U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: Oct. 11, 1990

FAA Order No. 90-26

In the Matter of:	
BARBARA J. WADDELL	Docket No. CP89SO0321

DECISION AND ORDER

Respondent Barbara J. Waddell ("Respondent") has appealed from the oral initial decision issued by Administrative Law Judge E. Earl Thomas at the conclusion of the hearing held in this matter on January 23, 1990, in Atlanta, Georgia.[1/] In his decision, the law judge held that Respondent violated section 901(d) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. section 1471(d),[2/] and apparently held that Respondent also violated section 107.21(a)(1) of the Federal

1/ A copy of the law judge's oral initial decision is attached.

2/ Section 901(d) of the Federal Aviation Act, as amended, 49 U.S.C. App. 1471(d), provides in pertinent part:

> [W]hoever while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air operation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight shall be subject to civil penalty of not more than $10,000 which shall be recoverable in a civil action brought in the name of the United States.

Aviation Regulations (FAR),[3/] 14 C.F.R. 107.21(a)(1),[4/] as alleged in the complaint in this matter. The law judge sustained the $1000 civil penalty sought in the complaint. In light of my conclusion that Complainant failed to sustain its burden of proof that the weapon was or appeared to be deadly or dangerous, the law judge's decision is reversed.

The facts of this case are not in dispute. Respondent, who has been a flight attendant for Eastern Airlines for over 20 years, presented her carry-on bag for x-ray inspection at Hartsfield Atlanta International Airport on July 3, 1988. Respondent intended to board an Eastern Airlines flight on which she was scheduled to serve as a flight attendant. Security personnel found an unloaded, .32 caliber H & R revolver, serial number 384456, in her bag during the inspection process.

3/ The law judge did not state whether he found a violation of section 107.21(a)(1). Based upon his finding of a violation of section 901(d) of the Act, which is similar to section 107.21(a)(1) of the FAR, it would seem likely that he would have found a violation of that regulation as well.

It would assist me during the review of future initial decisions if the law judges would make explicit findings concerning the allegations set forth in the complaint.

4/ Section 107.21(a)(1) of the FAR provides:

> Carriage of an explosive, incendiary, or deadly or dangerous weapon.
> (a) Except as provided in paragraph (b) of this section, no person may have an explosive, incendiary, or deadly or dangerous weapon on or about the individual's person or accessible property (1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area.

Respondent testified at the hearing that prior to this incident, she had moved into a new home. While packing her belongings in preparation for the move, she had placed the gun in question in the tote bag that she usually carried with her on flights. She explained that she had placed the gun in that tote bag because the moving company had instructed her not to leave any weapons in the drawers of the furniture. On the morning of this flight, Respondent took the tote bag with her to the airport, apparently having forgotten that the gun was in her bag. After her bag went through the x-ray machine, a police officer asked her if that was her bag. She acknowledged that it was. The officer opened the bag and found the gun.

Complainant argued at the hearing that the gun was a "deadly and dangerous weapon," as that term is used in the statute and regulation in question. Respondent disagreed with Complainant's position.

Dewey Wayne Waddell, Respondent's husband, testified at the hearing. Mr. Waddell, who had received training in firearms while in the Air Force, stated that the gun is in "rather deplorable condition" because it is rusty, the cylinder spins freely, and the handle is chipped. He testified, "It's only deadly, in my opinion, to someone who might attempt to use it in that it would probably disintegrate and cause greater damage to the holder than to anyone else."

Respondent introduced an affidavit by Fred B. Sher, who has been doing gun appraisals since 1956. Mr. Sher stated in his affidavit as follows:

> I have this date personally examined Harrington and Richardson 32 caliber revolver, serial number 384456. This 5-shot top-break revolver was manufactured between 1900 and 1920. This item is thus a relic or antique, with a value of less than $40.00. The cylinder is free spinning and does not lock when the hammer is pulled back. It does not cock. The cylinder is so badly rusted that a bullet could not be loaded, nor does the cylinder align with the rusty barrel.
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> In my expert opinion this item is not nor can it be restored to firing condition; thus, it is neither a dangerous nor deadly weapon.

William Yarborough, employed as a civil aviation security inspector for 18 years by the Federal Aviation Administration (FAA), testified that an old, rusty gun that will not fire is a dangerous weapon. He explained that such a weapon has a dangerous appearance because someone looking at it would not know whether it was loaded, and if so, whether it would shoot. Inspector Yarborough acknowledged that he had never seen the Waddells' gun.

