UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **TRANS WORLD AIRLINES, INC.**	FAA Order No. 1999-12[1] Served: October 7, 1999 Docket Nos. CP97SO0016, CP97SO0017

DECISION AND ORDER[2]

Respondent Trans World Airlines, Inc. (TWA) has appealed Administrative Law Judge Burton S. Kolko's initial decision, which covers two separate security cases. In his initial decision, the law judge found that in each case, TWA violated an FAA security directive and several regulations. The law judge assessed a $6,500 civil penalty in each case, for a total of $13,000.[3] This decision denies TWA's appeal and affirms the law judge's decision.

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[1] Portions of this decision have been redacted for security reasons under 14 C.F.R. Part 191.

[2] 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* 64 Fed. Reg. 43,236, 43,250 (August 9, 1999).

[3] A copy of the law judge's written initial decision regarding the two cases (FAA Docket Numbers CP97SO0016 and CP97SO0017) is attached. The law judge held separate hearings for the two cases on the same day but decided them together, in the same initial decision.

I. Background

The facts of the two cases can be distilled as follows.[4] In the first case,[5] a TWA customer service agent failed during check-in to ask an FAA special agent, who was posing as a passenger, if she had received anything from unknown persons. FAA Security Directive 95-11-I was in effect at the time and required airline employees to ask the question of each passenger.

In the second case,[6] where an undercover FAA special agent * * *

, a TWA customer service agent failed to arrange for * * * of the undercover agent's checked baggage, as required by FAA Security Directive 95-11-K, which was then in effect. TWA transported the * * * baggage aboard the airplane, even though the undercover agent never boarded.

Complainant filed separate complaints in the two cases. Each complaint alleged that TWA violated the following regulations:

1. 14 C.F.R. § 108.5(a)(1), which requires TWA to adopt and carry out a security program. TWA's security program in turn requires it to comply with FAA security directives.

2. 14 C.F.R. § 108.18(a), which requires TWA to comply with FAA security directives.

In each case, TWA admitted the facts underlying the allegations, but denied that it committed any violations. TWA raised the following defenses at the hearing:

- FAA security directives were too burdensome because of their number and length;

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[4] For greater detail regarding the facts, see the law judge's initial decision, which is attached.

[5] Docket Number CP97SO0016.

[6] Docket Number CP97SO0017.

- Security Directives 95-11-I and 95-11-K were void because they should have been promulgated under Administrative Procedure Act (APA) rulemaking procedures providing for public notice and comment;

- Security Directives 95-11-I and 95-11-K were void because the FAA had an inadequate factual basis for invoking Level III security procedures involving an imminent or likely threat to U.S. civil aviation interests;

- The 100% standard the FAA expects of airline customer service agents is unreasonable;

- In the case involving the failure to ask whether the passenger had received anything from unknown persons, no violation occurred because TWA never transported the baggage -- the undercover agent retrieved her baggage before it could be transported.

- In the other case, where the undercover agent * * * , no violation should be found because Complainant failed to prove that TWA did *not* * * * the undercover agent's baggage.

As for the sanction, TWA argued that the $7,500 sanction sought by Complainant in each case should be reduced in light of: (1) remedial measures taken by TWA; and (2) the airline's alleged financial hardship.

The law judge rejected each of TWA's rationales for finding no violations. The law judge declined to consider any of TWA's various challenges to the validity of the FAA security directives, stating that such challenges are better left to the Federal courts. In the law judge's view, the air carriers should not be permitted to determine on their own which security directives to follow.

The law judge rejected TWA's argument that no violation occurred in the first case because TWA did not actually transport the undercover agent's baggage. Instead, the law judge held that actual transport is not an element of the offense. He noted that the

security directive neither states nor implies that no violation occurs unless a traveler's luggage is transported.

The law judge stated that he would not require Complainant to show in the second case that TWA failed to * * * the undercover agent's baggage. Rather, the law judge held that it was TWA's burden to present any evidence that it cleared the bag properly, which the airline failed to do.[7]

As for the sanction amounts, the law judge rejected several of TWA's proffered reasons for lowering the sanctions based on remedial measures, stating that TWA's actions, for the most part, involved merely reviewing with its personnel their existing responsibilities, which did not justify any reduction. The law judge did find, however, that TWA's toughening of its disciplinary policy (to permit discharge of an employee after a second security violation instead of a fourth) constituted a remedial measure that justified reducing the $7,500 sought by Complainant in each case to $6,500.

Finally, the law judge rejected TWA's claim of financial hardship because TWA offered no witness who could testify to a nexus between the proposed penalties and TWA's finances. To the law judge, it seemed "extremely unlikely" that the $6,500 civil penalties would cause financial hardship to TWA, given that TWA had earned more than $762 million in the most recent quarter in evidence (the first quarter of 1997).

On appeal, TWA renews many of the arguments that the law judge rejected.

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[7] The law judge stated that because the carrier "naturally" would be aware of any evidence that it * * * the bag, the fact that it did not present any such evidence raised an inference that no * * * was performed. (Initial Decision at 7-8.) The law judge also stated that Complainant is not required to prove a negative. (*Id.* at 8.) TWA has not challenged the law judge's holding that it was TWA's burden to present any evidence that it cleared the bag properly.

