

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of:**

**ATLANTIC COAST AIRLINES**

FAA Order No. 2000-6<sup>1</sup>

Served: March 29, 2000

Docket No. CP97SO0047

**DECISION AND ORDER<sup>2</sup>**

Complainant has appealed from the written initial decision issued by Administrative Law Judge Ann C. Cook, on August 21, 1998.<sup>3</sup> The law judge held that Atlantic Coast Aviation had failed to comply with a security directive requiring that

\* \* \* .

The law judge held that Atlantic Coast Aviation had violated 14 C.F.R. § 108.18(a)<sup>4</sup>, but that § 108.5(a)(1) and (2)<sup>5</sup> were

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<sup>1</sup>Portions of this decision have been redacted for security reasons under 14 C.F.R. Part 191.

<sup>2</sup> The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they 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. 1654, 1671 (January 11, 2000).

<sup>3</sup> A copy of the law judge's written initial decision is attached.

<sup>4</sup> 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

inapplicable in this situation. The law judge rejected Complainant's proposal that a \$4,000 civil penalty should be assessed, and instead, the law judge assessed a \$1,500 civil penalty.

After consideration of the briefs on appeal and the record, the law judge's determination that Section 108.5(a)(2) did not apply is affirmed but on other grounds. It is held further that because Complainant failed to prove that Section 108.5(a) applied in this case, Complainant failed to prove a violation of Section 108.18.

# I

Atlantic Coast Aviation is the holder of an air carrier operating certificate, and does business as United Express. Atlantic Coast Airlines has an approved Air Carrier Standard Security Program, which requires it to comply with security directives. (Tr. 92, 117.)

Atlantic Coast Airlines has no employees based at Raleigh-Durham International Airport. However it provides a feeder service for United Airlines (United) at Raleigh-

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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.

14 C.F.R. § 108.18(a).

<sup>5</sup> Subsections 108.5(a)(1) and 108.5(a)(2) provide as follows:

(a) Each certificate holder shall adopt and carry out a security program that meets the requirements of § 108.7 for each of the following scheduled or public charter passenger operations:

(1) Each operation with an airplane having a passenger seating configuration of more than 60 seats;

(2) Each operation that provides deplaned passengers access, that is not otherwise controlled by a certificate holder using an approved security program ... to a sterile area.

14 C.F.R. §§ 108.5(a)(1) and (2).

Durham, and utilizes United employees for the performance of ground handling and baggage handling services, passenger processing and ticketing at that location. (Tr. 97, 149-150, 182-183.)<sup>6</sup>

On June 19, 1996, FAA Agent \* \* \*, Manager of the FAA Civil Aviation Security Field Unit in Raleigh, North Carolina, participated in a test of Atlantic Coast Airlines' compliance with Security Directive (SD) 95-11(k). Posing as a ticketed passenger, Agent \* \* \* went into the sterile area and approached the ticket podium for a United Express flight. He presented his ticket to Larry Baird, a United employee. Mr. Baird did not know Agent \* \* \*. Mr. Baird first asked to see Agent \* \* \*'s identification and then asked, "Did anyone unknown to you give you any items to check or carry on board the airplane?" Agent \* \* \* replied, "yes" and explained that someone had given him a package. He showed the package, which was wrapped in brown paper, to Mr. Baird. The dimensions of the package were about 10 or 11 inches by 7 inches by 3 inches. (Tr. 19-20; 147-148.) The package actually was a book wrapped in brown paper.

Mr. Baird asked if Agent \* \* \* had gone through security when he came in, and Agent \* \* \* replied that he had. (Tr. 22.)<sup>7</sup> Mr. Baird then indicated that it would be necessary to \* \* \*. (Tr. 29.)

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<sup>6</sup> Michelle Bauman, Atlantic Coast Airlines' Director of Customer Service Systems, testified that United handles 30 of Atlantic Coast Airlines' locations independently. \* \* \*

At this point, David Lucas, the United station manager, walked by and offered to help. Mr. Baird gave the package to Mr. Lucas, explained what had transpired, and indicated that it was necessary to \* \* \*. (Tr. 29.) Mr. Lucas accompanied Agent \* \* \* to the security checkpoint. Mr. Lucas put the package flat on the conveyor belt (similar to the first time that Agent \* \* \* had gone through security prior to approaching the ticket podium.) (Tr. 27, 30.) The larger surface of the package was placed flat on the conveyor belt. Mr. Lucas observed the x-ray monitor screen along with the screener. When the package came through the x-ray machine, Mr. Lucas informed Agent \* \* \* that the package was just paper, and handed the package back to Agent \* \* \*. (Tr. 30.)

