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

Served: November 7, 1990

FAA Order No. 90-37

In the Matter of:	
NORTHWEST AIRLINES, INC.	Docket No. CP89AL0291

DECISION AND ORDER

Respondent Northwest Airlines ("Respondent") has appealed from the oral initial decision[1/] issued by Administrative Law Judge Burton S. Kolko at the conclusion of the hearing held in this matter on February 1, 1990 in Seattle, Washington.[2/] In his decision, the law judge held that Respondent violated section 108.13(a) of the Federal Aviation

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1/ An excerpt of the transcript containing the law judge's decision is attached.

2/ Portions of this decision have been redacted for security reasons, pursuant to 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 (SSP), all of whom have been given unredacted copies in addition to redacted copies.

Neither party in this matter moved for the hearing record to be closed. Agency counsel must be alert to the need for protective measures to prevent the release of security information which, under Part 191, must not be made public. By separate action, I am closing the record of this case.

Regulations (FAR), 14 C.F.R. 108.13(a).[3/] The law judge sustained the $10,000 civil penalty sought in the complaint. After consideration of Respondent's arguments on appeal, I deny Respondent's appeal and affirm the decision of the law judge.

Complainant introduced the testimony of one witness, , a Civil Aviation Security special agent, and two exhibits: a) the Complaint and the Answer (Exhibit C-1), and b) an excerpt from Appendix 4, the Enforcement Sanction Guidance Table of FAA Order 2150.3A, Compliance and Enforcement Program (Exhibit C-2). Respondent introduced no evidence.

The facts of this case are not in dispute. On October 8, 1988, Special Agent and another special agent checked the security measures at the air operations area (AOA) at Airport. They and, despite the fact that they were not

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3/ Section 108.13 of the FAR provides in pertinent part:

> Each certificate holder required to conduct screening under a security program shall use the procedures included, and the facilities and equipment described, in its approved security program to perform the following control functions with respect to each airplane operation for which screening is required:
>
> (a) Prohibit unauthorized access to the airplane.

4/ They entered an aircraft operated by Northwest Airlines, tail number N723RW, which was parked at of the Terminal.

Mr. and the other special agent did not see anyone near or attending the aircraft when they approached the aircraft or when they deplaned. After 10 minutes on board the aircraft, they walked over to Respondent's Operations Area and tapped on the window until someone inside opened the door.

Special Agent testified that the FAR and the air carrier security plan require they are on the AOA. Respondent's Air Carrier Security Program provides:

Special Agent testified that

That is necessary, he explained, to prevent "sabotage, bombs,

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4/ Respondent was not charged with any violation relating to the fact that no one challenged them.

stowaways, damage to the aircraft, safety hazard." In addition, this requirement is intended to prevent unauthorized people from getting on board and "playing with the aircfaft," (e.g., taxiing the aircraft).

On cross-examination, Special Agent also testified that the airport operator is responsible for operating the manned security checkpoint on the perimeter of the AOA, and that the other agent and he passed by that security checkpoint without the security guard detecting them.

According to Exhibit C-2, Appendix 4, the Enforcement Sanction Guidance Table, the maximum civil penalty for violations committed by air carriers on or after December 31, 1987 ranges from $7,500 to $10,000 per violation. It is provided further in the Enforcement Sanction Guidance Table that a civil penalty within the maximum civil penalty range should be imposed for failures to comply with an air carrier security program.

The law judge found that Complainant had established the violation as alleged in the Complaint. The law judge stated in his decision:

> The FAA Guidelines, which its own people are obliged to follow, call for a maximum rate of $7,500 to $10,000. I am not obliged to follow that but I am asked by the Rules of Practice to defer to the requested sanction unless there are some equitable reasons for doing otherwise. It is tempting to lop a little something off the maximum because of the fact that the Airport Authority wasn't doing its job but . . . there was culpability, either inadvertent or otherwise on Northwest's part, . . . and it is just in these circumstances where something terrible could happen, when various lines of defense are breached so I don't know, that while it's tempting to give Northwest a little aid

> and comfort from the dereliction of the Airport Authority I really am not inclined to do so because nevertheless we have a very clearly accessible aircraft that . . . it could be an access (sic) for far more than ten minutes and who knows what that could have resulted in, even though the aircraft was subject to a subsequent inspection by Ground Services and walk-around by Flight Personnel.

