

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

JAMES J. HORNER

FAA Order No. 2000-19

Served: August 11, 2000

Docket No. CP99NM0004

DECISION AND ORDER¹

Respondent James J. Horner has appealed Administrative Law Judge Burton S. Kolko's initial decision, which assessed Horner a \$750 civil penalty after finding that Horner violated 14 C.F.R. § 107.20² by entering a sterile area without properly submitting to screening of his carry-on bag. Horner's appeal is denied, and the law judge's initial decision is affirmed.³

¹ The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They also can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 65 Fed. Reg. 47,557, 47,573-47,574 (August 2, 2000).

² 14 C.F.R. § 107.20 (1998) provides, in pertinent part, as follows: "No person may enter a sterile area without submitting to the screening of his or her person and property in accordance with the procedures being applied to control access to that area under § 108.9 ... of this chapter."

14 C.F.R. § 108.9 requires that "certificate holders required to conduct screening under a security program inspect each person entering a sterile area at each preboarding screening checkpoint ... and inspect all accessible property under that person's control ... for explosives, incendiaries, and deadly or dangerous weapons"

The regulations define "sterile area" as "an area to which access is controlled by the inspection of persons and property in accordance with an approved security program"
14 C.F.R. § 107.1(b)(6).

³ A copy of the law judge's initial decision is attached.

Facts

On appeal, Horner does not challenge the basic findings of fact by the law judge. Basically, the law judge found that Horner was a ticketed passenger on an Alaska Airlines flight at the Seattle-Tacoma International Airport the morning of March 21, 1998. Horner presented his carry-on bag for x-ray inspection at a security checkpoint. The screener was unable to determine the nature of one of the objects inside the bag, so he handed it to a bag checker for a physical search. Horner was in a hurry to make his flight, and appeared upset. The bag checker asked if she could check the bag, but Horner did not respond. The bag checker proceeded to check the bag anyway. Horner asked her what she was looking for, but the bag checker did not answer. Horner repeated his question with the same result. The bag checker's silence irritated Horner. He testified that her failure to respond provoked him. He also testified that opening his bag without his permission violated his right to privacy and his rights to freedom from unreasonable searches under the Constitution's Fourth Amendment. He then "grabbed" the bag from the bag checker even though she had not finished searching it. (Tr. 11, 12.)

The bag checker called over the checkpoint screening supervisor, who tried to explain the procedures to Horner, but Horner, who was upset and late for his flight, interrupted her, telling her he had rights, his questions were not being answered, and they were violating his privacy. He then walked quickly down the concourse toward the gate.

The supervisor called out to Horner to stop. The law judge did not believe Horner's testimony that he did not hear her, given that an Alaska Airlines agent who observed the incident credibly testified that the supervisor's command to stop was loud and repeated several times.

Neither the supervisor nor the bag checker could leave their positions, so the supervisor called out to another screener who was working as a "back bagger" (Tr. 22) to go after Horner. Horner became aware that someone in a uniform was following him. Horner testified that he assumed that officials wanted to re-search his bag and if so, they could do so at the gate. He continued to walk hurriedly down the concourse.

An Alaska Airlines customer service agent entered the security checkpoint at the time of the incident. Horner appeared to her to be very upset, and she decided to follow him also. Since Horner was walking briskly, the Alaska Airlines agent and the screener had to walk equally quickly to keep pace with him, which they were able to do. They followed Horner to the gate, where the Alaska Airlines agent advised another airline employee to call 911 and to get a supervisor.

Horner handed his ticket to the ticket agent. The screener, however, told the ticket agent not to let him board because his bag had not been searched thoroughly.

An Alaska Airlines representative asked the screener to search Horner's bag there instead of returning to the checkpoint. The screener asked Horner if he could search the bag, and Horner agreed. But when the screener, who was about 5 – 6 feet away from Horner, asked Horner to bring the bag over, Horner threw it on the ground and kicked it. Horner said that if the screener wanted to search his bag, he should "get over there and check it." (Tr. 30.) The Alaska Airlines agent who witnessed the incident described Horner as "extremely angry" and "scary." (Tr. 34, 37.) The screener searched the bag and found nothing threatening. But by the time the situation was resolved, Horner had missed his flight. The screener turned over the situation, including the irate Horner, to

the Port of Seattle police, who had arrived by that time. There is no indication in the record that the police arrested Horner.