The Security Directive in question requires that if a passenger discloses that he is carrying an item that was given to him by an unknown person, then \* \* \*. (Complainant's Exhibit 2 at 2; Tr. 34.) At no time did the United employees \* \* \*. (Tr. 32, 172.)

According to the FAA security agents who testified, Agents \* \* \* and \* \* \*, \* \* \* on this package would have required the screeners to \* \* \*.

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<sup>7</sup> See also Complainant's First Supplementary Response to Respondent's Request for Admissions.

The FAA did not provide guidance to the air carriers prior to the issuance of this security directive pertaining to the meaning of “\* \* \*.” (Tr. 48-49, 123, 193.) The term is included in the ACSSP, but is undefined. (Tr. 58.)

Mr. Lucas testified at the hearing that at the time of the incident, he understood the term “\* \* \*” to mean that \* \* \*. (Tr. 162.) Nonetheless, he testified, he thought that \* \* \* had been performed because the package: “\* \* \*” (Tr. 173.) Basically, therefore, he testified that he thought that simply because the package \* \* \*, that \* \* \* had been performed.

Michelle Bauman, Atlantic Coast Airlines’ Director of Customer Service Systems,<sup>8</sup> testified that when the term “\* \* \*” appeared in a predecessor of SD 95-11-K, “there was some confusion as to [whether] this [is] a special kind of \* \* \* ....” (Tr. 188.) Ms. Bauman inquired about the meaning of this term by calling the United corporate security department. She said that she was told that when \* \* \* is performed, “you \* \* \*.” (Tr. 188.)

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<sup>8</sup> The manager of the Security Department reports to Ms. Bauman. (Tr. 181.)

The parties stipulated that at the time of this incident, Atlantic Coast Airlines' fleet consisted of two types of aircraft: the J-32, configured with 19 passenger seats, and the J-41, configured with 29 passenger seats. (Tr. 140.)

In the complaint, Complainant alleged that Atlantic Coast Airlines had violated 14 C.F.R. §§ 108.5(a)(1) and 108.18(a). At the hearing, Complainant moved to amend the complaint to substitute 14 C.F.R. § 108.5(a)(2) for § 108.5(a)(1). (Tr. 5-6.) Under both subsections, the holder of an operating certificate issued by the FAA is required to adopt and carry out a security program. Subsection (a)(1) applies to operations with an airplane having a passenger seating configuration of more than 60 seats. Subsection (a)(2) applies to operations providing "deplaned passengers access, that is not otherwise controlled by a certificate holder using an approved security program ... to a sterile area." 14 C.F.R. § 108.5(a)(2).

## II

Atlantic Coast Airlines objected to the motion to amend the complaint, arguing that the morning of the hearing was too late for such an amendment and that neither Section 108.5(a)(1) nor 108.5(a)(2) applied. Instead, it claimed, the applicable regulatory provision was Section 108.5(b).<sup>9</sup> (Tr. 7-8). The law judge accepted the amendment. (Tr. 9.)

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<sup>9</sup> Section 108.5(b) provides as follows:

Each certificate holder that has obtained FAA approval for a security program for operations not listed in paragraph (a) of this section shall carry out the provisions of that program.

14 C.F.R. § 108.5(b).

In her initial decision, the law judge held that neither 14 C.F.R. § 108.5(a)(1) nor § 108.5(a)(2) applied to the facts of this case. Section 108.5(a)(1) did not apply to Atlantic Coast Airlines, she wrote, because it pertains only to operations with airplanes having 60 or more seats. (Initial Decision at 3.) She held that Section 108.5(a)(2) also did not apply because it:

covers operations that provide deplaned passengers access that is not otherwise controlled by a certificate holder using an approved security program. Atlantic has an approved security program which requires that they prescreen all passengers (Tr. 117, 183.) Therefore 108.5(a)(2) does not apply. Complainant cites In the Matter of WestAir Commuter Airlines, Inc., d/b/a United Express, FAA Order No. 96-16, for the proposition that it does not need to specify which sub-section of the FAR was violated. However, the facts in WestAir are far different from those in this case. In WestAir, the Complainant did not specify a subsection at all and the Administrator noted that the parties had stipulated as to which section should apply. In the case at hand, Complainant has plead consecutively two alternative subsections and neither apply. WestAir does not stand for the proposition that Complainant may draft its Complaint citing erroneous subsections. Complainant failed to cite a section of 108.5 which Respondent could have violated. It is not for the court to amend the Complaint after the hearing to an entirely different subsection to cure the Complaint's defects. Accordingly, the allegation that Respondent violated either subsection 108.5(a)(1) or 108.5(a)(2) is dismissed.

Initial Decision at 3.