(TR-37-38).

Respondent first contends on appeal that the Rules of Practice governing civil penalty proceedings violate the FAA's enabling act, the Administrative Procedure Act (APA) and the concepts of due process and equal protection of the law. In support of this position, Respondent states that it is incorporating by reference the arguments presented by the petitioner in Air Transport Association of America v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990). Respondent argues next that Complainant failed to prove by the preponderance of the evidence, as required by the Rules of Practice, that the $10,000 civil penalty assessed against Respondent is appropriate. Respondent contends that Complainant was obligated under section 901(a)(1) of the Federal Aviation Act, as amended, 49 U.S.C. App. 1471(a)(1), to prove that the imposition of a $10,000 civil penalty is supported by the nature, circumstances, extent, and gravity of the violation committed by Respondent, along with Respondent's degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. Respondent also states that the Enforcement Sanction Guidance

Table does not suffice to prove the appropriateness of the civil penalty imposed in this matter.[5/]

In reply, Complainant argues that in other decisions the Administrator rejected the argument that the Rules of Practice violate the FAA's enabling act, the APA, and concepts of due process and equal protection. In addition, Complainant notes, the Rules of Practice in effect at the time that Respondent submitted its brief were held to be invalid in Air Transport Association, supra, and that since that time the FAA has promulgated new rules of practice.

With regard to Respondent's second argument, Complainant argues that it met its burden of proof that the $10,000 civil penalty is appropriate. According to Complainant, those factors enumerated in section 901(a) of the Federal Aviation Act apply only to penalties assessed under the Hazardous Materials Transportation Act. Complainant asserts that it has met its burden of proof as long as it demonstrates that the sanction is appropriate in light of factors such as the FAA's enforcement policy and the nature of the case. Complainant argues further that it met its burden of proof through the introduction of the relevant portion of the Enforcement Sanction Guidance Table and the testimony of Special Agent

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5/ Respondent also argued that due to Complainant's failure of proof, the law judge lacked the authority to issue the Order Assessing Civil Penalty.

1. Do the Rules of Practice violate the Federal Aviation Act of 1958, as amended, the APA, and the concepts of due process and equal protection?

I haye declined previously to resolve this issue when it was raised in In the Matter of Continental Airlines, Inc., FAA Order No. 90-0012 (April 25, 1990). As was explained in that decision, where, as here, the respondent challenged the validity of the Rules, without demonstrating how any particular rule(s) prejudiced the respondent, it would be an inappropriate exercise of my decisionmaking authority to rule in a civil penalty proceeding on the validity of rules not implicated in that case. Id., at 6. In addition, as I previously noted, the Federal Courts of Appeals constitute a more appropriate forum to attack existing administrative regulations as inconsistent with the U.S. Constitution, the APA, and the agency's enabling act. Id., at 6-7.

2. Did Complainant prove by the preponderance of the evidence that the $10,000 civil penalty is appropriate?

I find that Complainant proved by the preponderance of the evidence that the $10,000 civil penalty is appropriate. Complainant sustained its burden of proof regarding the appropriateness of the $10,000 civil penalty by introducing the testimony of Special Agent Special Agent testified that the aircraft must be

for the following reasons:

> Well quite a few different reasons. One is to prevent unauthorized people from getting on the aircraft. There are many reasons for that, such as sabotage, bombs, stowaways, damage to the aircraft, safety hazard. You certainly wouldn't want somebody playing with the aircraft and perhaps trying to taxi it or whatever. That's the whole purpose of it, to keep unauthorized people off the airplane.

