UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **CITY OF LOS ANGELES, DEPARTMENT OF AIRPORTS**	FAA Order No. 98-7 Served: April 7, 1998 Docket No. CP96WP0046

DECISION AND ORDER[1]

Respondent airport operator (Respondent) has appealed[2] the law judge's decision,[3] which found that Respondent failed to use its approved security program to control access to the air operations area, a violation of 14 C.F.R. § 107.13(a).[4] After examining the arguments of both parties, this decision denies Respondent's appeal and affirms the law judge's decision imposing a civil penalty of $500, the

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

[2] Respondent's appeal is filed under 14 C.F.R. Part 13.

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

[4] Section 107.13(a) provides as follows:

> 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 ... 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.
>
> (2) Controlling movement of persons and ground vehicles within each air operations area, including, when appropriate, requirements for the display of identification.
>
> (3) Promptly detecting and taking action to control each penetration, or attempted penetration, of an air operations area by a person whose entry is not authorized in accordance with the security program.

amount requested by Complainant Federal Aviation Administration (FAA) (Complainant).

The facts are as follows. On February 8, 1994, in a test of airport security, an unbadged FAA security agent followed an employee of a ground handling company[5] onto a restricted-access elevator. The employee, who was making a delivery to an air carrier's airplane, failed to ***. Consequently, the unbadged agent was able to gain access to the baggage make-up area[6] and the air operations area,[7] even though the agent had not shown that she was authorized to enter any restricted area.

When Complainant filed the instant civil penalty action, Respondent argued that an air carrier had signed an exclusive area agreement relieving Respondent of responsibility for the violation.[8] Respondent also argued that Complainant was improperly attempting to impose strict liability (*i.e.*, liability without fault) on it.

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[5] A ground handling company provides ground services such as baggage handling and aircraft service to air carriers. (Tr. 103.)

[6] The "baggage make-up area" is the place where passenger bags and packages are processed for placement onto aircraft. (Tr. 43.)

[7] An "air operations area" is "a portion of an airport designed and used for landing, taking off, or surface maneuvering of airplanes." 14 C.F.R. § 107.1(b)(2).

[8] The regulations define "exclusive area" as "that part of an air operations area for which an air carrier has agreed in writing with the airport operator to exercise exclusive security responsibility under an approved security program or a security program used in accordance with § 129.25." 14 C.F.R. § 107.1(b)(4).

In addition, 14 C.F.R. § 107.13(b) provides that an airport operator:

> need not comply with paragraph (a) of this section [requiring airport operators to use the procedures in their approved security programs to control access to the air operations area] with respect to an air carrier's exclusive area, if the airport operator's security program contains--
>
> (1) Procedures, and a description of the facilities and equipment, used by the air carrier to perform the control functions described in paragraph (a) of this section [For the text of paragraph (a), *see supra* note 4]; and

Complainant countered that the FAA's Director of Civil Aviation Security had not approved the alleged exclusive area agreement, and therefore, it was not part of Respondent's security program. Respondent claimed, however, that the agreement became effective by default, because the FAA's Director of Civil Aviation Security had failed to approve or deny it within 15 days, as provided by the regulations. Section 107.9(b) provides: "Within 15 days after receipt of a proposed amendment, the Director of Civil Aviation Security issues to the airport operator, in writing, either an approval or a denial of the request." 14 C.F.R. § 107.9(b). At the time of the incident, approximately 3 months had passed without action from the FAA's Director of Civil Aviation Security.[9] Ultimately, the proposed amendment was denied. (Tr. 154.)

After a hearing, the law judge issued the initial decision. In it, the law judge stated that nothing in the rules or case law suggested that a proposed amendment to an airport security program could be approved by default. (Initial Decision at 4.) Therefore, the law judge held, the agreement between Respondent and the air carrier was not part of Respondent's security program. (*Id.*)

The law judge determined that although Respondent had installed a security system, trained airport employees, and posted reminder signs regarding ***, this was not a case of liability without fault, given the ease with which the FAA security agent gained access to the air operations area. (Initial Decision at 5.) The law

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(2) Procedures by which the air carrier will notify the airport operator when its procedures, facilities, and equipment are not adequate to perform the control functions described in paragraph (a) of this section.

[9] The breach in security occurred on February 8, 1994, and Respondent claims (*see* Tr. 102) that it submitted the agreement with the air carrier as an amendment to its security program on or shortly after November 11, 1993.

judge noted that "the agent used no guile or ingenuity to gain access to the restricted area, but gained access in a manner the [airport security] program was designed to prevent." (*Id.*)

The law judge agreed with a witness of Complainant that Respondent "didn't comply with the aspect of ... follow-through to ensure that ... the human element that [Respondent] elected to employ as part of the system ... did what it was supposed to do." (Initial Decision at 5.) The law judge assessed Respondent a $500 civil penalty, leading Respondent to file the instant appeal.

Complainant contends that Respondent's appeal does not raise an appealable issue. (Reply Brief at 2.) Complainant relies on 14 C.F.R. § 13.233(b), which provides as follows:

> *Issues on appeal.* A party may appeal only the following issues:
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> (1) Whether each [finding] of fact is supported by a preponderance of reliable, probative, and substantial evidence;
> (2) Whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and
> (3) Whether the administrative law judge committed any prejudicial errors during the hearing that support the appeal.