The Law Judge's Initial Decision

The law judge found that Horner violated 14 C.F.R. § 107.20 because a preponderance of the credible and probative evidence demonstrated that he had entered the sterile area beyond the checkpoint without allowing the bag checker to perform a full search of his carry-on bag. (Initial Decision at 4.) The law judge expressly found that Horner's conduct was deliberate and without justification. (*Id.*)

The law judge rejected Horner's claim that he was "provoked" by the bag checker's failure to answer his questions, stating that the checker's silence did not justify Horner's snatching his bag from her. (Initial Decision at 5.) The law judge also said that some evidence suggested that Horner grabbed his bag from the checker because he was running late; in this regard, the law judge cited case law indicating that the risk of missing a flight does not justify violating security regulations. (*Id.*)

The law judge also rejected Horner's claim that the bag search violated his constitutional right under the Fourth Amendment to be free from unreasonable searches. (Initial Decision at 5.) The law judge correctly held, citing Federal case law,⁴ that airport searches without a warrant are valid under the Constitution as long as the searches are undertaken for airport safety and are limited to examining baggage for guns, explosives, or other dangerous devices. (*Id.*)

⁴ *E.g.*, United States v. \$124,570 of United States Currency, 873 F.2d 1240, 1243 (9th Cir. 1989).

Regarding the sanction, the law judge noted that while Horner had no previous violations, he displayed a non-compliant attitude throughout the incident. (Initial Decision at 4.) The law judge found that Horner's actions constituted purposeful non-compliance, an aggravating factor. Another aggravating factor was Horner's anger and associated actions (*i.e.*, yelling and throwing and kicking his bag). (*Id.* at 5.)

After noting that the agency's sanction guidance table recommends a civil penalty in the maximum range of \$500-\$1,000 for failing to submit to a screening with aggravating circumstances,⁵ the law judge concluded that a civil penalty of \$750 was "warranted and suitable" under the circumstances. (Initial Decision at 6.)

Horner's Arguments on Appeal

On appeal, Horner argues that the case against him should be dismissed because:

- A. Complainant Federal Aviation Administration (FAA) denied him a fair hearing by failing to provide him, at least 30 days before the hearing, a list of evidence it intended to present.
- B. The law judge filed his written decision late.

Analysis

A. Did Complainant deny Horner a fair hearing?

Horner argues that Complainant violated Rule 26 of the Federal Rules of Civil Procedure (FRCP) by failing to provide him, at least 30 days before the hearing, a list of evidence Complainant might introduce at the hearing.⁶ Horner contends that he did not

⁵ FAA Order No. 2150.3A, Appendix 4, Section G.

⁶ Rule 26(a) provides, in relevant part, that "(1) ... Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties: (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts ...; (B) a copy ... or

present any witnesses in his defense because he thought that Complainant would not present any evidence at the hearing. Horner states in his appeal brief that due to Complainant's failure to comply with Rule 26, Complainant "did not allow the defense to present defense witnesses[,] thus negating a fair hearing" (Appeal Brief at 2.)

The rules of practice governing FAA civil penalty proceedings are contained in Subpart G of 14 C.F.R. Part 13. The Federal Rules of Civil Procedure do not apply. The FAA civil penalty rules of practice do not contain a provision, like FRCP 26, that mandates disclosure without a discovery request. They do, however, expressly permit parties to conduct discovery. *See* 14 C.F.R. § 13.220. Thus, Horner was free to submit discovery requests to Complainant, but he failed to do so.

Although Horner attempts to blame Complainant for his failure to present any witnesses in his own defense, he alone bears responsibility for the failure. His claim that he was denied a fair hearing is rejected.

B. Should the case against Horner be dismissed because the law judge filed his written initial decision late?

Horner argues that the case against him should be dismissed because the law judge failed to issue a decision within 30 days after the hearing, as required by 14 C.F.R. § 13.232(c).⁷ The hearing in this case began and ended on June 23, 1999, and the parties did not submit post-hearing briefs. The law judge's decision, however, was not issued

description ... of all documents, data compilations, and tangible things in the possession, custody, or control of that part that are relevant ... ; (C) a computation of any category of damages claimed ...; and (D) any insurance agreement.

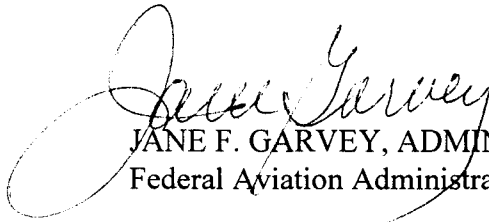
⁷ 14 C.F.R. § 13.232(c) provides, in relevant part, as follows: "The administrative law judge may issue a written initial decision not later than 30 days after the conclusion of the hearing"

until October 29, 1999. Thus, it was approximately 3 months late.

Horner has neither asserted nor shown any prejudice resulting from the delay. He could have moved to compel the law judge to issue the decision, but did not do so. Under the circumstances, his request for dismissal is rejected. *See In the Matter of Sanford Air, Inc.*, FAA Order No. 97-31 at 6-8 (October 8, 1997), also declining to dismiss the complaint where the written initial decision was late.

Conclusion

The law judge's decision is affirmed and a \$750 civil penalty is assessed.⁸


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 11th day of August, 2000.

⁸ Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2).