

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 13**

[Docket No. 25690; Amdt. No. 13-23]

Rules of Practice for FAA Civil Penalty Actions**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Final rule.

SUMMARY: In a final rule issued in June 1990, the FAA revised the initiation procedures and the rules of practice for civil penalty actions brought under the agency's assessment authority. The revised procedures and rules were effective on August 2, 1990. In late July 1990, a commenter in the rulemaking proceedings submitted a letter to the FAA, noting what the commenter perceives to be errors or inconsistencies in the provisions of the final rule issued in June 1990. This final rule corrects two sections of the rules of practice in which changes were inadvertently omitted or material was unintentionally deleted when the rules were revised and republished. These corrections will ensure that the rules of practice accurately reflect the agency's intent in revising the rules and will promote clear understanding and consistent interpretation of the revised rules.

EFFECTIVE DATE: October 31, 1990.**FOR FURTHER INFORMATION CONTACT:**

Denise Daniels Ross, Special Counsel to the Chief Counsel (AGC-3), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3773.

SUPPLEMENTARY INFORMATION:**Availability of the Final Rule**

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center (APA-430), 800 Independence Avenue, SW., Washington, DC 20591; or by calling (202) 267-3484. Communications must identify the amendment number of this final rule. Persons interested in being placed on the mailing list for future notices of proposed rulemaking also should request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Background

In a notice of proposed rulemaking (NPRM) issued on April 17, 1990, the FAA solicited comment on the initiation

procedures and the rules of practice that apply to civil penalty actions (1) not exceeding \$50,000, for a violation of the Federal Aviation Act of 1958, or any rule, regulation, or order issued thereunder; and, (2) regardless of amount, for a violation of the Hazardous Materials Transportation Act, or any rule, regulation, or order issued thereunder. 55 FR 15134; April 20, 1990. On June 27, 1990, the FAA issued a final rule revising the initiation procedures and the rules of practice for civil penalty actions in response to the comments submitted to the NPRM. 55 FR 27548; July 3, 1990. The revised rules of practice were effective on August 2, 1990.

In a letter dated July 27, 1990, the Air Transport Association of America (ATA) suggests "technical corrections" to the final rule, and notes "several inconsistencies between the preamble and the final rule * * *." ATA cites four issues, some of which it characterizes as inadvertent omissions, and some of which it believes should be added to the rules of practice. Those issues are: (1) Failure to amend the text of § 13.219(d) to reflect the longer time provided to file an interlocutory appeal; (2) clarification of the appropriate document in which a respondent should express a preferred location for a hearing; (3) deletion of language in § 13.220(k) regarding "separate and complete" responses to interrogatories; and (4) inclusion of a general "defense of timeliness" based on prejudicial delay in the rules of practice so that respondents are aware of this defense. ATA suggests that the FAA publish a "notice of correction" in the *Federal Register* to address its concerns. ATA's request did not arrive sufficiently in advance of the effective date to review and analyze the need for changes to the rules and to prepare and issue an appropriate notice in the *Federal Register* before August 2, 1990. By this notice however, the FAA is amending the rules of practice to correct and clarify two sections in which intended changes either were inadvertently omitted or language was unintentionally deleted.

Discussion

1. *Interlocutory appeals.* ATA correctly notes that the revised text of § 13.219(d) fails to reflect expressly the extended time within which to file an interlocutory appeal, a change suggested by several commenters to the April 1990 NPRM and adopted by the FAA in the June 1990 final rule. The FAA is correcting that omission in the text of § 13.219(d) to ensure that the rule accurately reflects the 10-day period within which to file a notice of

interlocutory appeal and any supporting documents.

The agency's review of this section, prompted by ATA's request, highlights several other issues requiring clarification related to interlocutory appeals, issues not identified by ATA. Even as revised to reflect the increased time period, the first sentence of § 13.219(d) would read:

A party shall file a notice of interlocutory appeal, with supporting documents, with the FAA decisionmaker and the hearing docket clerk, and shall serve a copy of the notice and supporting documents on each party and the administrative law judge, not later than 10 days after the administrative law judge's decision forming the basis of the appeal.

The italicized language in this sentence describes accurately the procedure to file a notice and supporting documents in the case of an interlocutory appeal of right. Upon review, however, the FAA is concerned that this section does not adequately address the filing of an interlocutory appeal for cause, permitted only if an administrative law judge grants a party's request to file such an appeal. In the case of an interlocutory appeal for cause, an administrative law judge would need time to review a party's request submitted pursuant to § 13.219(b). A party also would need time to prepare a notice of interlocutory appeal and supporting documents (i.e., a brief in support) if the law judge grants the party's request. Although the arguments and any material submitted to the law judge may be very similar to the arguments prepared for the Administrator, the rule should not operate to truncate either the time provided to a party to prepare arguments or the time provided to a law judge to review such arguments.

Therefore, the FAA is amending the first sentence in § 13.219(d). The amendment will ensure that a party has the full 10-day period within which to file the required documents with the Administrator if an administrative law judge grants a request for leave to file an interlocutory appeal for cause. Section 13.219(d) is revised by adding the italicized language and, as revised, the first sentence reads as follows:

A party shall file a notice of interlocutory appeal, with supporting documents, with the FAA decisionmaker and the hearing docket clerk, and shall serve a copy of the notice and supporting documents on each party and the administrative law judge, not later than 10 days after the administrative law judge's decision forming the basis of an interlocutory appeal of right or not later than 10 days after the administrative law judge's decision granting an interlocutory appeal for cause, whichever is appropriate.

The agency's review of this section also discloses an inconsistency that should be corrected. The third sentence of § 13.219(d) states:

If the FAA decisionmaker does not issue a decision on the interlocutory appeal or does not seek additional information *within 10 days of the filing of the appeal*, the stay of the proceedings is dissolved."

That provision, which describes the amount of time within which the Administrator must review an interlocutory appeal and issue a decision on that appeal before an automatic stay of the proceedings is dissolved by operation of the rule, was originally promulgated to ensure that an interlocutory appeal is resolved with dispatch and without undue delay to the remainder of the proceedings. However, in light of the extended time period in which to file a notice of interlocutory appeal and supporting documents, the stay of the proceedings under this provision would likely be dissolved automatically before a reply brief would be filed. Increasing the time within which to file an interlocutory appeal brief was not intended to affect any rights of an opposing party to submit written argument or to alter any time period within which the Administrator must resolve an interlocutory appeal. So that the rule does not result in such adverse affects, the FAA is deleting the quoted sentence to eliminate the automatic dissolution of the stay of the proceedings while an interlocutory appeal is pending.

Although previous commenters did not focus specifically on this issue or any apparent inconsistency, automatic dissolution of a stay of the underlying proceedings does not appear to be warranted. Both § 13.219(b) (interlocutory appeals for cause) and § 13.219(c) (interlocutory appeals of right) provide for an absolute stay of the proceedings until the Administrator has issued a decision on the interlocutory appeal. Such a stay seems to be appropriate and necessary for at least two reasons: (1) It encourages swift resolution of issues that may result in dismissal of a case or may otherwise be critical for proper disposition of the case; and (2) it protects the parties from procedural default during the pendency of any interlocutory appeal.

