

U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of)	
)	
Suburban Air Freight, Inc.,)	Docket No. 10-TSA-0077
)	
Respondent.)	

FINAL DECISION AND ORDER

Respondent Suburban Air Freight, Inc. (Respondent) appeals the July 13, 2011 Initial Decision of the Administrative Law Judge (ALJ) in the above-referenced matter. In his initial decision, the ALJ found that Respondent violated 49 C.F.R. § 1544.101(d) by failing to comply with two provisions in its security program regarding verification of crewmembers and oversight of cargo loaded onto its aircraft. For the reasons stated below, the Initial Decision is upheld.

According to the Transportation Security Administration's (TSA's) rules of practice for civil penalty actions, a party may appeal only the following issues: (1) whether each finding of fact made by the ALJ is supported by a preponderance of reliable, probative, and substantial evidence; (2) whether each conclusion of law by the ALJ is made in accordance with applicable law, precedent, and public policy; and (3) whether the ALJ committed any prejudicial errors during the hearing that support the appeal. 49 C.F.R. § 1503.657(b).

Respondent is a "twelve-five" aircraft operator subject to the provisions of part 1544 of the Transportation Security regulations. As required under the regulations, Respondent adopted a Twelve-Five Standard Security Program (TFSSP). Respondent operates as a "single-pilot" operation transporting cargo tendered by DHL between Richmond International Airport and Cincinnati/Northern Kentucky International Airport approximately six times per week. Respondent does not carry passengers on these flights. In September 2009, Transportation Security Inspectors informed Respondent that the pilot must have his identification verified as

required by the TFSSP. The discussion included a specific suggestion that would enable Respondent to comply with the TFSSP requirement. In October 2009, the Inspectors conducted an inspection of Respondent's operation. Respondent did not properly verify the identification of the pilot. The Inspectors also observed that Respondent was not properly overseeing the cargo loaded onto the aircraft.¹

The ALJ found that TSA proved two violations of TSA's security regulations by a preponderance of the evidence. While TSA had also alleged an additional violation for failing to notify TSA of the inability to comply with a provision of the TFSSP, the ALJ found that that alleged violation was not proved. A civil penalty of \$9,000 for each violation, or \$18,000 in total, was assessed.

In its appeal Respondent raises the following issues:

1. The ALJ erred as a matter of fact and law that Suburban's operation at the Richmond International Airport was subject to the requirements of the TFSSP.
2. The ALJ erred as a matter of fact and law that Respondent was carrying cargo and was therefore not subject to the requirements of the TFSSP.
3. The ALJ erred as a matter of fact and law in interpreting the definition of cargo contained in the TFSSP.
4. The ALJ erred as a matter of fact and law by failing to consider the impact of TSA's interpretation of the TFSSP on Respondent's operations outside of Richmond.
5. The ALJ erred as a matter of fact and law by finding that the manner in which the pilot certified his identification violated the TFSSP.
6. The ALJ erred as a matter of fact and law by finding that Respondent did not exercise proper oversight of its cargo.
7. The ALJ erred as a matter of fact and law by assessing civil penalty in violation of Respondent's due process rights.

¹ The specific requirements contained in the TFSSP are Sensitive Security Information (SSI) and will not be set forth so that the Final Decision and Order can be made publicly available.

Applicability of the TFSSP

The first three issues involve whether the TFSSP was applicable to Respondent's Richmond operation. Respondent argues that the TFSSP does not apply since it was not transporting "cargo" as defined in the TFSSP. Respondent claims that in order for the property to be considered "cargo" it must be accompanied by an air waybill. Respondent states that it did not receive an air waybill for the operation in question. Respondent contends that documents presented by TSA at the hearing were not air waybills as defined in the TFSSP. Respondent refers to testimony presented by witnesses to corroborate its argument.

The ALJ notes in his Initial Decision that Respondent admitted it was a twelve-five aircraft operator subject to the provisions of 49 C.F.R. § 1544 in its Response to Letter of Investigation, its Answer to the Complaint, its Amendment to Answer and in its testimony at the hearing. In addition, Respondent states in its appeal brief that it has a TSA approved security program under which certain of its aircraft on certain of its operations operate. Therefore, there is no dispute that Respondent is subject to the requirements TSA's security regulations.