Regarding the requirement of Security Directive 95-11(k), the law judge held that Atlantic Coast Airlines did not perform the required \* \* \*. (Tr. 4.) Indeed, she wrote, even under its own understanding of the security directive, the screener should have \* \* \*, and, it is irrelevant that the package had been \* \* \* earlier. (Initial Decision at 4-5.) Hence, she found that Atlantic Coast Airlines had violated Section 108.18(a). The law judge held that it was a moot issue whether the term \* \* \*, as used in the security directive, was vague

because Atlantic Coast Airlines had not even followed its own understanding of that term. (Initial Decision at 4.)

Complainant had sought a \$4,000 civil penalty. The law judge, in her initial decision, assessed a \$1,500 civil penalty, based upon the following reasoning:

Given the difficulty in ascertaining how to perform a \* \* \*, the FAA's lack of any instruction or guidance on the subject, as well as Respondent's nearly complete compliance with the directive, I find that only minimal penalty is appropriate and impose a penalty in the amount of \$1,500.

(Initial Decision at 5.)

### III

On appeal, Complainant argues that the law judge erred in finding that Atlantic Coast Airlines did not violate Section 108.5(a)(2). Complainant asserts that the law judge ignored the critical fact that Atlantic Coast Airlines' aircraft deplaned passengers at Raleigh-Durham within the sterile area. Complainant argues that there must have been a violation of Section 108.5 if the law judge found a violation of Section 108.18. Finally, Complainant argues that the civil penalty assessed by the law judge was too low.

### IV

Section 108.5(a)(2) provides specifically as follows:

(a) Each certificate holder shall adopt and carry out a security program that meets the requirements of § 108.7 for each of the following scheduled or public charter passenger operations:

(2) Each operation that provides deplaned passengers access, that is not otherwise controlled by a certificate holder using an approved security program ... to a sterile area.

Thus, Section 108.5(a)(2) requires carriers to have approved security plans when they provide deplaning passengers access to sterile areas and that access is not controlled



by *another* air carrier or other certificate holder with an approved security plan. Simply stated, if a carrier's deplaning passengers are entering a sterile area and no other certificate holder with a security plan is controlling the access of those passengers to the sterile area, then the carrier must adopt a security plan itself to control that access.<sup>10</sup>

Agent \* \* \* testified that he believed that Section 108.5(a)(2) applied to Atlantic Coast Airlines. However, Agent \* \* \*'s testimony in this regard, as will be discussed further, does not deserve credit.

On cross-examination, Agent \* \* \* testified that Section 108.5(a)(2) applies in situations in which "passengers ... arriv[e] from what we have come to call a Category 5 airport, where it's not required to screen prior to passengers boarding smaller commuter aircraft and then allowing access into a sterile area." (Tr. 117.) He stated that it was true that the agent posing as a ticketed passenger in this instance was both an enplaning and a deplaning passenger. (Tr. 117-118.) However, on re-direct, Agent \* \* \* clearly confused Section 108.5(a)(2) regarding deplaning passengers having uncontrolled access to sterile areas, with Section 108.5(b) pertaining to carriers not required under 108.5(a) to have a security plan.<sup>11</sup> He testified as follows:

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<sup>10</sup> As was stated in the preamble to the final rule including Section 108.5:

This final rule requires implementing a full security program only for scheduled and public charter operations with airplanes having a passenger seating configuration of more than 60 seats and *for operations providing deplaned passengers access to a sterile area at the next landing when the access is not controlled by another airplane operator's security program.*

46 Fed. Reg. 3782, 3783 (January 15, 1981)(emphasis added.)

<sup>11</sup> In Complainant's appeal brief, agency counsel ignores Agent \* \* \*'s testimony on cross-examination at Tr. 117 regarding the applicability of Section 108.5(a)(2) to instances in which small commuter aircraft passengers depart from airports at which screening is not required and deplane in sterile areas. Agency counsel relies simply on Agent \* \* \*'s opinion that Section

Q: With respect to specifically 108.5(a)(2), could you tell us why you believe that would be the appropriate regulation involved in this case if there was a violation? In other words, why that regulation or subpart rather than some other part of 108.5?

A: One, oh, eight, point, five (a) says that each certificate holder shall adopt and carry out a security program. (a)(1) specifically designates operators of aircraft of greater than 60 seats. In other words, 61.

Q: Would this be large 121 carriers generally?

A: Sure. Yes, sit (sic) would.

(a)(3) states that each operation with an airplane having a passenger seating configuration of more than 30 seats but less than 60 sheets (sic) except those parts affecting compliance requirements listed in 108.7(b)(1), (2) or (4), need only implement when the Director of Civil Aviation Security or a designate of the director notifies the certificate holder in writing that a security threat exists. In other words, they would only have to carry out a program if they'd been told by the Director of the FAA.