Without correcting the third sentence of § 13.219(d), automatic dissolution of a stay could force the Administrator to issue a decision without the benefit of an opposing party's reply brief or could place the parties in technical noncompliance with some other rule requirement. Because these results were neither intended nor contemplated when

the rules were revised, the FAA believes that staying the underlying proceedings while an interlocutory appeal is pending is appropriate. A stay, without automatic dissolution by operation of the rule, serves the interests of both the adjudicators and the parties in these cases by conserving the resources of both the parties and adjudicators, and ensuring final resolution of an issue important enough to warrant interlocutory appeal. Therefore, rather than simply extending the time in which the stay would automatically dissolve to accommodate an extended briefing period, the FAA is deleting the third sentence in § 13.219(d). Thus, as revised, a law judge's decision granting a request for an interlocutory appeal for cause, or a party's filing an interlocutory appeal of right, will stay the proceedings until the Administrator issues a decision on the appeal. Because of the interests served by swift resolution of an interlocutory appeal and the automatic stay of the proceedings imposed by rule, the Administrator will act expeditiously to issue decisions on interlocutory appeals so as not to delay the underlying proceedings.

2. Interrogatories. The second issue ATA identifies for correction is § 13.220(k) regarding interrogatories and responses to interrogatories. ATA states that language requiring "separate and complete" responses to interrogatories "may have been inadvertently omitted along with the 'under the oath' language which was purposefully deleted." Because ATA states that it is aware of no previous objections to this language, and also believes that this language serves a "valid and useful" function, ATA urges the FAA to reinsert this language in the rule.

The FAA agrees that the omitted language assists the parties, both in responding to interrogatories and reviewing responses to interrogatories. Because this requirement serves the interests of the parties in full and complete discovery, the FAA is amending § 13.220(k). As revised by adding the italicized language, that section reads as follows:

(k) *Interrogatories.* A party, the party's attorney, or the party's representative may sign the party's responses to interrogatories. *A party shall answer each interrogatory separately and completely in writing.* If a party objects to an interrogatory, the party shall state the objection and the reasons for the objection. An opposing party may use any part or all of a party's responses to interrogatories at a hearing authorized under this subpart to the extent that the response is relevant, material, and not repetitious.

Although not specifically raised by ATA in its letter, the FAA assumes that ATA

and other commenters do not object to the requirement that interrogatory responses be made "in writing." So what seems to be the commenters' preference is reflected in the rule, the FAA is merely reinserting the sentence as it was promulgated in September 1988, omitting only the language "and under oath" as suggested by previous commenters and discussed in the June 1990 final rule.

3. Location of hearings. ATA believes that it is "appropriate and reasonable" for a respondent to suggest a location for a hearing when filing the answer to a complaint. In ATA's opinion, a respondent should not be required to suggest a location until after the specific factual allegations have "finally" been determined by the FAA in its complaint. In ATA's opinion, the allegations as stated in the complaint will "most likely suggest what location is most appropriate from the respondent's perspective."

In response to the agency's April 1990 NPRM, ATA objected to any involvement by the docket clerk in determining the location for a hearing and suggested revision to the rules of practice; the FAA adopted ATA's suggested revisions in the June 1990 final rule. ATA's current concern arises because the discussion of the revisions in the preamble to the June 1990 final rule referred to this issue in the context of filing a request for a hearing. ATA correctly notes, however, that § 13.16(f) of the initiation procedures does not impose such a requirement at that point in the proceedings. ATA does not suggest any revision or correction to the initiation procedures or the rules of practice in this regard, and none is required. The procedures and the rules, as revised in June 1990, accurately reflect the agency's intent with respect to a party's suggestion of a hearing location and the law judge's selection of an appropriate location.

Notwithstanding the preamble's statement that a respondent is "required" to include a suggested location when filing a request for a hearing, a respondent is obligated to comply only with the initiation procedures and other procedures contained in the rules of practice, not a discussion in the preamble.

That is not to say, however, that a respondent is precluded from suggesting a desired hearing location in a request for a hearing. ATA believes that a law judge's "need to know the desires of the parties for hearing location does not arise until after a complaint and answer have been filed." However, it is possible that a respondent's interests would be well served by ensuring that the law

judge is aware at the earliest possible time of the hearing location preferred by the respondent. Such early notification also could assist the administrative law judge's expeditious scheduling of hearings.

Although ATA may prefer to wait until agency counsel has "finalized" the allegations by filing a complaint, the FAA does not believe that the complaint would be so drastically different from prior notices that it would significantly affect or alter a logical location for a hearing. The FAA also is not convinced that a respondent would gain any appreciable advantage by suggesting a hearing location in an answer rather than some document that may be filed earlier. Nevertheless, the initiation procedures and the rules of practice impose no contrary obligation and, so long as a respondent complies with the rules, the choice is left to the respondent.

4. *Prejudicial delay.* The final issue of concern to ATA is identified as the availability and codification of a "defense of timeliness." In both the April 1990 NPRM and the June 1990 final rule, the FAA expressed its view that a respondent's demonstration of actual prejudice resulting from unreasonable or excessive delay in initiation of a case could be asserted as a defense in an appropriate case.

ATA believes the agency's recognition of such a defense should be specifically referenced in the rules of practice. Failure to do so, in ATA's opinion, will make it "likely that a presumption of its unavailability will arise." ATA claims that the administrative law judges who hear these cases "may be likely to prohibit this defense from being raised as a matter of course absent its recognition" expressly in the rules of practice for civil penalty actions.

The FAA disagrees. The rules of practice governing proceedings before the National Transportation Safety Board (NTSB) do not contain a provision that codifies a "defense of timeliness" other than the "stale complaint" provisions in 49 CFR 821.33. Nevertheless, the NTSB has noted the potential availability of such a defense to respondents in certificate actions before the NTSB. For example, in *Administrator v. Shrader*, EA-3018 (October 16, 1989), the NTSB stated, *in dicta*, that even if the stale complaint rule does not apply, delay in prosecuting and enforcement action could warrant dismissal if the delay has demonstrably prejudiced a respondent's defense. *Shrader* at 7-8. The NTSB noted that a respondent may not simply claim that the passage of time has or may adversely affect preparation of a

defense; instead, a respondent must show that any delay " * * * significantly undermines, in a way that can be objectively identified, [a respondent's] ability to prepare a defense." *Id.*

The administrative law judges employed by the Department of Transportation and the Administrator clearly have similar authority to consider such a claim in defense of a civil penalty action, and the agency believes that the adjudicators will exercise that authority in appropriate cases. As evidence of this belief, a recent decision of the Administrator in a civil penalty case recognizes the availability of this defense in the agency's civil penalty actions. See *In the Matter of Carroll*, FAA Order No. 90-21 (August 16, 1990), in which the Administrator noted his willingness to consider such a defense in an appropriate case. Pursuant to § 13.233(j)(3), a final decision and order of the Administrator is precedent in any other civil penalty action. Thus, the Administrator's express recognition of the availability of this defense certainly provides notice of the availability of a "timeliness defense," the Administrator's willingness to apply it in appropriate cases, and the authority of administrative law judges to consider this defense if it is asserted by a respondent in a civil penalty case before them. ATA's assertion that the administrative law judges will be hostile to such a defense in an appropriate case, simply because the defense is not "codified" in the rules, is belied by the *Carroll* decision. Indeed, the administrative law judge in that case recognized the defense of prejudicial delay, even before the Administrator had expressly recognized it in a decision.

Publication and Effective Date of the Final Rule

This final rule makes minor corrections and clarifications to the final rule issued on June 27, 1990. The amendments will convey more accurately the agency's intent, as expressed in the June 1990 final rule, and will not place any new restriction or requirement on persons or entities involved in a civil penalty action. This notice makes only minor, technical corrections to the revised rules adopted in June 1990, on which public comment was solicited in notices issued in February 1990 and April 1990. For these reasons, and because an additional period for comment would unduly delay correction and clarification of the rules, the initiation of new cases, and continued processing of cases already initiated, the FAA finds that further

notice and opportunity for public comment under the Administrative Procedure Act (5 U.S.C. 553(b)) are unnecessary and contrary to the public interest.

