

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of: RICHARD W. KUHLING

FAA Order No. 2005-13

Docket No. CP03GL0002 (EAJA)

DMS No. FAA-2000-8122¹

Served: August 17, 2005

DECISION AND ORDER²

Richard W. Kuhling has appealed the decision of the administrative law judge (ALJ) denying his application for attorney's fees and other expenses³ under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504(a)(1).⁴ Kuhling argues that the Administrator should reverse the denial because the FAA's position in the underlying

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS) at the following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, see the website.

³ A copy of the ALJ's decision in the EAJA action is attached to this decision. (The ALJ's decision is not available on the FAA website version of this decision.)

⁴ The EAJA provides that:

An agency that conducts an adversary adjudication shall award, to a prevailing party ..., fees and other expenses incurred by that party in connection with that proceeding, unless ... the position of the agency was substantially justified or ... special circumstances make an award unjust.

⁵ U.S.C. § 504(a)(1).

enforcement action – *i.e.*, that Kuhling interfered with the flight attendant’s performance of her duties by impeding her service cart, in violation of 14 C.F.R. § 121.580⁵ – was unreasonable in fact and law. Kuhling argues that the agency’s position was not substantially justified because the agency unreasonably tried to prove something that would be impossible to do – that Kuhling impeded an inanimate object (the beverage cart) with his voice and demeanor. Kuhling argues further that the FAA should not have brought this case, in light of the holding in In the Matter of Dorfman,⁶ in which the Administrator held that a minimal interference with the performance of a flight attendant’s duties does not constitute a violation of 14 C.F.R. § 121.580.

It is held that the agency was substantially justified in bringing and pursuing this action against Kuhling. Consequently, Kuhling’s appeal of the ALJ’s initial decision in the EAJA action is denied.

I. Summary of the Evidence⁷

On April 22, 1999, Kuhling traveled aboard Northwest Airlines Flight 612, from Spokane, Washington, to Minneapolis, Minnesota. Kuhling, who is 6 feet, 6 inches tall, was seated in Seat 19C on the aisle, and his wife was seated next to him. (Tr. 14-15, 154, 155-156.) As a result of a condition called chondromalacia, Kuhling’s knees ache when

⁵ Section 121.580 provides:

No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember’s duties aboard an aircraft being operated under this part.

14 C.F.R. § 121.580.

⁶ In the Matter of Dorfman, FAA Order No. 1999-9 (December 12, 1999).

⁷ A hearing was held on August 20, 2001.

they are bent for more than 15 to 20 minutes. (Tr. 156.) He usually requests an aisle seat when he flies so that he can put one foot in the aisle. (Tr. 158.) During this flight, Kuhling's knees were hitting the seat in front of him. (*Id.*)

Three flight attendants handled the meal and beverage service in the coach section during this flight.⁸ First, the galley flight attendant, facing the front of the aircraft, walked backwards and pulled the meal cart down the aisle from the front to the rear of the aircraft. Next, Flight Attendant Nancy Auld walked backwards and pulled a beverage cart down the aisle.⁹ Last, Flight Attendant Lora Linn-Schmidt, facing the rear of the aircraft, pushed a second beverage cart down the aisle. (Tr. 15-16, 72-74.)¹⁰

Linn-Schmidt described the incident as follows. She testified that when she was at Row 18 during the service, she tried to push her beverage cart forward, but felt a "restraint" or "restriction" on the cart. (Tr. 18.) Linn-Schmidt could not see what blocked her cart. (Tr. 46, 49.)¹¹ Assuming that someone's bag or foot was in the aisle, she pulled the cart toward her and then tried again to push it forward. Once again, she felt something blocking the cart, and simultaneously, Kuhling yelled¹² at her not to move

⁸ There were four flight attendants on duty during that flight on board a Boeing 727.

⁹ Auld, standing between the meal cart and her beverage cart, was in the "pivot" or "swivel" position. When she faced the rear of the aircraft, she could work from the meal cart, and when she faced the front of the aircraft, she could serve from the beverage cart.