I agree with the law judge that such a serious breach in security by Respondent warrants a civil penalty of $10,000, which is the maximum civil penalty that Congress has authorized me to impose in such cases. 49 U.S.C. App. 1471(a)(1). I am following the policy set forth in Appendix 4 of FAA Order 2150.3A, the Enforcement Sanction Guidance Table, in which the maximum civil penalty range ($7,500 to $10,000) is prescribed for such a violation.

Order 2150.3A was "prepared to provide compliance and enforcement program and procedural guidance for all agency personnel." Order 2150.3A at page i. Because the law judges who preside over these cases are not FAA personnel, they are not expressly required by the provisions of that order to follow its guidance. Nonetheless, concerning matters of agency law and policy, administrative law judges are subject to the agency. As was explained in one case:

> On matters of law and policy . . ., ALJ's are entirely subject to the agency. E.g., D'Amico v. Schweiker, 698 F.2d 903, 907 (7th Cir. 1983); See Scalia, The ALJ - A Reprise, 47 U. Chi. L. Rev. 57, 62 (1980). Although an ALJ may dispute the validity of agency policy, the agency may impose its policy through the administrative appeals process.

Association of Administrative Law Judges v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984).[6/] The Administrative Procedure Act provides for review on appeal of the decisions of law judges and that when an agency reviews the initial decision of a law judge, "the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. 557(b). See Universal Camera Corp. v. NLRB, 340 U.S. 474, 494-95 & n.27 (1951) for a discussion of the relationship upon appeal of the hearing examiner (now called administrative law judge) and the agency.

The Enforcement Sanction Guidance Table is an appendix to FAA Order 2150.3A, which was signed by the Administrator of the Federal Aviation Administration. It represents the policy of the agency. Thus, in light of the foregoing, I am

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6/ As the FAA mentioned in the preamble to the Rules of Practice published in April, 1990:

> Indeed, it is incumbent even on administrative law judges to apply faithfully the law and policy set forth as agency policy by the head of the agency. As Professor Bruff states, "Everyone agrees that [administrative law judges] must follow their agency's regulations and published policies as well as the statutes and caselaw." "Restructuring Judicial Review in Administrative Law," at 22 (September 1, 1989)(draft report prepared for Federal Courts Study Committee and the Administrative Conference). . . . So it hardly seems unfair to the respondent that the head of the agency, on review of an administrative law judge's initial decision, applies that law or policy.

55 Fed. Reg. 15110, 15114 (April 20, 1990).

not precluded from reversing on appeal a law judge's decision regarding the issue of what is the appropriate sanction when the law judge's decision differs from the policy expressed in Order 2150.3A.7/

Respondent argues that pursuant to section 901(a) of the Act, 49 U.S.C. App. 1471(a), Complainant bears the burden of proving that the sanction is appropriate in light of the "nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." Respondent argues further that Complainant failed to sustain this burden of proof.

Respondent's argument is based upon its misinterpretation of Section 901(a)(1) of the Act, which provides in pertinent part:

7/ When reversing a decision of the ALJ, I will present a reasoned explanation for my action. This statement is consistent with case law pertaining to the power of the full NTSB to reverse the decision of one of its law judges.

> The NTSB's reversal [of the decision of a law judge], however, is vulnerable only if it fails to reflect attentive consideration of the ALJ's decision. However, the reversal can be upheld if the NTSB presents a reasoned explanation. . . . [I]n the last analysis, it is the NTSB's function, not the ALJ's, to render the ultimate decision, and where, as here, there is substantial evidence supporting the result, it is the NTSB's choice which governs.

Dodson v. NTSB, 644 F.2d 647, 650-651 (7th Cir. 1981) (citations omitted).