It is important that these corrections and clarifications be issued and published as soon as possible so that the public is aware of the corrections. It also is important that these amendments be effective immediately to ensure that they are applied in new civil penalty actions initiated by the FAA and cases already initiated. The FAA also believes that these corrections will prevent public misunderstanding of procedural requirements, will ensure consistent interpretation of the rules, and will conserve the resources of the parties and the adjudicators in civil penalty actions initiated pursuant to the agency's assessment authority. Accordingly, the FAA finds that good cause exists to make these amendments effective less than 30 days after publication in the *Federal Register*.

Regulatory Evaluation

The FAA has determined that this final rule is not a major action under the criteria of Executive Order 12291; thus, the FAA is not required to prepare a regulatory impact analysis under either the Executive Order or the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979). In nonmajor rulemaking actions, procedures of the Department of Transportation require the FAA to analyze the economic consequences of regulations and quantify, to the extent practicable, the estimated costs and anticipated benefits and impacts of the regulations. The FAA discussed its analysis and evaluation of changes to the rules of practice adopted in June 1990. In that final rule document, the FAA concluded that the agency was not required to prepare a full regulatory evaluation of the changes because neither the commenters nor the FAA identified any specific economic consequences attributable to the revisions. 55 FR at 27573. This final rule makes only technical changes and minor corrections to two sections of the rules of practice that were revised in June 1990, actions that do not impose new obligations and do not result in any costs or appreciable benefits for respondents in civil penalty actions. For these reasons, the FAA has determined that preparation of a full regulatory evaluation is not required and revision of the analysis set forth in the June 1990 final rule is not necessary.

Conclusion

For the reasons stated above, the FAA has determined that this notice is not a major action under the criteria of Executive Order 12291 and is not a significant rule under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979). The FAA also has determined that this action does not warrant preparation of a regulatory evaluation, or revision of the evaluation previously set forth, because the action will have no impact on, or economic consequences to, persons or entities involved in civil penalty actions initiated pursuant to the agency's general assessment authority.

For the same reasons, the FAA certifies that the corrections noted herein will not have a significant economic impact, positive or negative, on a substantial number of small entities, as those terms are defined in the Regulatory Flexibility Act of 1980. There also will be no impact on trade opportunities for U.S. firms operating outside the United States or foreign firms operating within the United States. Moreover, these corrections will not have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the FAA has determined that these amendments do not have sufficient Federalism implication to warrant preparation of a Federalism assessment.

List of Subjects in 14 CFR Part 13

Enforcement procedures,
Investigations, Penalties.

The Amendments

Accordingly, the FAA amends part 13 of the Federal Aviation Regulations (14 CFR part 13) as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

1. The authority citation for part 13 continues to read as follows:

Authority: 49 U.S.C. App. 1354 (a) and (c), 1374(d), 1401-1406, 1421-1428, 1471, 1475, 1481, 1482 (a), (b), and (c), and 1484-1489, 1523 (Federal Aviation Act of 1958) (as amended, 49 U.S.C. App. 1471(a)(3) (Federal Aviation Administration Drug Enforcement Assistance Act of 1988); 49 U.S.C. App. 1475 (Airport and Airway Safety and Capacity Expansion Act of 1987); 49 U.S.C. App. 1555(c) (Department of Transportation Act, as revised 49 U.S.C. 106(g)); 49 U.S.C. 1727 and 1730 (Airport and Airway Development Act of 1970); 49 U.S.C. 1808, 1809, and 1810 (Hazardous Materials Transportation Act); 49 U.S.C. 2218 and 2219 (Airport and Airway Improvement Act of 1982); 49 U.S.C. 2201 (as amended, 49 U.S.C. App. 2218, Airport and Airway Safety and Capacity Expansion Act of 1987); 18 U.S.C. 6002 and 6004 (Organized Crime Control Act of 1970); 49 CFR § 1.47 (f), (k), and (q) (Regulations of the Office of the Secretary of Transportation).

2. Section 13.219 is amended by revising paragraph (d) to read as follows:

§ 13.219 Interlocutory appeals.

(d) *Procedure.* A party shall file a notice of interlocutory appeal, with supporting documents, with the FAA decisionmaker and the hearing docket clerk, and shall serve a copy of the notice and supporting documents on each party and the administrative law judge, not later than 10 days after the administrative law judge's decision

forming the basis of an interlocutory appeal of right or not later than 10 days after the administrative law judge's decision granting an interlocutory appeal for cause, whichever is appropriate. A party shall file a reply brief, if any, with the FAA decisionmaker and serve a copy of the reply brief on each party, not later than 10 days after service of the appeal brief. The FAA decisionmaker shall render a decision on the interlocutory appeal, on the record and as a part of the decision in the proceedings, within a reasonable time after receipt of the interlocutory appeal.

3. Section 13.220 is amended by revising paragraph (k) to read as follows:

§ 13.220 Discovery.

(k) *Interrogatories.* A party, the party's attorney, or the party's representative may sign the party's responses to interrogatories. A party shall answer each interrogatory separately and completely in writing. If a party objects to an interrogatory, the party shall state the objection and the reasons for the objection. An opposing party may use any part or all of a party's responses to interrogatories at a hearing authorized under this subpart to the extent that the response is relevant, material, and not repetitious.

Issued in Washington, DC, on October 26, 1990.

James B. Busey,
Administrator.

[FR Doc. 90-25761 Filed 10-30-90; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Index of Administrator's Decisions and Orders in Civil Penalty Actions; Publication

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of publication.

SUMMARY: This notice constitutes the required publication of an index of the Administrator's decisions and orders in civil penalty cases. The FAA is publishing an index by order number, a subject-matter index, and case digests that contain identifying information about the final decisions and orders issued by the Administrator. These indexes and digests will increase the public's awareness of the Administrator's decisions and orders and will assist litigants and practitioners in their research and review of decisions and orders that may have precedential value in a particular civil penalty action. Publication of the index by order number ensures that the agency is in compliance with statutory indexing requirements.

FOR FURTHER INFORMATION CONTACT:

James S. Dillman, Assistant Chief Counsel for Litigation (AGC-400), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3661.

SUPPLEMENTARY INFORMATION: In section 905 of the Federal Aviation Act, Congress authorized the Administrator of the Federal Aviation Administration (FAA) to assess civil penalties not to exceed \$50,000 for violations of the Federal Aviation Act, or any rule, regulation, or order issued thereunder, after written notice and finding of violation by the Administrator. 49 U.S.C. app. 1475. As extended, this civil penalty assessment authority is effective through July 1992. Under the rules of practice governing hearings and appeals of civil penalty actions (14 CFR part 13, subpart G), the Administrator, or his

delegate, is designated as the FAA decisionmaker to review and decide appeals of initial decisions issued by administrative law judges who hold adjudicatory hearings in these civil penalty actions. The Administrator, as the decisionmaker, issues the final decisions and order of the agency in those cases.

In the Federal Aviation Administration Drug Enforcement Assistance Act of 1988, Congress extended the Administrator's authority in section 901 to include the assessment of civil penalties, not to exceed \$50,000, in the case of aircraft registration and recordation violations related to drug trafficking. 49 U.S.C. app. 1471(a)(3). This civil penalty assessment authority is identical to the authority under section 905 except that it is permanent. In addition, the Administrator is authorized to initiate and assess civil penalties, regardless of amount, for violations of the Hazardous Materials Transportation Act. 49 U.S.C. 1809. This assessment authority is also permanent.

Under the Administrative Procedure Act, Federal agencies are required to make available for public inspection and copying, or publish and offer for sale, certain specified materials, including all "final opinions and orders made in the adjudication of cases." 5 U.S.C. 552(a)(2)(A). In a notice issued on May 1, 1990, and published in the *Federal Register*, the FAA announced the public availability of the Administrator's final decisions and orders in civil penalty cases. See 55 FR 18430-18431; May 2, 1990.