¹⁰ Thus, in order from front to rear, the flight attendants and carts were in this order: Linn-Schmidt, beverage cart #2, beverage cart #1, Auld, meal cart, galley flight attendant.

¹¹ On cross-examination, she testified that she did not see Kuhling block her cart. She stated that due to the size of her beverage cart, she was unable to see what had blocked the cart. (Tr. 46.)

¹² The passenger in Seat 18D, Mary Margaret Hilson, testified that Kuhling "raised his voice," upsetting one of her children and frightening the other. (Tr. 115-116.)

forward until the other flight attendant (Auld) moved her cart away. (Tr. 18-19, 43.)¹³ Linn-Schmidt explained that she was caught “off guard” by Kuhling’s demand¹⁴ and replied, “Excuse me? I think everyone else around you would really like something to drink.” (Tr. 20.) According to Linn-Schmidt, after Kuhling demanded that she not move her cart, she saw him push Auld’s beverage cart toward the rear of the aircraft until it hit Auld.¹⁵ (Tr. 19, 20.)

Kuhling described the incident somewhat differently. He testified that his shoulder was hit by the saddle bag of the first or second cart that went by him. While that cart was parked near him, he had to keep both of his feet in front of him and lean against his wife, who was seated next to him. (Tr. 159-160.) His knees ached due to his cramped position. (Tr. 165.) Later, when he saw Linn-Schmidt's beverage cart coming toward him, he was concerned that she would park it next to him, forcing him again into an uncomfortable position. (Tr. 161, 165.) He explained that he asked Linn-Schmidt to please hold her cart until the other cart had moved away from him. (Tr. 161.) He testified that she explained to him that she had to serve the passengers, and he replied, speaking somewhat louder, "Please hold that one there until this one gets out of the way." (Tr. 162.) He testified that he made this request one more time in a still louder and firmer voice, but denied that he had yelled at Linn-Schmidt. (Tr. 162.) Kuhling testified that he did not stick his foot out or use his hand to stop Linn-Schmidt's cart (Tr. 164), and denied

¹³ Linn-Schmidt testified that the brake was not on when she tried to push the cart and felt the restriction. (Tr. 20.)

¹⁴ Linn-Schmidt insisted that Kuhling *demanded* that she remain at Row 18. (Tr. 42-43.)

¹⁵ Auld testified that she had been bending down to get some meals out of the meal cart when her beverage cart hit her back. Auld stated that she did not see what had caused her beverage cart to move and that its brake had been on. (Tr. 76, 89.)

pushing or pulling any of the carts. (Tr. 172.) He testified that he never pushed, pulled, impeded or stopped Linn-Schmidt's cart. (Tr. 185.)

Linn-Schmidt testified that after this incident, she felt intimidated and threatened by Kuhling and decided to stay away from him. (Tr. 19, 21, 47-48.) Instead of moving her cart forward to serve the passengers in Row 19, she served them from her position at Row 18, by bending over the passengers in Row 18. (Tr. 20-21.) When she did move her cart, she testified, she deliberately did not stop next to Kuhling, waiting instead to push her cart until she could move it at least two rows past Kuhling. (Tr. 21.) As a result, Linn-Schmidt explained, the meal service was disrupted. (Tr. 21.)

Linn-Schmidt testified further that she injured her back during the flight. (Tr. 41.)¹⁶ She explained that when she reached the rear of the aircraft, about 10 to 15 minutes after the incident with Kuhling, she released her cart and immediately felt a tightening in her lower back. (Tr. 24, 41, 57-58.) Later, when she lifted a bag of trash, the tightening worsened. (Tr. 24.) Within about 30 minutes after she first felt the tightening in her back, she testified, she "went from walking, to not walking, to not moving at all" and had to be carried off the aircraft. (Tr. 30-31.)