Respondent has stated that the basis for its appeal is that "the ALJ's analysis of ... strict liability and fault ignores the effect of ... Respondent's pending agreement with [the air carrier] on the ... foreseeability of the violation." (Appeal Brief at 4.) In essence, Respondent's appeal challenges the law judge's application of the law to this case -- *i.e.*, it questions whether the law judge's analysis of the law included all the relevant factors. Thus, Respondent's appeal raises the issue "whether each conclusion of law is made in accordance with applicable law, precedent, and public policy." 14 C.F.R. § 13.233(b)(2). Accordingly, Respondent has raised an appealable issue.

As for the merits of Respondent's appeal, Respondent reasserts its argument that because the time for FAA objection to a proposed amendment to an airport security program had passed, a valid exclusive area agreement -- transferring responsibility for security violations from Respondent to an air carrier -- was in effect. Hence, Respondent argues, it could not have foreseen that it would be held liable for the security breach. Without foreseeability, Respondent contends, to impose liability on Respondent would be to impose strict liability. It is well-established that 14 C.F.R. § 107.13(a) does not impose strict liability on airport operators. *See, e.g.*, In the Matter of Detroit Metropolitan-Wayne County Airport, FAA Order No. 97-23 at 4, 1997 FAA LEXIS 815 (June 5, 1997).

Respondent's argument fails. As the law judge correctly held, an amendment to an airport security program cannot be approved by default. Under the regulations, approval of an amendment to an airport security program requires an affirmative, written finding by the Director of Civil Aviation Security that "(1) safety and the public interest will allow it, and (2) the proposed amendment provides the level of security required by § 107.3." 14 C.F.R. § 107.9(c). Section 107.9 provides: "the Director of Civil Aviation Security issues to the airport operator, *in writing*, either an approval or a denial of the request." 14 C.F.R. § 107.9(b) (emphasis added).

As in other contexts, when the term "approved" is used to describe a document, the FAA has evaluated and specifically approved the document. In the Matter of America West Airlines, FAA Order No. 96-3 at 3 n.4, 1996 FAA LEXIS 1064 (February 13, 1996), citing FAA Order No. 8400.10 (June 30, 1991). In

contrast, the term "accepted" is used to describe a document that is simply submitted to the FAA and is not required to have express FAA approval. *Id.*

It is undisputed that the Director of Civil Aviation Security did not issue written approval of the agreement between Respondent and the air carrier. Thus, the alleged exclusive area agreement never became part of Respondent's approved security program.

Given both the express language of 14 C.F.R. § 107.9, as well as common sense, it was entirely foreseeable that FAA approval of a document as important as an amendment to an airport security program, particularly one transferring crucial security responsibilities, could not occur by default. Under the circumstances, Respondent should have foreseen that it remained responsible for security in the baggage make-up area and the air operations area involved in this matter.

It is telling that the man responsible for Respondent's security program admitted at the hearing that he did not contact the air carrier after the FAA informed him about the security breach at issue. (Tr. 123.) This belies Respondent's contention that it believed it had transferred its responsibility for the security breach in question to the air carrier; it belies Respondent's contention that it could not foresee its own liability.

An airport operator that is aggrieved by the failure of the Director of Civil Aviation Security to act on a proposed amendment to the security program is not without recourse. For example, an airport operator could: (1) ask the Director to expedite his or her decision, (2) bring the Director's failure to act in a timely fashion to the attention of the Administrator; or (3) file an action to compel a decision. In

the instant case, the record contains no indication that Respondent did any of these things.

Respondent attempts to distinguish this case from another case in which an airport operator was held responsible for a security violation,[10] saying that, in the other case, "the airport operator's responsibility and control over the area of the violation was clear and uncontested" (Appeal Brief at 4), and "the violation did not involve a single isolated entry, but an ongoing defect which the airport operator, after being given official notice, made no discernible attempt to correct over a period of approximately 6 months and three subsequent inspections." (*Id.* at n.3.)

Respondent's responsibility for the area in which the violation occurred, however, is clear, even if Respondent has contested it in this action. Moreover, to the extent that Respondent suggests that a violation of 14 C.F.R. § 107.13(a) requires multiple penetrations or attempted penetrations, Respondent is wrong. A single failure to use the security program to control access to the air operations area may constitute a violation. Note, for example, that the regulation says that the airport operator must promptly detect and take action to control *each* penetration or attempted penetration of an air operations area by an unauthorized person. 14 C.F.R. § 107.13(a)(3) (emphasis added).[11]

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[10] In the Matter of [Airport Operator], FAA Order No. 96-1, 1996 FAA LEXIS 1074 (January 4, 1996), *reconsideration denied*, FAA Order No. 96-9 (March 5, 1996), *petition for review voluntarily dismissed*, [Airport Operator] v. FAA, No. 96-3508 (6th Cir. August 1, 1996).

[11] *See supra* note 4.

For the reasons stated above, the law judge did not err in finding a violation of 14 C.F.R. § 107.13(a). The law judge's decision assessing a $500[12] civil penalty is affirmed.[13]

[original signed by Jane F. Garvey]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of March, 1998.

[12] The airport operator has challenged only the law judge's finding of a violation, and not the amount of the sanction.

[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) (1997).