The Administrative Procedure Act also requires Federal agencies to maintain and make available for public inspection and copying current indexes that contain identifying information as to those materials required to be made available or published. 5 U.S.C. 552(a)(2). In a notice issued on July 11, 1990, and published in the *Federal Register*, the FAA announced the public availability of several indexes and summaries that provide identifying information about the final decisions and orders issued by the Administrator

in civil penalty actions. See 55 FR 29148; July 17, 1990. As described in that notice, and in accordance with the indexing requirements of the Administrative Procedure Act, the FAA maintains an index of the Administrator's decisions and orders, with identifying information about each decision or order, organized by order number. (The alphabetical arrangement of this index, which was made available in connection with the notice published in the *Federal Register* on July 17, 1990, is being discontinued as repetitive.) The FAA also maintains a subject-matter index, and digests of the Administrator's final decisions and orders in civil penalty cases. As noted at the beginning of each of these documents, *these indexes and digests do not constitute legal authority, and should not be cited or relied upon as such. The indexes and digests are not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.*

The index arranged by order number lists the service date, the name and docket number of the case, and the regulations that were discussed in the Administrator's final decision and order. That index, which appears in full below, lists all final decisions and orders issued by the Administrator through September 30, 1990. The FAA will publish noncumulative supplements to this index on a quarterly basis (e.g., in October, January, April, and July of each year).

Civil Penalty Actions—Decisions Issued by Administrator, Index by Order Number (Current as of September 30, 1990)

This index does not constitute legal authority, and should not be cited or relied upon as such. This index is not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.

Order No. (service date)	Name and docket No.	Regulations discussed in 14 CFR
89-0001 (11/13/89)	Humbert L. Gressani, CP89NE0103	13.233(c); 13.233(d)(2).
89-0002 (11/13/89)	Gail M. Lincoln-Walker, CP89NM0017	
89-0003 (11/13/89)	Steven G. Sittko, CP89NM0013	
89-0004 (11/13/89)	Richard Willford Metz, CP89CE0003	13.233(d)(1).
89-0005 (11/13/89)	Charles A. Schultz, CP89NM0092	13.232; 13.233(f); 107.21(a)(1).
89-0006 (12/21/89)	American Airlines, CP89GL0118, CP89GL0120, CP89GL0127, CP89GL0128	13.202; 13.211(e); 13.218; 13.219(b); 13.220(d).
89-0007 (12/21/89)	Betty A. Zenkner, CP89NM0068	13.211(e); 13.233(d).
89-0008 (12/22/89)	Thunderbird Accessories, CP89SW0251	13.233(c)
90-0001 (1/19/90)	Robert J. Jibben, CP89CE0192	
90-0002 (1/19/90)	Clifford B. Smith, CP89CE0247	
90-0003 (1/29/90)	Richard Willford Metz, CP89CE0003	13.209; 13.211(e); 13.233(a).

Order No. (service date)	Name and docket No.	Regulations discussed in 14 CFR
90-0004 (1/19/90)	Richard C. Nordrum, CP89GL0109	
90-0005 (1/19/90)	Hy C. Sussman, CP89SO0210	
90-0006 (2/16/90)	Peter M. Dabaghian, CP89WP0277	
90-0007 (2/16/90)	Darnita Lynn Steele, CP89SO0320	
90-0008 (2/16/90)	Jack L. Jenkins, CP89SO0173	
90-0009 (2/16/90)	Jessica S. Van Zandt, CP89WP0083	
90-0010 (3/19/90)	Merlin R. Webb, CP89WP0141	107.21(a)(1).
90-0011 (3/19/90)	Thunderbird Accessories, CP89SW0251	13.211(e); 13.212; 13.219; 13.233; 13.235; 43.13(a); 145.53; 145.61.
90-0012 (4/25/90)	Continental Airlines, CP89NE0031	13.201(a)(1); 13.203; 108.5(a); 108.5(b); 108.13; 121.367(a); Part 191.
90-0013 (3/14/90)	Tamara Ann O'Dell, CP89SW0172	
90-0014 (3/14/90)	Royce L. Miller, CP89CE0371	
90-0015 (3/19/90)	Budde Playter, CP89GL0257	13.209; 13.235; 91.9; 91.79.
90-0016 (4/5/90)	Rocky Mtn. Helicopter, CP89SO0498	13.16.
90-0017 (4/9/90)	Ernest Wilson, CP90SW0166, EAJA90SW0001	13.235; 14.05(e).
90-18 (8/22/90)	Continental Airlines, CP89NE0036	108.5(a); 108.7; 121.133(a).
90-20 (8/16/90)	Paul Degenhardt, CP89CE0389	13.205(a)(9); 13.232; 13.233; 107.1(b)(5); 107.21(a).
90-21 (8/16/90)	John J. Carroll, CP89NE0285	13.203; 13.208(d); 13.220(1)(3); 13.227; 135.87.
90-22 (8/16/90)	USAir, CP89SP0497	13.16(d); 13.16(e); 13.16(j)(2); 302.8(c).
90-23 (9/14/90)	Gordon B. Broyles, CP89SW0214	107.21(a); 108.11(c).
90-24 (9/14/90)	Marcia Bayer, CP89SO0130	107.20.
90-25 (9/14/90)	Lucious L. Gabbert, CP89WP0287	13.233(f); 43.15(a).
90-28 (9/25/90)	Frank Puleo, Jr., CP89SO0397	
90-29 (9/25/90)	John C. Sealander, CP89SO0473	
90-30 (9/27/90)	John A. Steidinger, CP89NE0267	

The subject-matter index arranges final decisions and orders (identified by name and order number) by subject matter. Many decisions are listed under more than one subject heading or subheading. The subject-matter index, which appears in full below, is current as of September 30, 1990. The FAA will update and republish this index in full on a quarterly basis (e.g., in October, January, April, and July of each year).

Civil Penalty Actions—Decisions Issued by the Administrator, Subject Matter Index (Current as of September 30, 1990)

This index does not constitute legal authority, and should not be cited or relied upon as such. This index is not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.

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The digests of the Administrator's final decisions and orders are arranged by order number, and briefly summarize key points of the decision. The following compilation of digests includes all final decisions and orders issued by the Administrator as of September 30, 1990. The FAA will publish noncumulative supplements to this compilation on a quarterly basis (e.g., in October, January, April, and July of each year).

Civil Penalty Case Decisions Digests (Current as of September 30, 1990)

These digests do not constitute legal authority, and should not be cited or relied upon as such. These digests are not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.

FAA v. Humbert L. Gressani, Order No. 89-0001 (11/13/89)

Failure to Perfect Appeal. Respondent failed to perfect appeal within the 50-day time period after entry of the ALJ's oral initial decision. The Administrator dismissed Complainant's appeal.

FAA v. Gail M. Lincoln-Walker, Order No. 89-0002 (11/13/89)

Withdrawal of Appeal. Complainant withdrew notice of appeal from an Order Assessing Civil Penalty recited in the initial decision issued by the ALJ at the conclusion of the hearing. The Administrator dismissed Complainant's appeal.

FAA v. Steve G. Sittoko, Order No. 89-0003 (11/13/89)

Withdrawal of Appeal. Complainant withdrew notice of appeal from an Order Assessing Civil Penalty recited in the initial decision issued by the ALJ at

the conclusion of the hearing. The Administrator dismissed Complainant's appeal.