II. Validity of Security Directives

TWA challenges the validity of FAA Security Directives 95-11-I and 95-11-K as follows. First, TWA argues that the FAA lacked an adequate factual basis for imposing Level III security procedures on the U.S. airline industry. Second, TWA argues that the agency violated the APA, as well as the FAA's own regulations, by promulgating the security directives without first providing notice and opportunity to comment. Third, TWA argues that the FAA violated the APA by requiring TWA employees to adhere faultlessly to the security directives. According to TWA, the FAA imposed on the airlines through these security directives a level of performance that is unreasonable, arbitrary, and capricious, given the reality of human imperfection.

The law judge did not err in declining to consider issues relating to the validity of the FAA security directives. As previously held, the Federal courts provide a more appropriate forum for challenging the validity of FAA security directives. In the Matter of Continental Airlines, FAA Order No. 97-34 at 3-4 and n.9 (October 23, 1997) (noting that whether the security directive at issue was justified had nothing to do with the facts of the case, and concluding that a Federal court must decide the question based on an appropriate record).[8]

III. Appropriateness of Finding TWA Fully Responsible

TWA argues that it should not be held fully responsible for the unauthorized actions and omissions of its employees. Instead, it asserts, its employees should be assigned at least some liability. TWA made the same argument in a previous case but its

[8] If TWA had genuine concerns about the validity of the security directives in question, it is unclear why the airline did not immediately challenge them when they were issued, rather than appearing to accept their validity while simultaneously failing to implement them adequately.

argument was rejected. In the Matter of TWA, FAA Order No. 98-11 (June 16, 1998) (holding TWA responsible for actions of its flight attendants, who served alcoholic beverages to a passenger who appeared intoxicated).

As discussed in the earlier case involving TWA, FAA Order No. 98-11 at 25-26, it has been held repeatedly that air carriers are responsible for regulatory violations committed by their employees while acting within the scope of their employment. *See* In the Matter of Pacific Aviation International, d/b/a Inter-Island Helicopters, FAA Order No. 97-8 at 4-5 (February 20, 1997) (holding an air carrier responsible for violations committed by its mechanic-employees) and In the Matter of Horizon Air Industries, FAA Order No. 96-24 (August 13, 1996) (affirming a law judge's holding that an air carrier was responsible for the actions of its pilot performed within the scope of his employment).

It has also been stated in previous cases that air carriers have a statutory mandate to perform their services with the highest possible standard of care, and that an air carrier's responsibilities are too critical to permit it to transfer its obligations to another. In the Matter of WestAir Commuter Airlines, FAA Order No. 96-16 at 6-7 (May 3, 1996) (WestAir had entered into a contract with United Express whereby the latter agreed to provide a ground security coordinator for certain WestAir flights; WestAir held liable for the absence of a ground security coordinator). Finally, an air carrier's duty of care has been held non-delegable. In the Matter of USAir, FAA Order No. 92-70 at 3-4 (December 12, 1992) (holding USAir responsible for the acts and omissions of its pushback operator and captain during the pushback of USAir's aircraft).

TWA has provided no persuasive reason for overturning this precedent. While TWA argues that FAA case law should be analogous to traffic law and asserts that an employer is not liable for an employee's traffic or parking ticket,[9] the analogy is inapt. Arguably, the dangers presented by the failure of air carrier employees to follow security directives designed to prevent terrorist activity in air transportation are significantly more serious than the dangers presented by ground transportation traffic or parking violations. Moreover, the imaginary employer in TWA's analogy does not have the same high level of responsibility for transportation security and safety that TWA does. As an air carrier, TWA has a duty "to provide service with the *highest* possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A) (emphasis added).

By holding air carriers responsible for violations committed by their employees, the public is assured that air carriers will do everything in their power to ensure that their employees comply with the security and safety regulations. No one is in a better position to bring pressure to bear on air carrier employees to comply with the regulations than the air carriers themselves. For these reasons, permitting TWA and other air carriers to transfer away their crucial safety and security responsibilities would be contrary to the public interest.

IV. Appropriateness of Sanction Amounts

TWA argues that the law judge should have reduced the proposed sanctions more than he did. As noted above, the law judge reduced the sanction in each of the two cases from the $7,500 sought by Complainant to $6,500. The law judge based the reduction on TWA's change in its employee disciplinary policy regarding security violations. Prior to

[9] TWA provides no supporting citations for its assertion.

these incidents, TWA's policy was as follows: 1st offense – oral warning; 2nd offense – letter of discipline; 3rd offense – time off without pay; 4th offense – discharge. Now TWA's policy is: 1st offense – letter of discipline; 2nd offense – discharge hearing. TWA argues that the law judge did not place adequate weight on the mitigating factor of TWA's change in its disciplinary policy.

