehicle gates. According to the operator, as long as the gates prevented vehicle access, they served their function

⁶ The head of security for the airport operator testified that he did not follow the work order for the gates in question and did not know when it was actually completed. (Tr. 112.) However, one of the FAA's security inspectors testified, without rebuttal, that the repairs occurred in December 1990 or January 1991. (Tr. 81.)

⁷ Although the airport operator has requested oral argument (Notice of Appeal at 1), oral argument would not contribute substantially to the development of the issues on appeal, and therefore the request for oral argument is denied. (See 14 C.F.R. § 13.233(h), providing that the Administrator has sole discretion to permit oral argument on the appeal.)

and no violation occurred. (Appeal Brief at 3, 4.) As counsel for the airport operator argued at the hearing, "The gates that were in place were there to control access by vehicles, not creepers and crawlers and climbers." (Tr. 8.) This argument is not persuasive. The gates at issue are called vehicle gates because they are large enough to provide access to authorized vehicles, not because the airport has no obligation to control access by pedestrians at this point. The airport operator points to nothing in the regulations or in its security program that would indicate that the operator must control only *vehicular* access to the air operations area. In fact, both Section 107.13(a)(1) and the airport security program require control of the unmodified term "access." Because the term "access" is not modified by "vehicular" or some similar adjective, the airport operator must control both vehicular and pedestrian access.

The airport operator's brief contains a number of other arguments as well. For example, the airport operator argues that the Administrator should invalidate Section 107.13(a)(1) as vague and overbroad for the following reasons:

1. the regulation contains undefined terms like "control" and "prevent";
2. the regulation fails to specify the exact size and configuration of vehicle gates; and
3. the regulation fails to specify the amount of time an airport operator has to respond to a security problem identified by FAA security inspectors.

(Appeal Brief at 3, 5, 6.) According to the airport operator, the inspectors' decisions regarding airport security are arbitrary and capricious. (Appeal Brief at 4.) The

airport operator claims that the gaps in the gates at issue had been there for years,⁸ but Complainant never indicated before June 1990 that the gates violated Part 107. (Appeal Brief at 3.) Moreover, the airport operator contends, it could not be certain that the FAA would accept the repairs it made because there are no standards. (Appeal Brief at 4.) For these reasons, according to the airport operator, imposing a civil penalty in this case would amount to strict liability. (Appeal Brief at 6.) Finally, the airport operator argues that it did fix the problem within a reasonable time, contrary to the law judge's finding. (*Id.*)

The airport operator is correct in stating that Section 107.13(a)(1) does not impose on airport operators strict or absolute liability for unauthorized entry. In the Matter of [Airport Operator], FAA Order No. 91-58 (December 3, 1991); In the Matter of [Airport Operator], FAA Order No. 91-41 (October 31, 1991); In the Matter of [Airport Operator], FAA Order No. 91-40 (September 30, 1991); In the Matter of [Airport Operator], FAA Order No. 91-18 (June 3, 1991). However, Section 107.13(a)(1) does require that the airport operator use the facilities and equipment described in its security program to control access to the air operations access. Where the operator fails to do so adequately, the case is not one of liability without fault. *Id.* In this case, given the ease with which the FAA security inspector gained access to the air operations area, the airport was not adequately using its security program to control access. Thus, contrary to the airport's assertions, fault is present in this case.

⁸ According to the airport operator, the gaps were there when Complainant approved the operator's security program in October 1988 and they were there years before the 1988 approval as well.

The regulation is not unconstitutionally vague. Under the vagueness doctrine, a law that does not fairly inform a person of what is commanded or prohibited is unconstitutional as violative of due process.⁹ Section 107.13(a)(1) does not require airport operators to make the airport absolutely impenetrable, which is perhaps impossible, but they must make reasonable efforts to control access. The airport operator's claim that there are no objective standards is not true: the standard that governs is one of reasonableness. Where persons can easily enter a restricted area by slipping under a gate or between a fence and a gate, then the airport operator is not controlling access. There is nothing vague about this.

Likewise, the regulation is not overbroad. The overbreadth doctrine requires invalidation of a law that is fairly capable of being applied to constitutionally protected speech or conduct, if there is no way of severing the law's constitutional from its unconstitutional applications.¹⁰ The airport operator has failed to show how the regulation at issue reaches protected speech or conduct. Assuming, *arguendo*, that it does, the airport operator has failed to show that the scope of the regulation has not been, and cannot be, properly limited through interpretation.

As for the airport's claim that the gaps had been there for years, if this is true it was all the more reason for the airport operator to correct the breach in security as quickly as possible. Note, however, that one of the FAA security inspectors testified at the hearing that erosion had occurred, making the gaps larger than they had been in the past. (Tr. 45.)

⁹ Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995).

¹⁰ For a discussion of the overbreadth doctrine, see, e.g., Melugin v. Hames, 38 F.3d 1478, 1482-83 (9th Cir. 1994).

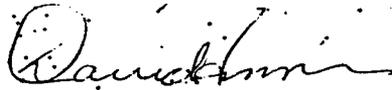
Although the airport operator states that it could not be certain that the inspectors would accept its repairs, the inspectors found that the repairs were satisfactory. As long as an airport operator takes reasonable action in a timely manner to eliminate threats to security identified by FAA security inspectors, it is on solid ground. In the instant case, the inspectors concluded that the repairs, which eliminated the gaps permitting a person to slip through into the air operations area, were satisfactory. Thus, the facts of this case do not support the airport operator's allegations of arbitrary and capricious behavior on the part of FAA security inspectors.

Regarding the amount of time taken to correct the problems, the law judge did not err in finding a failure to correct within a reasonable time. The FAA security inspectors advised the airport operator of the problems as early as June 1990. Despite three more requests from the inspectors in the months that followed,¹¹ the airport operator did not correct the problems until 6 or 7 months later, in December 1990 or January 1991. The airport operator permitted well beyond a reasonable amount of time to elapse before correcting the breaches in security at issue.¹²

¹¹ On July 30, September 8, and November 30, 1990.

¹² At the hearing, the airport operator suggested that it had other repairs to accomplish during the same time period that were of higher priority (Tr. 118), but it failed to offer any evidence to substantiate this claim.

Contrary to the airport operator's arguments, a preponderance of the reliable, probative, and substantial evidence supports the law judge's finding of a violation of Section 107.13(a)(1). Breaches in security like those in the instant case pose a serious danger, and airport operators should not take them lightly. As one of the security inspectors testified at the hearing, unauthorized persons entering the air operations area could have taken a firearm or an explosive device and placed it on an aircraft. (Tr. 34.) In fact, there was an aircraft parked near one of the gates on the day the security inspector slipped into the air operations area. (*Id.*) The law judge's decision assessing a \$1,000 civil penalty is affirmed.¹³


DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 19th day of December, 1995.

¹³ 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) (1994).