FAA v. Richard Willford Metz, Order No. 89-0004 (11/13/89)

Appeal Brief. The Administrator determined that Respondent's letter of July 28, 1989, satisfied the requirements for an appeal brief. Respondent's letter shall be regarded as both notice of appeal and a brief on the merits. FAA counsel is ordered to respond to Respondent's brief within 30 days of issuance of Order.

FAA v. Charles A. Schultz, Order No. 89-0005 (11/13/89)

Respondent appealed the ALJ's decision arguing that FAA did not prove that he had knowledge of the presence of the revolver in his carry-on baggage; that the judge erred in finding that the weapon was "concealed" because Respondent had not knowingly or intentionally concealed it, and that the penalty assessed is excessive.

Intent to carry a weapon. The Administrator affirmed the ALJ's decision on all counts. He said that Respondent should have known that he was carrying a personal firearm when he attempted to board a flight; that the FAA did not have to have proof of Respondent's intent to carry the weapon on an aircraft because it is not a required element of a violation of section 901(d) of the Act (49 U.S.C. 1471(d)), or of § 107.21(a)(1) of the FAR.

Sanction. The Administrator held that the \$2000 civil penalty should not be further reduced. Respondent has not argued that he lack the ability to pay the penalty, the only relevant factor not considered by the ALJ.

FAA v. American Airlines, Inc., Order No. 89-0006 (12/21/89)

Respondent filed an interlocutory appeal from the written decision of the Administrative Law Judge (ALJ) issued denying Respondent's Motion to Compel. The ALJ held that Complainant's responses to Respondent's discovery requests were timely filed. He held that the information Respondent seeks pertaining to whether Complainant complied with its internal procedures is irrelevant to the matters alleged in the complaint and that the information is protected from discovery by the deliberative process privilege.

Interlocutory Appeals, in General. Generally speaking, law judges should not permit interlocutory appeals to resolve discovery matters.

Timeliness of Discovery Responses. The Administrator held that Complainant's responses to Respondent's discovery requests were untimely. But Administrator held that FAA did not thereby waive its right to object. Although that sanction is sometimes imposed by Federal courts, the Administrator is not bound by Federal Rules of Civil Procedure. Also, Respondent did not argue that it has been prejudiced.

Relevance of Discovery Request. The Administrator agreed with the ALJ that internal deliberations of employees of the FAA pertaining to the selection of the sanction are irrelevant and that information sought by Respondent regarding internal deliberation is protected from discovery by the deliberative process privilege. That privilege was not overcome here by a showing that Respondent's need for disclosure outweighs the harm that could result from disclosure.

Completeness of Responses. Since the ALJ did not rule on the issue of the completeness of the Complainant's responses to Respondent's discovery request, he remanded the case to the ALJ for findings on that issue.

FAA v. Betty A. Zenkner, Order No. 89-0007 (12/21/89)

Failure to Perfect Appeal. Respondent filed a notice of appeal from an Order Assessing Civil Penalty recited in the oral initial decision of the Administrative Law Judge. At Respondent's request, a 20-day extension of time was granted. The Administrator dismissed Respondent's appeal for failure to file brief within the extended filing period.

FAA v. Thunderbird Accessories, Inc., Order No. 89-0008 (12/22/89)

"Good Cause" for Extension of Time. Respondent requested an extension of time in which to file its appeal brief from the initial oral decision of the Administrative Law Judge (ALJ).

Respondent states that the extension is necessary because Complainant has failed to provide color copies of photographs introduced into evidence at the hearing. Complainant opposed Respondent's request stating that Respondent should not have waited until one week before its brief was due before realizing that more information was needed to prepare its brief. Complainant failed to agree or disagree with Respondent's assertion that the ALJ had ordered the production of the color photographs. The Administrator granted Respondent's 10-day extension of time to file its appeal brief based on the "weak showing of good cause", but

warned that a stronger showing may be required in the future.

FAA v. Robert J. Jibben, Order No. 90-0001 (01/19/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal from an Order Assessing Civil Penalty recited in the initial decision at the conclusion of the hearing. The Administrator dismissed Complainant's appeal.

FAA v. Clifford B. Smith, Order No. 90-0002 (01/19/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal from the Order Assessing Civil Penalty recited in the initial decision at the conclusion of the hearing. The Administrator dismissed Complainant's appeal.

FAA v. Richard Willford Metz, Order No. 90-0003 (01/29/90)

Administrator issued a previous order ordering Complainant to respond to Respondent's letter of July 28, 1989, which he determined satisfied the requirements for an appeal brief. Complainant filed a Motion for Reconsideration of the Decisionmaker's Order, or in the Alternative, Reply Brief. Complainant argues that Respondent's appeal was not timely and should be dismissed and that Respondent never filed an Answer to the Order of Civil Penalty and has never explained the reason for this failure.

Untimely Notice of Appeal. Administrator determined that Respondent's notice of appeal was late. But he waived the requirement for filing the notice of appeal timely for good cause—in that it appeared that Respondent was not provided a copy of the Rules of Practice or information from the ALJ regarding his appeal rights.

Untimely Answer to Complaint. Administrator determined that without a copy of the Rules of Practice or other guidance provided by the Complainant, Respondent had good cause for failing to file an Answer which contained specific denials to the allegations in the Complaint.

He remanded the matter to the ALJ for further proceedings and required that Complainant serve Respondent with a copy of the Rules of Practice. He ordered Respondent to file an Answer in accordance with the Rules of Practice within 30 days of receipt of the copy of the Rules.

FAA v. Richard C. Nordrum, Order No. 90-0004 (01/19/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal from the ALJ's Order Dismissing Complaint and Canceling Hearing. The Administrator dismissed Complainant's appeal.

FAA v. Hy C. Sussman, Order No. 90-0005 (01/19/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal from an Order Assessing Civil Penalty incorporated in a written order and decision of the ALJ. The Administrator dismissed Complainant's appeal.

FAA v. Peter M. Dabaghian, Order No. 90-0006 (02/16/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal from the oral initial decision of the Administrative Law Judge issued at the conclusion of the hearing. Complainant's appeal is dismissed.

FAA v. Darnita Lynn Steele, Order No. 90-0007 (02/16/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal from the oral initial decision of the ALJ issued at the conclusion of the hearing. Complainant's appeal is dismissed.

FAA v. Jack L. Jenkins, Order No. 90-0008 (02/16/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal from the written initial decision of the ALJ. Complainant's appeal is dismissed.

FAA v. Jessica S. Van Zandt, Order No. 90-0009 (02/16/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal of the ALJ's oral initial decision issued at the conclusion of the hearing. Complainant's appeal is dismissed.

FAA v. Merlin R. Webb, Order No. 90-0010 (03/19/90)

Complainant appealed from the oral initial decision of the ALJ's decision issued December 5, 1989. The ALJ held that Respondent had violated § 107.21(a)(1) of the Federal Aviation Regulations as alleged in the Complaint, but held that circumstances of this case did not warrant the maximum civil penalty, and he reduced the civil penalty from \$1000 to \$100.

Complainant argued that the ALJ erred in reducing the sanction to \$100 because the maximum civil penalty in gun cases under the Act is \$10,000, not \$1,000, as stated by the ALJ.

Complainant Bound by Complaint. The Administrator determined that the ALJ's reduction in the amount of civil penalty was not inappropriate. Complainant failed to allege in the Complaint that Respondent violated section 901(d) of the Federal Aviation Act. Complainant only alleged violation of § 107.21(a)(1) of the Federal Aviation Regulations. Only a violation of section 901(d) of the Act can support a civil penalty of up to \$10,000. The ALJ

correctly stated that \$1,000 is the maximum civil penalty for a violation of § 107.21 of the FAR alone. The Administrator agreed that the maximum civil penalty is not warranted in this case. The Administrator affirmed the ALJ's initial decision.