> The amount of any such civil penalty which relates to the transportation of hazardous materials shall be assessed by the Secretary or his delegate, upon written notice upon a finding of violation by the Secretary, after notice and an opportunity for a hearing. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

49 U.S.C. App. 1471(a)(1).[8/]

Congress added this language to section 901(a)(1) of the Federal Aviation Act in 1975 with the passage of the Hazardous Materials Transportation Act. See Sections 110(a)(1) and 113(b)(2) of the Hazardous Materials Transportation Act, Pub. L. No. 93-633, 88 Stat. 2156, 2160-62. Congress did not alter that particular language in section 901(a)(1) when it passed the Airport and Airway Safety and Capacity Expansion Act, authorizing the FAA to assess civil penalties not exceeding $50,000 for violations of the Federal Aviation Act, or any rule, regulation or order issued thereunder. Pub. L. No. 100-223, 101 Stat. 1486, 1519-21. See H. Conf. Rept. No. 100-484, 100th Cong., 1st Sess. 80-81 (reprinted in 1987 U.S. Code Cong. & Ad. News

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8/ Pursuant to 49 U.S.C. 106(g), "[t]he Administrator of the FAA shall carry out the duties and powers of the Secretary related to aviation safety (except those related to transportation, packaging, marking, or description of hazardous materials)" including those powers vested in the Secretary in Title IX of the Federal Aviation Act, 49 U.S.C. App. 1471 et seq.

2630, 2630-2656). Thus, section 901(a)(1)'s specific considerations apply only to hazardous materials cases.[9/]

9/ Compare 14 C.F.R. 13.16(a)(1)-(3) with 14 C.F.R. 13.16(a)(4). Although Complainant is not obligated by statute to consider these factors when determining the amount of civil penalty for safety and security violations, agency counsel should take those factors into account as a matter of prosecutorial discretion. As was explained in the July 1990 preamble to the Rules of Practice in these cases:

> Since the FAA is required by statute to consider these criteria before issuing an order assessing a civil penalty for a violation of the Hazardous Materials Transportation Act and the implementing regulations, the agency believes that they should be set forth in the regulation. [14 C.F.R. 13.16]
>
> No such similar criteria are statutorily required to be considered for aviation safety and security violations under the Federal Aviation Act, as amended. However, as a matter of policy, the FAA has determined that similar criteria should be considered before assessing civil penalties against persons who violate the Federal Aviation Act or any rule, regulation, or order issued thereunder. The FAA believes that the criteria which are evaluated before a civil penalty is assessed under section 905 of the Federal Aviaiton Act of 1958, as amended, are more appropriately placed in agency orders, rather than in the regulations governing the initiation and hearing procedures of civil penalty actions . . . . Indeed, these factors presently are set forth in Order 2150.3A, which is available to the public.

55 Fed. Reg. 27548, 27569 (July 3, 1990). See Administrator v. Schultz, FAA Order No. 89-0005 at 12 (Nov. 13, 1989)(in which it was explained that "in the formulation of the Enforcement Sanction Guidance Table . . . the FAA considered the nature, circumstances, extent and gravity of each general type of violation as well as the individual's prior violation history . . . .")

This decision should not be read as requiring the prosecutor at a hazardous material case hearing to offer evidence on each of the specified considerations.

THEREFORE, in light of the foregoing, the law judge's decision is affirmed and Respondent's appeal is denied.[10/] A civil penalty in the amount of $10,000 is hereby assessed.[11/]

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 7th day of November, 1990.

10/ I have also considered whether any changes made in the Rules of Practice during the pendency of this case may have affected the result in this case, and have concluded that no change in the Rules is pertinent to this case. If Respondent believes that changes in the rules would have affected the outcome of this case, it may file a petition for reconsideration of this decision and order, pursuant to 14 C.F.R. 13.234. Such a petition for reconsideration must include a particularized showing of harm, citing the specific rule change (or changes) and its relevance to the challenged findings or conclusions. See 55 Fed. Reg. 15110, 15125 (April 20, 1990). Although the filing of a petition for reconsideration does not normally stay the effectiveness of the Administrator's decision and order, under these circumstances, if Respondent files such a petition I will stay the effectiveness of this decision and order pending disposition of the petition.

11/ Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described in the footnote above), or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. 1486), this decision shall be considered an order assessing civil penalty. See 55 Fed. Reg. 27574 and 27585 (July 3, 1990)(to be codified at 14 C.F.R. 13.16(b)(4) and 13.233(j)(2)).