TWA also argues that the law judge erred in failing to reduce the sanctions based on the following:

- Other Remedial Action. In CP97SO0016, the station manager counseled the TWA customer service agent and instructed him to read over and make sure he understood the security directives. In CP97SO0017, TWA placed a memorandum about the security directive in all its customer service agents' boxes. In both cases, TWA re-briefed its personnel and quizzes them occasionally about the security directives. TWA also holds meetings at which it discusses, among other things, security.

- Inadvertent Nature of Violations. TWA argues that the violations were inadvertent rather than deliberate.

- TWA's Attitude. TWA argues that it has a good compliance attitude.

- TWA's Ability to Absorb the Sanctions. TWA states that it lost 284 million dollars in 1996 and 110 million dollars in 1997. While TWA concedes in each case that "the assessed penalty ... will certainly not drastically harm" it, it argues that a much lower penalty would "fully meet" FAA objectives.

In setting the sanctions, the law judge carefully balanced the seriousness of the violations against any mitigating factors. He gave adequate weight to the mitigating factor of TWA's corrective action. Previous cases have held that simple reminders of pre-existing security responsibilities, standing alone, do not ordinarily justify a reduction in an otherwise reasonable civil penalty. In the Matter of Northwest Airlines, FAA Order No. 98-22 at 13 (November 10, 1998); In the Matter of Mauna Kea Helicopters, FAA

Order No. 97-16 at 9 (May 23, 1997); In the Matter of [Air Carrier], FAA Order No. 96-19 at 12 (June 4, 1996). In the Matter of Delta Air Lines, FAA Order No. 92-5 at 5 (January 15, 1992), quoting In the Matter of [Airport Operator], FAA Order No. 91-47 at 7 (October 31, 1991). A civil penalty may be reduced on the basis of corrective action, but only where there is sufficient, specific evidence of swift or comprehensive action that is positive in nature, such as sending employees to special training, or instituting programs to ensure compliance with the safety regulations. In the Matter of Detroit Metropolitan-Wayne County Airport, FAA Order No. 97-23 (June 5, 1997). To the extent that TWA's placing of reminders in its employee's boxes, re-briefing them, and quizzing them regarding their security responsibilities – in combination with TWA's change in its disciplinary policy – warrant a reduction, the law judge's $1,000 reduction in each proposed penalty is sufficient. *See, e.g.*, In the Matter of Continental Airlines, FAA Order No. 98-6 (April 7, 1998) (stating that the corrective action taken by Continental, including administering refresher training and instituting a new security requirement, justified the lowest penalty in the maximum range);[10] In the Matter of Delta Air Lines, FAA Order No. 92-5 (January 15, 1992) (stating that while Delta's reminder to the staff of their pre-existing responsibilities, standing alone, did not necessarily constitute the type of significant corrective action that warrants a reduction, the Administrator was impressed with the timeliness and thoroughness of Delta's response, which included adjusting the timing of an electronic gate, issuing reminders, and removing the gate's remote access capability).

Regarding the inadvertent nature of the violations and TWA's compliance

[10] Note that in the instant case, the maximum range is $7,500 to $10,000. Thus, the $6,500 civil penalty in each case is *below* the maximum range. Complainant has not appealed the law judge's

disposition, the $6,500 sanctions set by the law judge already take into account these factors. If the violations had been deliberate or if TWA had demonstrated a noncompliant disposition, higher penalties would have been appropriate. *See* In the Matter of Petek-Jackson, FAA Order No. 92-59 at 5 (October 16, 1992) (noting, similarly, that the violation assessed reflected the inadvertent nature of the act).

As for TWA's claim of financial hardship, the law judge correctly found on this record that TWA had failed to prove its claim, given that TWA offered no witness who could testify to TWA's inability to absorb the proposed sanctions. (Respondent's Exhibit 2.) A civil penalty cannot be reduced on the basis of financial hardship without adequate proof. In the Matter of Hampton Air Transport, FAA Order No. 97-11 at 12 (February 20, 1997), citing In the Matter of Giuffrida, FAA Order No. 97-72 at 3 (December 21, 1992). Moreover, TWA's admission in its appeal briefs that the $6,500 civil penalties "will certainly not drastically harm" it undercuts its financial hardship argument.

Due to the seriousness of security violations like those in the instant case, which leave the system vulnerable to terrorist attack, the law judge did not err in setting the sanction in each case at $6,500.

V. Conclusion

As the law judge noted, the "threat of terrorist activity underscores the need for the strictest possible enforcement of laws protecting the traveling public." Initial Decision at 3, quoting United States v. American Airlines, 23 Av. Cas. (CCH) 17,360, 17,362 (W.D. Tex. 1991). TWA's failure to ensure in these cases that its employees

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reduction of each of its two proposed $7,500 civil penalties to $6,500.

followed the security directives is inconsistent with its duty as an air carrier "to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A). The law judge did not err in finding that TWA violated the regulations or in setting the sanction amounts. Therefore, this decision denies TWA's appeal and affirms the law judge's assessment of $6,500 in CP97SO0016 and $6,500 in CP97SO0017, for a total civil penalty of $13,000. [11]

[Original unredacted decision signed by
Jane F. Garvey]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 23rd day of August, 1999.

[11] 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) (1998).