FAA v. Thunderbird Accessories, Inc.,
Order No. 90-0011 (03/19/90)

Both Respondent and Complainant appealed from the oral initial decision of the Administrative Law Judge (ALJ) issued at the conclusion of the hearing. The ALJ found that Respondent violated 14 CFR 145.53 by performing maintenance on a Chrysler aircraft alternator for which it was not rated and 14 CFR 145.61 by failing to maintain adequate records of the work. He also found that the preponderance of evidence did not establish a violation of 14 CFR 43.13(a), which required maintenance to be performed in accordance with the manufacturer's maintenance manual. The ALJ reduced the civil penalty from \$2,500 to \$1,500.

Respondent's appeal alleged that Complainant's notice of appeal was untimely. Respondent's calculation of when Complainant's notice of appeal was due is incorrect because Respondent counted the day of the hearing in the 10-day filing period. Complainant appealed stating that Respondent's appeal brief was untimely filed; that the preponderance of evidence proves that Respondent violated § 43.13(a) of FAR and that the ALJ should not have dismissed the charge and should not have reduced the civil penalty.

Failure to Perfect Appeal. On the issue of the timeliness of Respondent's appeal brief, the Administrator determined that Respondent's brief was due on January 8, 1990. The brief was dated January 19, 1990 (postmarked January 22, 1990). Thus the brief was untimely filed. The Administrator dismissed Respondent's appeal.

Violation of Section 43.13(a). Administrator stated that the evidence clearly demonstrates that Respondent had not received approval for use of a procedure not prescribed in the current manufacturer's maintenance manual. Therefore, the procedure was not acceptable to the Administrator and in violation of § 43.13(a). Additionally, the ALJ appears to have reduced the penalty solely because he dismissed the allegation of § 43.13(a). The Administrator reversed the findings and reinstated the \$2,500 civil penalty.

In the Matter of Continental Airlines, Inc., Order No. 90-0012 (04/25/90)

The ALJ held that Respondent had violated § 108.5(a)(1) of the Federal Aviation Regulations by failing to carry out a particular provision of the Standard Security Program which Respondent had adopted. Administrator denied Respondent's appeal and affirmed the ALJ's decision. Respondent is assessed a civil penalty in the amount of \$10,000.

Consolidation of cases. There is no requirement under law or regulation that Complainant must consolidate in one civil penalty action all cases involving alleged security regulation violations which may have been initiated at or about the same time simply because they involve the same air carrier.

Rules of Procedure. It would be an inappropriate exercise of Administrator's decisionmaking authority to consider in this proceeding a challenge to rules which are not implicated in this proceeding. Federal Courts of Appeals constitute a more appropriate forum to attack administrative regulations as not consistent with the U.S. Constitution, the AP, and/or the agency's enabling act. Rules effective September 7, 1988, apply to this proceeding. Procedural regulations in force at the time administrative proceedings occur are the ones that govern, rather than the procedural rules in effect at the time the alleged violation occurred.

Discovery—Privilege. Information relating to FAA's decisionmaking process prior to the issuance of the complaint is irrelevant. Such information is protected from discovery by the deliberative process privilege. Moreover, in the absence of specific allegations of agency failure to comply with required separation of functions, there is no need to discover information relating to agency's compliance.

Standard Security Program. Respondent's failure to implement (i.e., "carry out") its security program is a violation of 14 CFR 108.5(a).

Circumstantial evidence. A party may use circumstantial evidence to sustain its burden of proof.

FAA v. Tamara Ann O'Dell, Order No. 90-0013 (03/14/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal from the oral initial decision of the ALJ issued at the conclusion of the hearing. Complainant's appeal is dismissed.

FAA v. Royce L. Miller, Order No. 90-0014 (03/14/90)

Withdrawal of Appeal. Complainant withdrew notice of appeal from the oral initial decision of the ALJ. Complainant's appeal is dismissed.

FAA v. Budde W. Playter, Case No. 90-0015 (03/19/90)

Complainant appealed from the oral initial decision of the ALJ issued at the conclusion of the hearing. The ALJ found that Respondent did not violate § 91.79(a), 91.97(b), and 91.9 of the Federal Aviation Regulations as alleged in the complaint. He reversed the complaint seeking \$3,000 in penalty.

Failure to File Answer. Complainant appealed stating that the ALJ should have deemed the allegations in the complaint admitted because Respondent failed to file an answer to the complaint. The Administrator reversed the ALJ's initial decision stating that because Respondent has not demonstrated good cause for his failure to file an answer, the allegations in the complaint are deemed admitted.

In the Matter of Rocky Mountain Helicopters, Inc., Order No. 90-0016 (04/05/90)

Withdrawal of Order Assessing Civil Penalty. This case is before the Administrator for the resolution of a dispute as to whether an Order Assessing Civil Penalty was properly issued against Respondent. Because of confusion resulting from a consolidated informal conference and the FAA attorney's letter regarding a settlement offer, the Administrator remanded this case to the Southern Region Counsel's office for withdrawal of the Order Assessing Civil Penalty and to give Respondent an opportunity to request a hearing on the allegations contained in the Notice of Proposed Civil Penalty.

In the Matter of Ernest Wilson, Order No. 90-0017 (04/09/90)

Counsel for FAA issued a Notice of Proposed Civil Penalty seeking \$2,000 from Respondent for alleged violations of FAR. After an informal conference the agency attorney withdrew the Notice of Proposed Civil Penalty stating that the legal enforcement action was not warranted. Counsel for Respondent filed application for attorney fees and expenses under the Equal Access to Justice Act (EAJA) seeking \$1,035 in attorney fees and \$60.39 in expenses which were incurred in connection with the Notice of Civil Penalty.

Denial of Application for Attorney Fees. The Administrator denied Respondent's application for attorney fees and expenses stating that FAA rules implementing the EAJA states that fees may be awarded for work performed only after the issuance of an Order of Civil Penalty which serves as the complaint and which begins the adversary adjudication. Legal expenses

incurred before the adversary adjudication are not covered by the EAJA and the FAA regulations.

In the Matter of Continental Airlines, Inc., Order No. 90-18 (8/22/90)

Respondent's security screener failed to detect an FAA-approved test object during a no-notice test conducted by the FAA, as required by the Standard Security Program. The ALJ held that Respondent violated 14 CFR 108.5(a)(1) by failing to carry out a provision of the SSP which Respondent adopted pursuant to that regulation, and affirmed the \$1,000 civil penalty sought by Complainant.

Consolidation of cases. There is no requirement that all cases involving alleged security violations be consolidated in one civil penalty action merely because they were initiated at or about the same time and involve the same air carrier. *Citing*, FAA Order No. 90-12.

Rules of Procedure. Respondent's attack on the procedural rules in effect at the time of the hearing fails to provide any basis for overturning the ALJ's decision in this case because Respondent does not demonstrate how it was prejudiced by any of those rules. Federal Courts of Appeals constitute a more appropriate forum in which to attack the rules as not consistent with the U.S. Constitution, the APA, and/or the agency's enabling act. *Citing*, FAA Order No. 90-12. Administrative proceedings are governed by the procedural regulations in force at the time the proceedings occur, not those in effect at the time of the alleged violation. *Citing*, FAA Order No. 90-12.

Discovery—Privilege. Information relating to the agency's decisionmaking process prior to the issuance of the complaint is irrelevant, and protected from discovery by the deliberative process privilege. *Citing*, FAA Order No. 90-12.