Inspector Yarborough sponsored the introduction of Complainant's Exhibit No. 1, which he testified was Appendix I, entitled "Deadly or Dangerous Weapon Guidelines," of the standard Air Carrier Security Program.

The law judge held that Respondent violated section 901(d) of the Act. He found that she had put the gun in her luggage and then forgot that she had it there when she presented the bag, with the gun in it, to the security people at the checkpoint at the airport. Although Respondent did not intend to bring the weapon with her, the judge explained, she had nonetheless violated the statute because intent is not an element of section 901(d).

He held further that the gun in question is a dangerous weapon, based upon the FAA's guidelines. He explained:

> It's not a question of whether the weapon can be fired or whether you can actually injure someone with it. . . . It's whether a reasonable person would believe that it was capable of inflicting serious harm.

The law judge sustained the civil penalty sought in the Complaint, explaining that Congress amended the statute to allow for higher civil penalties for such offenses and that the Complainant had sought a relatively low penalty in this case.

Relying heavily upon United States v. Dishman, 486 F.2d 727 (9th Cir. 1973), Respondent argues on appeal that it was error for the law judge to find that the inoperative pistol is a dangerous weapon when Respondent did not even know that she had it in her possession. Respondent also argues that even if

there was a technical violation, no sanction is warranted.[5/]

In response, Complainant, through its agency counsel, argues that the law judge properly found that Respondent violated section 901(d) of the Act, 49 U.S.C. App. 1471(d), and section 107.21(a)(1) of the FAR despite the fact that her gun was inoperative. Complainant argues that, unlike Respondent's expert witnesses, an aircraft passenger held at gunpoint does not have the option to examine the gun to determine whether it is capable of firing. Complainant points to United States v. Ware, 315 F. Supp. 1333 (W.D. Okla. 1970), in which it was held that an unloaded handgun is a deadly and dangerous weapon because even an unloaded firearm could be used to divert an aircraft. Complainant explains that it disagrees with the Dishman rationale because the Dishman court failed to consider the nature of the interests Congress intended to protect in adopting 49 U.S.C. App. sections 1472(l) and 1471(d). Additionally, Complainant distinguishes this case from Dishman because the violations charged here are civil, rather than criminal as in Dishman. Complainant argues further

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5/ Respondent has also filed a Motion for Leave to File an Additional Brief. Complainant has responded that it has no objection to Respondent's request. However, because of the disposition of this case against Complainant, there is no need for me to rule on the petition.

that the law judge properly affirmed the $1000 civil penalty, relying upon FAA Order 2150.3A, Appendix I, Compliance Enforcement Bulletin No. 88-5 (December 12, 1988).

The term "deadly or dangerous weapon," as used in section 901(d) of the Act must be construed to include those weapons which could appear capable of inflicting grave physical injuries.[6/] This construction is required to implement my strongly held conviction, shared by the Congress, that except under very limited and specific circumstances, firearms do not belong on board aircraft operated by air carriers. By regulation, for example, the FAA specifically prohibits the carriage of loaded firearms in checked baggage and severely restricts the carriage even of unloaded firearms in checked baggage.[7/] See 14 C.F.R. 108.11(c) and (d). Guns, even

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6/ My interpretation of the term "deadly or dangerous weapon", as used in section 901(d) of the Act, is consistent with United States v. Ware, in which the court discussed the meaning of that same phrase as it is used in the criminal penalty section of the Act, section 902(l), 49 U.S.C. App. 1472(l). United States v. Ware, 315 F. Supp. 1333 (W.D. Okla. 1970). In Ware, it was held that an unloaded firearm was a deadly and dangerous weapon because it could be used to hijack an aircraft. Id., at 1334-1335. The court in Ware explained that it was required to consider the entire context, recognizing that what might not be a dangerous weapon in one context could be in another context. Id., at 1334.

7/ Section 108.11(c) provides in pertinent part that "No certificate holder may knowingly permit any person to transport nor may any person transport or tender for transport, any . . . loaded firearm in checked baggage aboard an airplane." Section
(footnote 7 is continued)

inoperative guns, should not be carried in a person's carry-on baggage.