However, Respondent claims that the particular operation in question was not subject to its security program requirements because the property was not "cargo" as defined in the TFSSP. TSA's regulations require that each "twelve-five" aircraft operator must carry out the requirements of its security program, "for each operation that meets all of the following: is an aircraft with a maximum certificated takeoff weight of more than 12,500 pounds; is in scheduled or charter service; is carrying passengers or cargo or both; and is not under a full program, partial program, or full all cargo program." 49 C.F.R. § 1544.101(d). During the hearing, there was testimony that not all operations are covered by the TFSSP; such as flights for training, maintenance, re-positioning, ferrying, and transportation of company materials. However, none

of these exceptions applied to the operation in question and Respondent testified that the operation involved transporting freight on behalf of DHL.

Respondent argues that the operation was not covered by the TFSSP because the property that was loaded onto its aircraft by DHL was not cargo and therefore Respondent was not “carrying passengers, cargo, or both.” Respondent claims in its appeal brief that only freight shipped with an air waybill qualifies as cargo. Respondent’s arguments are not supported by the evidence presented during the hearing and are inconsistent with the plain wording of the regulation. TSA’s regulations define cargo as “property tendered for air transportation accounted for on an air waybill. All accompanied commercial courier consignments, whether or not accounted for on an air waybill, are also classified as cargo.” 49 C.F.R. § 1540.5. This definition is consistent with the definition contained in the TFSSP. Respondent states that a document submitted by TSA at the hearing titled “DHL Shipment Control Multi-level All Product Inquiry Report” is not an air waybill and that other exhibits presented during the hearing were not air waybills. Respondent fails to show, however, that the property loaded onto its aircraft was not accounted for on an air waybill. The testimony of other aircraft operators reveals that they do not receive an air waybill from DHL. Their testimony does not demonstrate that the property is not accounted for on an air waybill.

Respondent misinterprets the definition of cargo. The definition does not state that the property must be shipped with an air waybill, rather that the property must be accounted for on an air waybill. The testimony of the aircraft operators indicates that the air waybill may not accompany the cargo in every instance. Significantly, a DHL representative testified that DHL does account for every shipment tendered to Suburban on a master air waybill. None of Respondent’s arguments refute DHL’s testimony which indicates that the property was in fact

cargo, as defined in the regulation and in the TFSSP, and therefore that the TFSSP was applicable to the operation, as described in 49 C.F.R. 1544.101(d).

Respondent's argument is further undermined by its repeated assertions that it was in compliance with the TFSSP. If the TFSSP did not apply to its Richmond operation, it is not clear why Respondent would not point that out when the inspectors first contacted Respondent to notify it that it was not in compliance. Further, Respondent's use of the term freight rather than cargo does not support its argument or in any way refute the fact that the cargo loaded onto its aircraft was accounted for on an air waybill by DHL.

Respondent also makes the argument that the TFSSP only applies when the aircraft operator is the "point of entry" for the cargo. That interpretation is not consistent with 49 C.F.R. § 1544.101(d) which describes the operations that are subject to the TFSSP requirements. In addition, as the ALJ explains in the Initial Decision, Respondent's arguments regarding the definitions in the TFSSP are "inconsistent with the entire regulatory regime that was developed to address security requirements after the tragedy of September 11, 2001." I agree. Security measures employed by Indirect Air Carriers and airports could be easily thwarted if the last link in the cargo chain, the actual transportation of the cargo, is not also secure. The importance of cargo security has become more acute given the more recent attempt by terrorists in 2010 to destroy two airplanes in flight using explosive devices hidden in cargo. The Initial Decision is consistent with a preponderance of the evidence presented during the hearing as well as with the plain language of the Transportation Security Regulations. I find no error of fact or law with regard to the first three issues raised in Respondent's appeal.

Impact on Respondent's Other Operations

Regarding the fourth issue, Respondent argues that the ALJ erred in failing to consider the impact of the application of the TFSSP requirements on Respondent's other operations. This argument is without merit. The application of the TFSSP is governed by 49 C.F.R. § 1544.101(d). Respondent argues that the way in which the TFSSP was interpreted was impractical. There was no evidence presented by Respondent at the hearing to support that contention. Respondent argues that the ALJ should not limit its findings to the narrow facts of the case. The Initial Decision must be based on the allegations contained in the Complaint and the evidence presented. I find no error of fact or law in the Initial Decision regarding this issue. The ALJ points out that TSA provided Respondent with a suggestion as to how to comply with the TFSSP prior to the inspection. I also note that the Transportation Security regulations permit an aircraft operator to submit a request to amend its security program. 49 C.F.R. § 1544.105(b). Respondent did not avail itself of either alternative when first informed that it was not in compliance with the TFSSP.