Standard Security Program. The FAA may take enforcement action against a carrier, such as Respondent, that fails to implement the provisions of its security program because carriers are specifically required under 14 CFR 108.5(a) to "adopt and carry out a security program that meets the requirements of § 108.7 * * * ." *Citing*, FAA Order No. 90-12. While it is true that 14 CFR 108.7 sets forth general requirements and identifies various types of procedures which must be described in a carrier's security program, it does not follow that a carrier's program is enforceable only under § 108.5 to the extent that it meets, but does not exceed, those minimum criteria.

The SSP has to be interpreted so as to permit tests of security checkpoints to be conducted in individual segments, each involving one component of the checkpoint. The agency attorney is not obligated to prove, as an element of the violation in this type of case, that test objects were rotated prior to the test at issue, or that the FAA test screeners rather than checkpoints. These issues are irrelevant to whether a violation occurred in this case. The test protocol is not intended to serve as a shield for the carrier in enforcement proceedings. The intended beneficiary is the traveling public.

Discovery—Effect of Failure to Produce. Complainant's failure to produce an intra-agency memorandum discussing agency policy on what civil penalty amounts should be sought in test object cases provides no basis for overturning the ALJ's decision in this case. Respondent was not prejudiced by Complainant's failure to produce the memorandum because: The agency attorney did provide another memorandum containing virtually identical sanction criteria; the criteria were not even followed in this case; and Respondent's counsel could have requested a continuance of the hearing in order to prepare a response if he felt it necessary.

Failure to Detect Test Object—Sanction. The policy of seeking a civil penalty for every failure to detect a test object is not arbitrary, capricious, or unreasonable. Each such failure is evidence of a weakness in the carrier's security screening procedures, and represents a potential threat to the safety of the traveling public.

Failure to Detect Test Object—Proof of Violation. Although there is no direct evidence that the test object was visible on the screen the first time it passed through the x ray device, there is ample circumstantial evidence to establish that fact. Testimony that the test object was clearly discernible when it passed through the x-ray device immediately after the test failure raises a strong inference that the object was equally visible when it passed through the device during the test itself a few moments earlier. Respondent has not rebutted this strong circumstantial evidence. Accordingly, the preponderance of the evidence supports the ALJ's finding that Respondent, through its security screener, failed to detect an FAA-approved test object as required by its security plan, in violation of 14 CFR 108.5(a).

In the Matter of Paul Degenhardt, Order No. 90-20 (8/16/90)

The law judge held Respondent violated 14 CFR 107.21(a) when he attempted to pass through a security checkpoint with a package containing an unloaded rifle, and assessed a \$1,000 civil penalty. However, the law judge stated he would vacate his decision upon appropriate motion if Respondent published a letter in a local newspaper in order to "raise awareness" on the issue of passengers' responsibility to ascertain the contents of packages which are carried onboard aircraft.

Intent to Carry a Weapon. Intent to carry a weapon is not a required element of a violation of § 107.21(a). That section is violated so long as a respondent knew or should have known that he had a weapon on or about his person or accessible property. Respondent in this case should have taken further steps to ascertain the contents of the package he was carrying and, accordingly, he should have known he was carrying a weapon.

Authority of Law Judge to Vacate Initial Decision. The law judge's offer to vacate his initial decision was improper. To the extent it goes beyond making findings of fact and conclusions of law with regard to the alleged violation before him, he exceeded his authority. The Rules of Practice do not empower a law judge to condition the assessment of a civil penalty on subsequent remedial conduct by the respondent, or to "vacate" a finding of violation, or otherwise dismiss a complaint, upon a showing of subsequent remedial conduct. A law judge loses jurisdiction over a case upon the issuance of the initial decision, and thereafter has no authority to entertain a motion to vacate. The initial decision issued by the law judge is affirmed to the extent that it finds a violation and upholds the agency's assessment of a \$1,000 civil penalty, and it is reversed to the extent that it provides Respondent with an opportunity to move that the initial decision be vacated.

In the Matter of John J. Carroll, Order No. 90-21 (8/16/90)

The law judge found Respondent had flown with a piece of carry-on baggage in the aisle obstructing access to the exits and the aisle, in violation of 14 CFR 135.87(c)(4) and (6).

Inexcusable Delay in Initiating Case. FAA has expressed its willingness to consider a laches-type defense in civil penalty actions by allowing respondents who believe they have been prejudiced by the agency's delay in initiating their case to assert such prejudice as a defense in the administrative proceeding. The pace of the agency's

ursuit of this case against Respondent during the eight-month period between the subject incident and FAA's first notification to Respondent that it was investigating the matter, and the additional four months which passed before Respondent received the Notice of Proposed Civil Penalty, was not reasonably or inexcusable dilatory. The 1-year interval between the alleged violation and notification to Respondent of the agency's proposed civil penalty did not constitute an unreasonable or excusable delay. Respondent has also failed to demonstrate that he was prejudiced by the FAA's delay in this case. He has not alleged that the delay resulted in a loss of evidence or witnesses supporting his position, or that he changed his position in a way that would not have occurred but for the delay.

ALJ's Credibility Findings. Because law judges are in the best position to evaluate the demeanor of witnesses in administrative proceedings, their credibility determinations are entitled to special deference on review by the agency. But an agency is not extricably bound by its law judges' credibility determinations. It is free to substitute its own judgment for that of the law judge. In applying only a minimum of deference the Administrator finds no reason to question the law judge's credibility finding.

Validity of the Rule of Practice. The issue of whether the Rules of Practice were properly promulgated without prior notice and comment has already been disposed of in *Air Transport Association v. Department of Transportation*, 900 F.2d 369 (DC Cir. 1990), where the court ruled that pre-promulgation notice and comment was required. The court noted that respondents whose cases were initiated and partially prosecuted under the "old" rules can raise the defense that the FAA could not have successfully prosecuted the case "but for the agency's reliance on some aspect of the * * * Rules abandoned in the new scheme." The Administrator reviewed the case with that potential defense in mind and found nothing in the new rules that would have changed the result in this case. Respondent's argument that the rules were improperly promulgated without notice and comment, standing alone, provides no ground for reversal of the law judge's decision.

Respondent also argues that the Rules of Practice fail to separate investigative and prosecutorial functions from decisionmaking functions until after a notice of proposed civil penalty is issued. However, he has not alleged any

actual breach of the required separation of functions and the Administrator finds none. In any event, 14 CFR 13.203 as originally promulgated did satisfy the requirements of the Administrative Procedure Act. Respondent also asserts that the rules violate the APA because "FAA decisions are [appealable] not to an independent United States District Court of Appeals [sic], but back to the FAA decisionmaker." However, the APA expressly contemplates intra-agency adjudication and appellate review.

In the Matter of USAir, Order No. 90-22 (8/16/90)

Respondent filed a "Petition to Reconsider" an Order Assessing Civil Penalty which was issued without a hearing due to Respondent's failure to timely respond to the Notice of Proposed Civil Penalty, arguing that its delay in responding to the NPCP was due to the agency's improper service of that document.

Effect of Changes in Rules of Procedure. Under the new procedural rules an Order Assessing Civil Penalty would not have been issued following Respondent's untimely response to the NPCP. Further, although it is impossible to say for certain whether the response to the NPCP would have been timely if it had been directed to a specific individual such as Respondent's president (as the rules now require), Respondent should be given the benefit of the new rules on this point. Accordingly, the Order Assessing Civil Penalty shall be withdrawn. If the agency attorney elects to re-initiate this case by the issuance of a new NPCP, the case shall be governed by the new initiation procedures and Rules of Practice.

