

(14 C.F.R. § 107.13(a)(1)),^{3/} by failing to use the procedures in its approved security program to control access to its air operations area (AOA). However, because the law judge found it significant that Respondent took corrective action after the incident, he reduced the \$1000 civil penalty sought in the complaint to \$500.

In the complaint, Complainant alleged that during the course of a Civil Aviation Security National Airport Inspection Program (CASNAIP) inspection, an unbadged FAA inspector was able to gain access to the AOA through a door behind a vacant ticket counter. The door had been propped open and left unattended. Citing Section 5.02 of Respondent's approved security program, which provides that Respondent is responsible for access to the AOA, the agency attorney alleged that as a result of this incident, Respondent violated Section 107.13(a)(1) of the FAR.

^{3/} Section 107.13(a)(1) of the FAR provides in pertinent part:

(a) Except as provided in paragraph (b) of this section, each 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.

At the hearing, it was established that at approximately 10:30 p.m. on * * * , an FAA special agent observed a door behind a ticket counter standing open. He saw nobody in the area. The door was equipped with a * * * lock * * *

. The FAA special agent walked through the propped open door, down an empty hallway, and through an uncontrolled door onto the AOA where he saw several parked airplanes and baggage carts. He stayed on the AOA for 2-3 minutes and re-entered the hallway where he encountered a construction worker. The worker, who did not have an appropriate airport identification badge with him,^{4/} admitted that he had propped the door open and left the area. The special agent immediately notified the responsible airport manager of the incident. At the conclusion of the CASNAIP inspection, the inspection team leader discussed this incident with the airport management.

Section 5.02 of Respondent's approved security program provides that the airport authority is responsible for access to the AOA. Further, Section 6.01 of that program provides that the airport operator must require all persons authorized access to the AOA to have identification on them when in that

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area. * * *

Respondent's security program also specifies, in Section 6.03, that airport security personnel are instructed to challenge any person on the AOA who is not recognized, and who does not have proper identification available.

Respondent does not contest the factual allegations of the complaint. In fact, Respondent's manager of airport operations admitted that the contractor's action in leaving the area unattended while the door was propped open was not in compliance with Respondent's approved security program. Rather, Respondent contends on appeal that it is being held strictly liable for a security breach, contrary to the FAA's stated position that Section 107.13(a) does not impose absolute liability for unauthorized entry onto the AOA. Respondent also contends that Complainant was required to consider the corrective action that Respondent took after this incident, before determining whether to treat this incident as a violation, and the absence of any mention of the corrective action in the special agent's report should bar this enforcement action. Finally, Respondent argues that Complainant's alleged failure to provide specific notice that civil penalties might be imposed as a result of the CASNAIP inspection should also bar this action. For the reasons discussed below, Respondent's appeal is denied, and the law judge's initial decision is affirmed.

Strict Liability

The FAA made clear when it promulgated Section 107.13(a) that the regulation merely requires the procedures described in the security program to be put into use; it does not impose absolute liability for unauthorized entry on the airport operator. 43 Fed. Reg. 60786, 60789 (1978). This is consistent with my holding in In the Matter of [Airport Operator], FAA Order No. 91-4 (February 11, 1991), that an airport operator must implement the procedures in its approved security program in order to satisfy the requirements of Section 107.13. In this case, I find that the procedures in Respondent's security program were not implemented adequately so as to control unauthorized access to the AOA. The use of a * * * lock on the door leading to the AOA, and the requirement that unrecognized and unbadged persons on the AOA be challenged, are two means by which Respondent sought to implement the requirement that it control unauthorized access to the AOA. However, the fact that the door was propped open while it was unattended is clear evidence that the security program was not implemented adequately in this case. Hence, this is not a case of liability without fault.

To the extent that Respondent is alleging that it is being held strictly liable for the security breach of its contractor, that argument is also rejected. Pursuant to Section 5.02 of Respondent's approved security program, Respondent is

responsible for access to the AOA. Accordingly, Respondent is responsible for ensuring that its contractors do not allow unauthorized access to the AOA. Although the manager of airport operations testified that he met with the contractor before construction work began to discuss the airport's security procedures, it is unclear from the record exactly what instructions were given and to what extent the contractor's employee's behavior deviated from those instructions. In any event, even if the contractor's conduct was a clear departure from the instructions given, Respondent is accountable for the breach of security.

Consideration of Corrective Action

An internal agency memorandum entitled "CASNAIP Team Leader Briefing Sheet" was admitted into evidence at the hearing. That memorandum instructs CASNAIP inspectors to report violations discovered during an inspection immediately to responsible airport supervisors so that corrective action can be taken. It also states that inspectors are not to "see how many violations" they can find, but are to report and seek corrective action for all violations and discrepancies.

