UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: February 6, 1992

FAA Order No. 92-5

In the Matter of:	Docket No. CP90NM0019
DELTA AIR LINES, INC.	

ORDER
(ERRATUM)

Please note the following correction to the Decision and Order in this case which was served on January 15, 1992:

Page 7, line 21 -- substitute the word "penalty" for the word "violation".

This Order should be attached to the previously-issued Decision and Order.

BARRY LAMBERT HARRIS
Acting Administrator
Federal Aviation Administration

JAMES S. DILLMAN*
Assistant Chief Counsel

Issued this 3rd day of February, 1992.

* Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated January 29, 1990, under 49 U.S.C. § 332(b) and 14 C.F.R. § 13.202. See 55 Fed. Reg. 15094 (April 20, 1990).

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OFFICE OF CHIEF COUNSEL
HEARING DOCKET

DECISION AND ORDER

At the hearing held in this matter on July 22, 1991, Administrative Law Judge Robert L. Barton, Jr., issued an oral initial decision,[1/] in which he held that Respondent Delta Air Lines, Inc. ("Respondent") violated Section 108.5(a)(1) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 108.5(a)(1).[2/] The law judge reduced the $10,000 civil penalty sought by Complainant to $4,000 because, in his view,

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1/ A copy of the initial decision is attached.

2/ Section 108.5(a)(1), 14 C.F.R. § 108.5(a)(1), provides:

> (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.

Respondent's post-incident remedial action and history of no prior similar violations at this airport warranted a reduction. Complainant has appealed from the reduction of civil penalty. As explained in this decision, Complainant's appeal is denied.[3/]

The facts in this case are not in dispute. On April 22, 1988, FAA Security Inspectors gained unchallenged access to the air operations area (AOA) at * * * Airport. Once on the AOA, they entered Respondent's aircraft, N4930A, by climbing the ventral stairs. The ventral stairs had been left down, and the passenger door was open. The aircraft was unattended and unsecured at the time of the inspection. Respondent admitted that it had violated Section V.A.1 of its Air Carrier Standard Security Program.

At Complainant's request, the law judge took judicial notice of the relevant portion of Appendix 4, the Enforcement Sanction Guidance Table, of FAA Order No. 2150.3A, Compliance and Enforcement Program. Complainant introduced no other evidence at the hearing.

Respondent's station manager testified that after the FAA special agents informed him that they had gotten aboard one of

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3/ Portions of this decision have been redacted for security reasons under 14 C.F.R. Part 191. All unredacted copies of this decision must be treated in a confidential manner. Unredacted copies of this decision may not be disseminated beyond the parties to this proceeding and those carriers bound by the Standard Security Program, all of whom have been given both unredacted and redacted copies.

Respondent's aircraft unchallenged, he investigated the incident and then prepared a memorandum dated April 22, 1988, in response to this matter. The memorandum was posted on bulletin boards for view by employees, and supervisors briefed ground personnel on the memorandum during shift briefings before the beginning of each shift. The station manager wrote in the memorandum that employees could expect increased inspections of security measures by the FAA because the airport had recently been reclassified. The memorandum also included "[s]ome of the things that the F.A.A. looks for." Respondent's Exhibit 1. The station manager ended the memorandum by admonishing "[e]ach and every one of us has equal responsibility that our work areas remain safe and secure." Id.

The law judge began the initial decision by discussing the effect of FAA Order No. 2150.3A. The law judge explained that in his view, FAA Order No. 2150.3A was not binding upon law judges, but it was not improper for him to consider the penalty levels discussed in the Enforcement Sanction Guidance Table, as he did in this matter. The law judge found a maximum civil penalty of $10,000 inappropriate in this case, because Respondent had no previous similar violations at this airport, and Respondent did take remedial action after the incident. He noted that in In the Matter of [Airport Operator], FAA Order No. 91-18 (June 3, 1991), appeal docketed, No. 91-70464 (9th Cir. July 29, 1991), the Administrator held that a bona fide corrective action is a

factor to consider in reducing a civil penalty.[4/] He held that Respondent had taken bona fide corrective action here. Therefore, the law judge decided to choose a moderate civil penalty, rather than the maximum civil penalty, even though the Enforcement Sanction Guidance Table recommends a maximum range civil penalty ($7500 to $10,000) for this violation. In so doing, the law judge considered the FAA policy of imposing $1000 civil penalties against air carriers for first-time test object test failures.