After her back began to hurt, Linn-Schmidt visited the captain in the cockpit and asked him whether passengers are allowed to push or restrain the carts. (Tr. 24.) She then followed his advice and filled out an in-flight incident report to document what she

¹⁶ Kuhling's attorney objected to the questioning about how the injury impacted Linn-Schmidt's ability to perform her duties during the flight. (Tr. 30.) The ALJ ruled that he would allow Linn-Schmidt to testify about her back injury, but not about how that injury may have made her unable to perform her duties. The ALJ based his ruling on the FAA's failure to plead in the complaint that Kuhling injured Linn-Schmidt and that the injury prevented her from performing her duties. (Tr. 31.) After the ALJ made this ruling, the FAA attorney explained that one reason that he wanted to introduce the evidence about the injury was that it would be relevant to the issue of sanction. (*Id.*)

believed had caused her injury. (Tr. 63.)¹⁷ She noted in the report that Kuhling admitted later in the flight that he had pushed or held the cart. (Tr. 219.)¹⁸

II. Case History

A. The Complaint. The FAA alleged in the second amended complaint that Kuhling violated 14 C.F.R. § 121.580¹⁹ when he “*interfered with a crewmember by impeding a serving cart* while that crewmember was performing her normal duties.”²⁰ (Emphasis added.) The FAA sought a \$1,100 civil penalty for this alleged violation.

B. The ALJ’s Decision. In his written initial decision, the ALJ held that Kuhling had interfered with the performance of Linn-Schmidt’s duties in violation of Section 121.580. He found that after Kuhling told her in a “loud, angry voice” not to move her cart, she was “intimidated ... to the point where she could not continue her service properly.” (Initial Decision at 4.) The ALJ concluded that Kuhling “impeded the flight attendant’s service through his demeanor and tone of voice.” (*Id.*) He concluded:

The preponderance of the credible evidence shows clearly that Kuhling addressed Linn-Schmidt in a tone brimming with hostility and belligerence. Kuhling’s tone instilled a fear in the flight attendant which caused her to interrupt her service. Kuhling thereby violated § 121.580.

(Initial Decision at 4.)

¹⁷ The report was introduced into evidence as Exhibit C-1. Linn-Schmidt testified that she prepared the report about 20 minutes after the incident with Kuhling. (Tr. 27.) Auld also prepared an in-flight report, documenting that her cart had been pushed into her. Auld’s in-flight report was identified as Exhibit C-2, but the ALJ denied its admission.

¹⁸ According to Linn-Schmidt, she learned about this admission from Michelle Orsini, who spoke with Kuhling while Linn-Schmidt was preparing her report. (Tr. 219.)

¹⁹ See n. 5, *supra*.

²⁰ In the original and the first amended complaints, the FAA alleged that Kuhling “interfered with a crewmember by *pushing that crewmember with a serving cart* while that crewmember was performing her normal duties.” (Emphasis added.)

The ALJ explained that it was not necessary for him to resolve the issue of whether Kuhling actually had pushed Linn-Schmidt's beverage cart, and consequently, he did not decide that issue.²¹ (*Id.*) He also made no findings or conclusions about Linn-Schmidt's back injury. (*Id.*)²² The ALJ assessed a \$250 civil penalty against Kuhling.

C. The Administrator's Decision. Both Kuhling and the FAA appealed the ALJ's decision to the Administrator.²³ In FAA Order No. 2003-3, the Administrator reversed the ALJ's decision. The Administrator found that a loud, angry voice could not "impede" a serving cart, and therefore, the FAA had failed to prove the allegation that Kuhling had impeded *the cart*.²⁴ The Administrator wrote:

It was alleged in the second amended complaint that Kuhling "interfered with a crewmember by *impeding a serving cart*" (Emphasis added.) While a flight attendant could be intimidated by a passenger who addressed her in a loud, angry voice, a beverage cart, unlike a flight attendant, is incapable of fear or apprehension, and therefore, could not be impeded by a voice alone. Kuhling, therefore, argues correctly that it was impossible for him to impede the serving

²¹ The ALJ also did not decide whether Kuhling physically stopped or blocked the cart when Linn-Schmidt attempted to move it forward.