Violations of the TFSSP

The fifth and sixth issues pertain to the violations of the TFSSP that were observed by the Transportation Security Inspectors during their inspection of Respondent. I note with great concern that Respondent included quotes from the TFSSP which may be SSI and did not include the protective markings on its appeal brief. Under 49 C.F.R. § 1520.7(a), Respondent is a covered person subject to the SSI requirements set forth in part 1520 of the Transportation security regulations. SSI must only be disclosed as specified in 49 C.F.R. § 1520.9 and SSI must be marked as described in 49 C.F.R. § 1520.13. The appeal brief must be marked and treated as SSI by Respondent and any individuals who received a copy.

The ALJ found that Respondent failed to verify the identity of the crew. Respondent does not deny that it was not in compliance with the TFSSP. Instead, Respondent argues that the TFSSP does not apply because Respondent was using a “single-pilot” operation and did not have a crew. Respondent points to other provisions in the TFSSP that it claims do not apply to Respondent. Those provisions are not at issue in this case. Respondent argues that the particular requirement is impractical and that the ALJ erred in not considering the impact of TSA’s interpretation of the TFSSP on future operations. The Initial Decision found that TSA’s interpretation of the TFSSP requirement to be reasonable and I agree. The requirement is an important security measure as it assists in verifying that the pilot is in fact authorized to transport the cargo to its destination. As the ALJ points out, Respondent has made a decision to operate as a “single-pilot” operation. Respondent was provided with an alternative to comply with the TFSSP. The decision of the ALJ cannot be based on unsupported statements, but must be based on a preponderance of the actual evidence presented at the hearing. I find no errors of fact or law in the analysis of the ALJ or the finding that Respondent violated the TFSSP.

The sixth issue pertains to Respondent’s failure to properly oversee the cargo once it had been accepted by Respondent. The ALJ found that the evidence demonstrated Respondent’s pilot had his back to the aircraft and could not observe the loading of the cargo. Respondent’s pilot also failed to examine the cargo once it had been loaded onto the aircraft. The testimony provided by Respondent’s witnesses indicated that it was their practice always to observe the loading of the cargo in order to ensure there is no unauthorized access. Respondent argues that the ALJ erred in failing to determine whether the cargo had been accepted. There is no dispute regarding the fact that the cargo was loaded onto Respondent’s aircraft and Respondent admits that it did not maintain continuous visual contact while the cargo was being loaded and did not

inspect the cargo once loading was complete. Since there was no dispute regarding the acceptance of the cargo, there was no reason for the ALJ to issue a finding in that regard.

Respondent also argues there was no need for it to supervise the loading of the cargo by representatives of an Indirect Air Carrier which has its own security requirements that are more rigorous than those imposed on Respondent. Respondent's reasoning is inconsistent with the regulatory system whereby access to cargo, particularly cargo that has been physically screened, should be restricted while it is transported to its destination to prevent the introduction of an explosive or other destructive device in the cargo or on the aircraft. 49 C.F.R. § 1544.205(c). Respondent also argues that its pilot was acting as the Ground Security Coordinator for the flight and properly used its discretion regarding whether to permit access to the aircraft. Nothing in the record identifies the pilot as the Ground Security Coordinator or demonstrates that the pilot made any attempt to carry out the duties of the Ground Security Coordinator. There are no errors of fact or law in the ALJ's determination that Respondent violated the security requirements of the TFSSP.

Due Process

Finally, Respondent claims it was denied due process because it did not receive fair notice of the possibility of a violation. Respondent, by its own admission, is a regulated party subject to the provisions of the Transportation Security regulations and the TFSSP. Respondent testified that it assisted in the development of the TFSSP. The testimony revealed that Respondent participated in conversations with Transportation Security Inspectors regarding Respondent's operations in Richmond and its failure to carry out the TFSSP prior to the inspection of Respondent's operations where violations were alleged. There is nothing to indicate that Respondent did not have notice of the violations. Further, Respondent had a

hearing where it was permitted to present its own evidence and to cross examine the witnesses of the Agency. This claim is not supported by the evidence and is rejected.

Conclusion

Based on the forgoing, Respondent's appeal is rejected and the Initial Decision is upheld.

Under TSA's rules of practice, either party may petition the TSA Decision Maker to reconsider or modify a Final Decision and Order. The rules of practice for filing a Petition for Reconsideration are described at 49 C.F.R. § 1503.659. A party must file the petition with the TSA Enforcement Docket Clerk not later than 30 days after service of the TSA Decision Maker's Final Decision and Order and serve a copy of the petition on all parties. A party may seek judicial review of the Final Decision and Order as provided in 49 U.S.C. § 46110.

Dated:

February 17, 2012



Gale Rossides
Deputy Administrator