On appeal, Complainant argues that it was inappropriate for the law judge to reduce the $10,000 civil penalty based upon Respondent's corrective action and its history of no other unauthorized access violations at * * *

Airport. According to Complainant, the law judge's "reasoning does not comport with applicable precedent, nor does it best serve the interests of aviation safety." Complainant's appeal brief at 6. Complainant argues that the Administrator held in In the Matter of Northwest Airlines, FAA Order No. 90-37 (November 7, 1990), that $10,000 is the

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4/ In that case, the respondent had introduced vague evidence that it had reinforced pre-existing security procedures with a particular contractor, and the law judge reduced the civil penalty based upon this corrective action. Complainant withdrew its appeal of the initial decision. In dictum, the Adminsitrator mentioned that he would not determine whether the corrective action taken by the respondent constituted 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.

appropriate civil penalty for unauthorized access to air carrier aircraft. Complainant argues further that a violation-free history should not generally serve as a basis for reduction of sanctions, and that the corrective action taken by Respondent should not be considered as a mitigating factor. Complainant asserts that a memorandum simply reminding ground personnel of their security-related duties does not constitute a bona fide corrective action as that term was used in In the Matter of [Airport Operator], FAA Order No. 91-18 (June 3, 1991).

In its reply brief, Respondent takes issue with Complainant's characterization of its corrective action memorandum and with the notion that an administrative law judge must automatically apply whatever sanctions are set out in the Enforcement Sanction Guidance Table. Respondent also asserts that the Administrator has in recent civil penalty cases considered as mitigating the same factors relied upon by the law judge in this case.

A severe penalty must be assessed when a carrier's security is so lax that individuals may easily gain unchallenged access to the carrier's aircraft. In the Matter of Northwest Airlines, FAA Order No. 90-37 at 8 (November 7, 1990). Unchallenged access to aircraft can result in tragic loss of lives and property. In the absence of mitigating factors, the maximum civil penalty under 49 U.S.C. App. § 1471(a) is necessary in unauthorized access cases to encourage the carrier involved, as well as others, to ensure

that security measures intended to prevent unauthorized access to aircraft are carried out properly.

It was inappropriate for the law judge to hold that Respondent's history of no similar violations at this airport constituted a mitigating factor. Generally speaking, a violation-free history should be the norm for air carriers,[5/] and therefore, should not be regarded, by itself, as a basis for reducing an otherwise reasonable civil penalty.

Reduction of an otherwise reasonable civil penalty is appropriate when there is sufficient specific evidence of swift or comprehensive corrective action. The Administrator stated in In the Matter of [Airport Operator], FAA Order No. 91-41 at 7 (October 31, 1991), that "[t]he corrective action taken by a respondent in some cases may warrant a reduction in an otherwise appropriate civil penalty; however, this determination may be made by the law judge in the first instance, and may be reviewed by the Administrator de novo, on appeal." In that same case, the Administrator held that reinforcement of appropriate security procedures with the offending employee and with all tenant managers alone did not warrant a reduction in sanction because the respondent had

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5/ Accord, e.g., Administrator v. Moris and Emerson, 2 NTSB 2102, 2105 n. 13 (1976) ("A violation-free record...is not generally considered to warrant a reduction in sanction since such a record should be the rule rather than the exception.")

merely reminded its tenants of their existing responsibilities.[6/] In In the Matter of [Airport Operator], FAA Order No. 91-40 (September 30, 1991), the Administrator held that Respondent's corrective action--adjusting the electronic gate's timing, reminding * * *

, and removing the remote access capability for opening the gate--warranted a reduction of the civil penalty.

In this case, the same day as the incident, Respondent prepared and displayed a memorandum informing employees that increased surveillance of security by FAA inspectors could be expected and admonishing that security was the responsibility of each employee. This memorandum was reviewed at all staff briefings that day. This reminder to the staff of their pre-existing responsibilities, standing alone, does not necessarily constitute the type of significant corrective action that warrants a reduction of an otherwise appropriate civil penalty. However, I am impressed with the timeliness and the thoroughness of Respondent's response to this situation. Although I do not agree with the amount by which the law judge reduced this violation, I will defer to

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6/ Nonetheless, in FAA Order No. 91-41, the Administrator deferred to the law judge's assessment of Respondent's good compliance disposition and did not disturb the law judge's modification of the civil penalty. In general, a good compliance disposition is expected from all certificate holders, and usually would not serve as a mitigating factor.

his judgment rather than reinstate the full penalty as sought by Complainant.

THEREFORE, Complainant's appeal is denied, and the law judge's initial decision is affirmed. A civil penalty of $4,000 is assessed.7/

BARRY LAMBERT HARRIS
Acting Administrator
Federal Aviation Administration

Issued this 7th day of January, 1992.

7/ Unless Respondent files a petition for reconsideration within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1991).