²² The ALJ wrote in his decision as follows:

Testimony also tended to show that Ms. Linn-Schmidt sustained or aggravated a back injury following her exchange with Respondent. Linn-Schmidt stated that she felt lower-back pain after she brought her cart to the back of the aircraft and let go. Tr. 24. I ruled at the hearing, however, that because no such charge was pled in the complaint, I would make no findings or conclusions on this issue. Tr. 31.

(Initial Decision at 4, n.2.)

²³ The FAA limited its appeal to arguing that the ALJ erred when he failed to accept an affidavit written by a former FAA attorney about statements made by Kuhling during the prehearing conference. The FAA argued that had the statement been admitted, it would have justified a higher civil penalty.

²⁴ The Administrator noted that the FAA was bound by the language of the complaint, citing In the Matter of Webb, FAA Order No. 1990-10 at 5-6 (March 19, 1990).

cart itself with only his voice, and consequently, Complainant did not prove the allegation.

(FAA Order No. 2003-3 at 15.) The Administrator held further that the minimal interference with Linn-Schmidt's duties caused by Kuhling did not amount to a violation of Section 121.580. The Administrator wrote:

Linn-Schmidt testified that she felt afraid of Kuhling and decided to stay away from him. Consequently, she served the occupants of Row 19 by bending over Row 18. She also delayed moving her cart forward until Auld [another flight attendant] moved her cart. This interference – the awkward way in which Linn-Schmidt served Row 19's passengers and the time that she waited to move her cart – was too insignificant to constitute a violation of Section 121.580. In the Matter of Dorfman, FAA Order No. 1999-16 (December 22, 1999).

(FAA Order No. 2003-3 at 15.)²⁵

Despite this holding, the Administrator wrote, she did not condone the angry tone that Kuhling used when addressing the flight attendant. The Administrator wrote further that she did not mean to imply that Kuhling might not have assaulted or intimidated the flight attendant, but the FAA had not alleged assault or intimidation in the complaint.

(FAA Order No. 2003-3 at 14.)

III. The EAJA Action

Kuhling applied for reimbursement of his attorney's fees and other expenses under the EAJA. The ALJ denied Kuhling's application, holding that the agency's position was substantially justified. The ALJ wrote:

Yet the Complainant's position had been reasonable, I conclude. Its charge in the amended complaint and through to the hearing that Mr. Kuhling's tone and attitude had impeded the cart necessarily implied that the cart acted through Ms. Linn-Schmidt. The agency's language reasonably suggested that Kuhling's overall behavior during the flight directly caused Ms. Linn-Schmidt to detrimentally interrupt and alter her service. The agency's position, further, was reasonable in law. The set of circumstances described logically could make out a case of interference in violation of § 121.580. Kuhling's conduct in impeding the

²⁵ The Administrator denied the other arguments that Kuhling presented on appeal.

cart, and thus the flight attendant's service, can reasonably [be] said to have disrupted the flight's goal of a calm, safe, and orderly environment – elements which make out interference in violation of § 121.580.

(EAJA Initial Decision at 3.)

IV. The EAJA Appeal.

A. Introduction.

Kuhling appealed from the ALJ's denial of his application for reimbursement of attorney's fees and costs. Kuhling argues on appeal that the ALJ was in error when he held that the FAA's position was substantially justified.

Under the Equal Access to Justice Act (EAJA), a prevailing party may recover reasonable litigation costs if the agency's position in the underlying litigation was not "substantially justified" or whether special circumstances made an award unjust. 5 U.S.C. § 504(a)(1).²⁶ The EAJA requires decisionmakers to determine whether the government's position was substantially justified based upon "the administrative record, as a whole." (*Id.*) Under the agency's rules implementing the EAJA, the agency attorney bears the burden of proving substantial justification. 14 C.F.R. § 14.04(a).

The Supreme Court has explained that the term "substantially justified," as used in the EAJA, means "justified to a degree that could satisfy a reasonable person," or

²⁶ The FAA's rules implementing the EAJA (published at 14 C.F.R. Part 14) contain an identical requirement. Section 14.01 provides in pertinent part as follows:

The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award for attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the Federal Aviation Administration. An eligible party may receive an award when it prevails over the FAA, unless the agency's position in the proceeding was substantially justified or special circumstances make an award unjust.