In the Matter of Gordon Barrett Broyles, Order No. 90-23 (9/14/90)

ALJ found Respondent violated 14 CFR 108.11(c) by tendering a bag containing a loaded gun for transport as checked baggage and assessed a \$500 civil penalty; Respondent did not appeal from this finding. ALJ also found Respondent violated 14 CFR 107.21(a) and 49 U.S.C. app. 1471(d) when Respondent (after retrieving his checked bag) attempted to carry the bag containing the loaded gun through a security checkpoint. But the ALJ reduced the \$2,500 civil penalty sought in the complaint for those violations to a "token" \$50 civil penalty in light of what the ALJ saw as the "unique situation" surrounding those violations. Complainant appealed from the reduction in sanction.

Effect of ATA Decision. Respondent contends that the assessment of any civil penalty in this case is improper in light of the court's decision in *ATA v. DOT*, 900 F.2d 369 (DC Cir. 1990). The court there held that a respondent whose case was initiated under the old rules could "raise the defense that the FAA could not have successfully prosecuted him but for the agency's reliance on some aspect of the * * * [r]ules abandoned in the new scheme," but Respondent does not point to any change in the rules that would have affected the result in this case. The holding in *ATA*, standing alone, does not require dismissal.

Sanction—Weapons Violations. The Sanction Guidance Table contained in FAA Order 2150.3A, Compliance and Enforcement Program, prescribes appropriate sanctions for violations involving concealment of a deadly or dangerous weapon which would be accessible in flight: \$1,000 when the weapon is unloaded and ammunition is not accessible; \$2,000 when the weapon is unloaded but ammunition is accessible; and \$2,500 when, as in this case, the weapon is loaded. While other penalties in the Sanction Guidance Table are expressed in terms of a range of potential sanctions, and the agency attorney has discretion even to seek a sanction outside the prescribed range, the prescribed penalties for these weapons violations are fixed and there are no other mitigating or aggravating factors appropriate to consider. Accordingly, the Administrator held the ALJ's reduction of the penalty of this case was improper and reinstated the \$2,500 civil penalty.

In the Matter of Marcia Bayer, Order No. 90-24 (9/14/90)

The ALJ apparently held that Respondent violated § 107.20 of the FAR by entering a sterile area without permission. (At the time in question, the Concourse to the gate areas were closed because part of the Concourse was under construction.) Respondent appealed from the ALJ's decision, arguing in pertinent part that she proved that she had submitted to screening. Respondent testified at the hearing that she had walked through the metal detector while the security agent was at a desk away from the device. The security agent testified that Respondent had walked around the metal detector and that she had not placed her purse on the x-ray device conveyor belt prior to entering the sterile area.

The Administrator remanded the case to the ALJ to resolve the critical factual dispute regarding whether Respondent

had walked through or around the metal detector and whether Respondent had a purse with her, and if so, did she put it on the conveyor belt. The Administrator explained that the ALJ had mistakenly focused on the issue of whether Respondent had permission to enter the sterile area. The issue (when the only regulation alleged to have been violated is 14 CFR 107.20) is whether or not Respondent submitted herself and her property, if any, to screening.

In the Matter of Lucious Laken Gabbert,
Order No. 90-25 (9/14/90)

Respondent's attorney submitted a Petition to File Amicus Curiae Brief of Norman de Witte, asserting that Mr. de Witte "has testimony material to this case," but that he was unable to appear at the hearing in this case.

Amicus Curiae Brief. Respondent testified at the hearing that the aircraft involved in this case was regularly maintained by Mr. de Witte, and that Mr. de Witte was not present at the hearing because he "got called away." The hearing record contains no further mention of Mr. de Witte's relevance to this case, nor does it reflect any request by Respondent's counsel for a continuance of the hearing.

While 14 CFR 13.233(f) does not provide that the Administrator may allow any person to submit an amicus curiae brief, on the record before him the Administrator cannot find that Mr. de Witte has a substantial interest that is not represented by the parties to this case, or that an amicus curiae brief from Mr. de Witte is otherwise necessary for a proper disposition of this case.

In the Matter of Frank Puleo, Jr., Order No. 90-28 (9/25/90)

Withdrawal of Appeal. Complainant withdrew its notice of appeal of the oral initial decision. Complainant's appeal is dismissed.

In the Matter of John C. Sealander,
Order No. 90-29 (9/25/90)

Withdrawal of Appeal. Complainant withdrew its notice of appeal of the oral initial decision. Complainant's appeal is dismissed.

In the Matter of John A. Steidinger,
Order No. 90-30 (9/27/90)

Withdrawal of Appeal. Complainant withdrew its notice of appeal of the oral initial decision. Complainant's appeal is dismissed.

The Administrator's final decisions and orders, indexes, and digests are all available for public inspection and copying at the following location in FAA headquarters: FAA Hearing Docket, Federal Aviation Administration, 800 Independence Avenue, SW, room 924A, Washington, DC 20591; (202) 267-3641.

In addition, those materials are available at all FAA regional and center legal offices at the following locations:

Office of the Assistant Chief Counsel for the Aeronautical Center (AAC-7), Mike Monroney Aeronautical Center, 6500 South MacArthur, Oklahoma City, OK 73125; (405) 680-3296

Office of the Assistant Chief Counsel for the Alaskan Region (AAL-7), Alaskan Region Headquarters, 222 West 7th Avenue, Anchorage, AL 99513; (907) 271-5269

Office of the Assistant Chief Counsel for the Central Region (ACE-7), Central Region Headquarters, 601 East 12th Street, Federal Building, Kansas City, MO 64106; (816) 426-5446

Office of the Assistant Chief Counsel for the Eastern Region (AEA-7), Eastern Region Headquarters, JFK International Airport, Fitzgerald Federal Building, Jamaica, NY 11430; (718) 917-1035

Office of the Assistant Chief Counsel for the Great Lakes Region (AGL-7), Great Lakes Region Headquarters, O'Hare Lake Office Center, 2300 East Devon Avenue, Des Plaines, IL 60018; 312 (694-7108

Office of the Assistant Chief Counsel for the New England Region (ANE-7), New England Region Headquarters, 12 New England Executive Park, Burlington, MA 01803; (617) 273-7310

Office of the Assistant Chief Counsel for the Northwest Mountain Region (ANM-7), Northwest Mountain Region Headquarters, 18000 Pacific Highway South, Seattle, WA 98188; (206) 227-2007

Office of the Assistant Chief Counsel for the Southern Region (ASO-7), Southern Region Headquarters, 3400 Norman Berry Drive, East Point, GA 30344; (404) 763-7204

Office of the Assistant Chief Counsel for the Southwest Region (ASW-7), Southwest Region Headquarters, 4400 Blue Mound Road, Forth Worth, TX 76193; (817) 624-5707

Office of the Assistant Chief Counsel for the Technical Center (ACT-7), Federal Aviation Administration Technical Center, Atlantic City International Airport, Atlantic City, NJ 08405; (609) 484-6605

Office of the Assistant Chief Counsel for the Western-Pacific Region (AWP-7), Western-Pacific Region Headquarters, 15000 Aviation Boulevard, Hawthorne, CA 90261; (213) 297-1270

This notice constitutes the FAA's publication of an index of decisions and orders issued by the Administrator in the adjudication of civil penalty actions, as required by 5 U.S.C. 552(a)(2). This notice also publishes a subject-matter index and digests of decisions that provide identifying information about civil penalty cases decided by the Administrator. The FAA still is considering various means by which the Administrator's decision and orders, and the indexes and digests of those decisions, could be published and offered for sale, such as by subscription through either a public or private reporting service. If the FAA completes such subscription arrangements, the agency will provide further notice of such publication or sale in the **Federal Register**. The FAA may discontinue publication of the subject-matter index and the digests at some future time if a commercial reporting service publishes similar information and provides it to the public in a timely and accurate manner.

Issued in Washington, DC, on October 26, 1990.

Gregory S. Walden,
Chief Counsel.

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