Five (a)(2) is the only thing left.

Q: Well, what about 108.5(b)? Why would that not be –

A: The certificate owner that has obtained an FAA approval for a security program for operations not listed in Paragraph A of this section shall carry out the provisions of that program.

Q: Well, if you can answer that, go ahead, but I –

A: No, I'm not sure that – 108.5(b) is directed to air carriers who are not required under 108.5(a)(1), (2), or (3), in other words, anybody else.

Q: So it's talking to entities not covered by 108.5 –

A: That's correct.

(Tr. 137-139.) The agency counsel then asked Agent \* \* \* questions regarding the passenger-seating capacity of the aircraft in Atlantic Coast Airlines' fleet. Once it was established that Atlantic Coast Airlines flew aircraft with fewer than 30 passengers seats

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108.5(a)(2) applied in this case, overlooking Agent \* \* \* 's apparent confusion of Section 108.5(a)(2) with Section 108.5(b) at Tr. 137-139. (See Appeal Brief at 5).

at this time, agency counsel explained to the law judge that he would not ask any more questions about the regulation (presumably Section 108.5.)

Agent \* \* \* 's testimony that Section 108.5(a)(2) applied in this instance cannot be credited because he clearly confused Section 108.5(a)(2) with 108.5(b). When Respondent's counsel directed Agent \* \* \* 's attention specifically to Section 108.5(a)(2), \* \* \* stated that that section applied in situations when small commuter aircraft passengers deplane in sterile areas after flights originating at Category 5 airports where screening is not required. While testimony was elicited to establish that Atlantic Coast Airlines passengers deplane in a sterile area at Raleigh-Durham International,<sup>12</sup> and that Atlantic Coast Airlines flies airplanes with no more than 29 passenger seats, there was no testimony regarding whether Atlantic Coast Airlines operates out of such Category 5 airports. Hence, even apart from the conflicting testimony of its key witness, it appears that Complainant failed to establish a critical fact under the analysis provided by its own expert witness pertaining to the applicability of Section 108.5(a)(2) (at Tr. 117.)

Agency counsel argues in the appeal brief as follows:

The ALJ appeared to base her decision at least partly on the fact that Respondent has an approved security program which requires that they prescreen all passengers. The ALJ is correct in observing that Respondent has an approved security program; however, that fact is not central to the analysis of whether or not Section 108.5(a)(2) of the FAR was violated. The critical fact, which the ALJ

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<sup>12</sup> On direct examination, Mr. Baird testified as follows:

Q: And at Raleigh Airport when an aircraft deplanes, does it deplane within the sterile area?

A: Yes, it does.

Q: So the passengers when they exit the plane are within the sterile area?

A: They are. They come up the steps to go into the terminal.

(Tr. 150.)

failed to consider in her initial decision, was the Respondent's aircraft deplane at Raleigh within the sterile area. Tr. 150.

(Appeal Brief at 5-6.) Agency counsel's argument misreads Section 108.5(a)(2). Section 108.5(a)(2) does not simply apply in situations in which passengers deplane into sterile areas, as the above argument would have one believe. Section 108.5(a)(2) applies when those deplaning passengers have access that is not otherwise controlled by a certificate holder to a sterile area. Complainant ignores the language of the regulation "that is not otherwise controlled by a certificate holder using an approved security program ... to a sterile area." Consequently, the law judge's conclusion that Complainant had failed to prove that Section 108.5(a)(2) applied in this instance is affirmed.<sup>13</sup>

As Complainant noted in its brief, there can be no violation of Section 108.18(a) unless it is established that Section 108.5 applies. (Appeal Brief at 6.) Section 108.18(a) provides in pertinent part that "Each certificate holder *required to have an approved security program* for passenger operations shall comply with each Security Directive issued to the certificate holder.... 14 C.F.R. § 108.18(a)(emphasis added.) Thus, it must be determined whether Atlantic Coast Airlines was required to have an approved security program under Section 108.5(a). While it is clear from the record that Atlantic Coast Airlines indeed has an approved security program, the evidence presented does not establish that it was required to have such a plan. Accordingly, the case fails for want of proof.

This agency is committed to protecting aviation safety. Consequently, the outcome of this decision is very troublesome. This decision is not intended to condone

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<sup>13</sup> It should be noted that this decision neither affirms nor reverses the reasoning that the law judge employed to arrive at that conclusion.

Atlantic Coast Airlines' failure to comply with the security directive or its failure to acknowledge its responsibility for having so failed.

The law judge's initial decision is reversed, and no penalty is assessed.<sup>14</sup>

(Original unredacted version signed by  
Jane F. Garvey)

JANE F. GARVEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 2nd day of February, 2000.

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<sup>14</sup> 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) (1999).