14 C.F.R. § 14.01. Section 14.02 specifies that the FAA's EAJA rules apply to proceedings under 49 U.S.C. § 46301. 14 C.F.R. § 14.02. The underlying case on the merits of the allegation that Kuhling violated 14 C.F.R. § 121.580 arose under 49 U.S.C. § 46301.

having a “reasonable basis both in law and fact.” Immigration and Naturalization Service v. Jean, 496 U.S. 154, 158 n.6 (1990), citing Pierce v. Underwood, 487 U.S. 552, 565-566 (1988). It has been held that the term “‘substantially justified’ does not mean ‘justified to a high degree.’” Pierce v. Underwood, 487 U.S. at 565. Instead, the substantial justification standard “is satisfied if there is a ‘genuine dispute,’ or if reasonable people could differ as to the appropriateness of the contested action.” (*Id.*).

Failure to prevail in the underlying action does not raise a presumption of lack of substantial justification warranting the payment of EAJA fees. Bay Area Peace Navy v. United States, 914 F.2d 1224, 1231 n.4 (9th Cir 1990); In the Matter of Pacific Sky Supply, FAA Order No. 1995-18 at 11 (August 4, 1995); In the Matter of Wendt, FAA Order No. 1993-9 at 3 (March 23, 1993). The government does not need to show that it had a substantial likelihood of prevailing to prove that its litigation position was substantially justified for the purposes of the EAJA. Bay Area Peace Navy v. United States, 914 F.2d at 1230; In the Matter of Wendt, FAA Order No. 1993-4.

B. The FAA’s Position that Kuhling Physically Impeded The Cart Was Substantially Justified.

The FAA alleged in the second amended complaint that Kuhling impeded the flight attendant’s cart. It is clear from the opening and closing arguments, and the language used in the second amended complaint, that the FAA set out to prove that Kuhling physically blocked – impeded – the cart, causing the resistance that Linn-Schmidt felt when she tried to move it to Kuhling’s row. (Tr. 10, 224.)²⁷ This position was reasonable.

²⁷ The FAA took the position at the hearing that Kuhling intimidated Linn-Schmidt even though the agency did not allege intimidation in the complaint. There was ample evidence showing that Kuhling intimidated Linn-Schmidt. It was reasonable for the FAA to argue that Kuhling had

Although none of the witnesses testified that they actually saw Kuhling touch or block Linn-Schmidt's cart,²⁸ there was ample circumstantial evidence that could have supported a finding that Kuhling actually stopped the cart physically. As already discussed, when Linn-Schmidt tried to push her cart forward to Row 19, an uncomfortable and visibly irritable Kuhling yelled at her, demanding that she not to move her cart forward. Simultaneous with this confrontation, Linn-Schmidt felt a restraint on her cart as she attempted to push it forward to Kuhling's row. Also, the physical nature of Kuhling's next action – angrily pushing Auld's cart into her back – supported a finding that Kuhling had reacted physically when he saw Linn-Schmidt's cart approaching by blocking it with his body.²⁹

Kuhling's denial that he had pushed any cart did not make the FAA's position unreasonable. It was for the ALJ to weigh the credibility of Kuhling's denial against the circumstantial evidence that Kuhling had blocked the cart. Indeed, in this case, the ALJ did find that Kuhling's testimony, in general, was less credible than Linn-Schmidt's

intimidated Linn-Schmidt if only because the ALJ could have viewed that evidence of intimidating behavior as making it more likely that Kuhling had physically impeded the cart. Evidence of intimidation may also have been relevant for sanction purposes if a violation of Section 121.580 was found.

Furthermore, it was not unreasonable for the FAA to argue that the language "impeded the cart" could mean "impeded the progress of the cart." Undoubtedly, the evidence showed that Kuhling impeded the progress of the cart when he intimidated the flight attendant. This interpretation, while rejected by the Administrator, who read the allegation literally, was not unreasonable. Indeed, reasonable people could differ regarding how to read that imprecise allegation.