In cases such as this one, it is simply fortuitous that the gun actually is inoperative. Even an inoperative gun could be used to threaten a passenger or flight crewmember. As Complainant convincingly argues, if indeed such a gun was pointed at a passenger or flight crewmember, that person would not have the luxury of an opportunity to examine the gun closely to determine whether it was loaded or even capable of firing a projectile of any sort. Thus, unless a gun is obviously incapable of inflicting physical harm, even such an inoperative gun could be used to attempt to hijack an aircraft.[8/] Consequently, a holding that an inoperative gun may constitute a "deadly or dangerous weapon," as that term is used in section 901(d) of the Act, is justified based upon the need to protect the traveling public from the many serious dangers associated with aircraft hijacking.

Respondent has argued that not only was the gun which she was carrying inoperative, but indeed, she had forgotten that

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(footnote 7 continued)
108.11(d) provides in pertinent part, "No certificate holder may knowingly permit any person to transport nor may any person transport or tender for transport, any unloaded firearmm in checked baggage aboard an airplane unless . . ." certain requirements, such as packaging and notification requirements, are satisfied.

8/ Respondent did not testify that she knew the gun was inoperative. If the Waddell's gun fell into the "wrong hands," it is unknown whether that person would realize that the gun was inoperative.

she placed the gun in her bag and, clearly, she had no intention of using it. However, as I have previously ruled, intent to bring a gun on board an aircraft is not an element of a violation of either section 901(d), the civil penalty provision of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. 1471(d), or section 107.21 of the FAR. In the Matter of Schultz, FAA Order No. 89-0005 at 9-10 (November 13, 1989). Thus, intent to use the gun in a menacing fashion is certainly not an element of a violation of that statutory provision or that regulation.

I do not find that the Dishman decision[9/] is controlling here. In Dishman, the court was faced with a lower court finding that the appellant had violated section 902(l) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. 1472(l). Section 902(l) of the Act, then, as now, provided for criminal penalties. In interpreting the term "deadly or dangerous weapon" as used in section 902(l), the court explained that it was obliged to follow the principle of statutory construction that criminal statutes must be strictly construed against the government. Id., at 730. Based upon this premise, the court held that a starter pistol, which was not capable of shooting a projectile, was not a deadly or dangerous weapon under section 902(l). The court reached this

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9/ United States v. Dishman, 486 F.2d 727 (9th Cir. 1973).

conclusion because the starter pistol was not factually intended to inflict serious bodily injury and was not readily altered to cause harm. Id., at 730-32. I find that such a narrow interpretation of the term "deadly or dangerous weapon" is not required to be extended to that same term in section 901(d), because criminal penalties are not involved. Moreover,the court in Dishman failed to consider the special problems associated with firearms in the aviation context.

Despite my interpretation of the term "deadly or dangerous weapon," I am compelled to rule against Complainant in this particular case because Complainant failed to satisfy its burden of proof. 14 C.F.R. 13.224. Guns are presumptively deadly or dangerous weapons under section 901(d) of the Act and those sections of the FAR in which that term is used. Therefore, ordinarily, Complainant could sustain its burden of proof on the issue of whether the gun is deadly or dangerous simply by introducing evidence that a gun was found. However, once a respondent rebuts the presumption that the gun is actually capable of firing, then it becomes necessary for Complainant to prove that the gun either is capable of firing or that it at least appears to be operative.

In this case, the testimony of Mr. Waddell and the affidavit of Mr. Sher sufficed to rebut the presumption that the gun actually was deadly or dangerous. Consequently, Complainant was obligated either to refute Respondent's evidence that the gun was inoperative or to demonstrate that

the gun at least appeared menacing enough to be considered deadly or dangerous. Complainant failed to do so. Complainant neither contested Respondent's position that it was an inoperative weapon nor introduced any evidence that it could appear capable of firing to a reasonable person and, therefore, could be used in an attempt to hijack an aircraft.[10/] Indeed, Complainant's only witness had never seen the weapon and merely testified it would be impossible to determine whether a hypothetical firearm was loaded or could fire. No evidence offered by Complainant suggested that this particular weapon was dangerous, appeared to be dangerous, or was otherwise likely to be regarded as dangerous. Consequently, solely on the basis of a failure of proof, and not because I condone the conduct of Respondent, I must reverse the oral initial decision of the law judge in this matter.

THEREFORE, it is ordered that the oral initial decision of the administrative law judge is reversed in accordance with the reasons set forth above.

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 11th day of October, 1990

10/ Neither party addressed the issue of whether this gun could be used as a bludgeon or should be considered to meet the statutory requirement because it could be used as a bludgeon. Hence, I have not considered that possibility.