Based on this internal guidance -- and on testimony by Complainant's witnesses that an airport operator's performance of "immediate corrective action" could be one factor in deciding whether enforcement action is appropriate in a particular case -- Respondent apparently has concluded that Complainant is required by its own procedures to consider

corrective action before deciding whether a discrepancy discovered during a CASNAIP inspection should be treated as a violation, and that Complainant's seeming failure to consider such action before issuing the complaint in this case warrants dismissal of this action.^{5/}

While it may be appropriate in certain instances to consider corrective action in determining what, if any, civil penalty is appropriate for a discrepancy discovered during a CASNAIP inspection, it clearly does not follow that the performance of corrective action exonerates the violator in every case. The Administrator is authorized by Section 905 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. § 1475), to assess a civil penalty for violations of the FAR, regardless of whether corrective action is taken. Moreover, the law judge in this case did take Respondent's corrective action into consideration when he reduced the civil penalty from the statutory maximum of \$1,000 to \$500, and Complainant withdrew its appeal of the law judge's decision.

^{5/} Complainant does not directly dispute Respondent's assertion that no corrective action was considered before initiating this civil penalty action. However, in its reply brief, Complainant contends that this argument should not be considered because Respondent failed to include this argument in its answer as an affirmative defense, as required by 14 C.F.R. § 13.209(c). Subsequently, Respondent filed a petition for leave to file an additional brief in which Respondent proposed to explain why this argument was not raised earlier. Because I have disposed of this argument on its merits, no additional argument concerning this issue is necessary. Therefore, Respondent's petition is denied.

Although the law judge's reduction of sanction was based on Respondent's performance of corrective action following the incident in this case, I note that the record contains very little evidence of what that corrective action was. The only description of that action came from the manager of airport operations, who testified that during a discussion with the contractor the airport management "reinforced" pre-existing security procedures with that contractor. He testified further that this was exactly what the CASNAIP inspectors had recommended at the post-inspection briefing. However, because this issue was not raised on appeal, I make no findings as to whether this constitutes a bona fide corrective action, or whether this evidence of corrective action was sufficient to warrant the law judge's reduction of the civil penalty.

Finally, I note that Respondent's argument on this issue is misdirected. Complainant's alleged non-compliance with its own internal policies prior to the initiation of an enforcement action is not an appropriate issue to raise on appeal. C.f., In the Matter of American Airlines, FAA Order No. 89-0006, p. 7 (December 21, 1989) (internal agency deliberations regarding selection of sanction are irrelevant). Rather, in a civil penalty action, the question before the law judge (and before the Administrator on appeal) is whether the alleged violation occurred, and if so, what civil penalty would be appropriate. Id. at 7-8. In considering these issues, both the law judge and the Administrator may consider and apply any relevant

internal agency policy which has not already been considered, thus curing any error which occurred prior to the initiation of the action.

Lack of Notice

Respondent argues that it was never explicitly notified by Complainant that the CASNAIP inspection could result in civil penalties. The manager of airport operations testified that during the pre-inspection briefing conducted by the CASNAIP team leader, he got the impression that the purpose of the inspection was simply to educate the airport operator and improve security. However, he did not state what airport management would have done differently if it had been notified that discrepancies discovered during the inspection could result in civil penalties.

Sections 901(a) and 905(a) of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. §§ 1471(a) and 1475(a)),^{6/} and Section 13.16(a)(1) of the Federal Aviation Regulations

^{6/} Section 901(a) provides, in pertinent part:

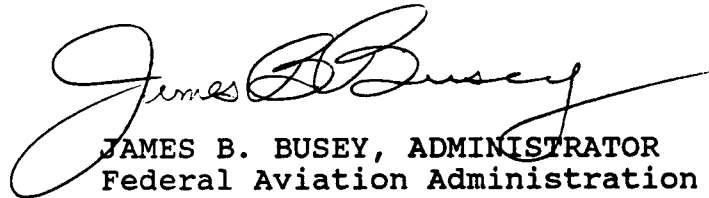
(a)(1) Any person who violates (A) any provision of title III, IV, V, VI, VII, or XII, . . . or any rule, regulation, or order issued thereunder, . . . shall be subject to a civil penalty of not to exceed \$1,000 for each such violation[.]

Section 905(a) provides:

(a) Civil Penalty - The Administrator, or his delegate, may assess a civil penalty for a violation arising under this Act or a rule, regulation, or order issued thereunder, upon written notice and finding of violation by the Administrator.

(14 C.F.R. § 13.16(a)(1)),^{7/} provide adequate notice that a violation of the FAR can result in a civil penalty. No further notice to Respondent was required.

THEREFORE, for the reasons stated above, Respondent's appeal is denied, and the law judge's initial decision is affirmed. A civil penalty of \$500 is hereby assessed.^{8/}


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this *29th* day of *May*, 1991.

^{7/} At the time of the incident in this case, Section 13.16(a)(1) provided, in pertinent part:

(a) The following penalties apply to persons who violate the Federal Aviation Act of 1958, as amended, . . .:

(1) Any person who violates any provision of Title III, V, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than \$1,000 for each violation, in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, et seq.).

14 C.F.R. § 13.16(a)(1) (53 Fed. Reg. 34646, 34654 (September 7, 1988)).

^{8/} Unless Respondent files a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 55 Fed. Reg. 27574 and 27585 (July 3, 1990) (to be codified at 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)).