²⁸ Linn-Schmidt testified that she was unable to see over the cart, but she believed that Kuhling deliberately stopped her cart. Hilson's view of what had transpired also was blocked because she was sitting in front of Kuhling.

²⁹ The ALJ, however, did not resolve this issue regarding whether Kuhling had stopped the cart physically.

account of events. The ALJ, however, declined to make any finding regarding whether Kuhling had stopped the cart physically.³⁰

C. The Laylin Letter Does Not Prove That The FAA’s Position Was Not Substantially Justified.

In the Notice of Proposed Civil Penalty (NPCP) issued by the agency attorney on January 26, 2000, the FAA alleged that Kuhling “assaulted, and otherwise interfered with a crewmember by *striking* that crewmember with a serving cart while the crewmember was performing her normal duties.” (Appeal Brief at 7) (Emphasis added.)³¹ Pointing to a letter written by former FAA attorney, Peter Laylin, the original agency attorney assigned to this matter, Kuhling argues on appeal that although the FAA knew that this allegation was false, it continued to pursue the case.³² As a result, Kuhling argues on appeal, the FAA’s case was not substantially justified.

Kuhling attached to his EAJA appeal brief a copy of a letter dated July 21, 2000, from Laylin,³³ who wrote that he was persuaded, after meeting with Kuhling at the

³⁰ But even if the ALJ had held that the FAA had failed to prove that Kuhling had blocked the cart, the FAA’s position that Kuhling blocked the cart was substantially justified in light of the evidence that would have supported such a finding.

³¹ Under 14 C.F.R. § 13.16, notices of proposed civil penalty and the final notice of proposed civil penalty are not filed in the Hearing Docket. As a result, the Notice of Proposed Civil Penalty and the Final Notice of Proposed Civil Penalty sent to Kuhling by agency counsel are not in the record of the underlying action on the merits.

³² The FAA’s original allegation in the NPCP (which predates Laylin’s July 21, 2000, letter) that Kuhling struck the flight attendant was reasonable in light of the statements that Linn-Schmidt made in her in-flight incident report. In that report, Linn-Schmidt wrote that the passenger “pushed my cart back against me” and that later in the flight, Kuhling admitted “push/holding cart....” (Exhibit C-1.)

³³ This pre-complaint document was not part of the record of the underlying action on the merits. The record may be supplemented in EAJA cases “when necessary for full and fair resolution of the issues arising from the application” under 14 C.F.R. § 14.26(a).

Also, this letter contains a settlement offer. It would be inappropriate to use statements in a settlement letter to prove that an alleged violation occurred. *E.g.*, In the Matter of Africa Air

informal conference and speaking with several flight attendants, that Kuhling had not struck Linn-Schmidt with a serving cart.

Significantly, however, Laylin also wrote in this letter, “as I recall the discussion during the informal conference, there appears to be no dispute that you did impede Ms. Linn’s movement of her serving cart” He wrote further that he believed that Kuhling had caused the resistance that Linn-Schmidt felt when she tried to push the cart forward. These statements represent the position that the FAA took in this litigation, *i.e.*, that Kuhling stopped the serving cart when Linn-Schmidt tried to move it down the aisle. Hence, the Laylin letter does not support Kuhling’s argument that the FAA should not have continued to pursue this action.

D. The FAA’s Position That Kuhling Interfered With The Performance of the Flight Crewmember’s Duties Is Substantially Justified.

Based on the evidence in the record, it was also reasonable for the FAA to argue that by impeding or blocking the cart, Kuhling interfered with the performance of the duties of the crewmembers, in violation of Section 121.580. Although the Administrator held that the interference with the service was minimal and did not amount to a violation of Section 121.580, the FAA, nonetheless, was reasonable in taking the position that by impeding the cart, Kuhling had interfered with the performance of the flight crewmember’s normal duties in violation of Section 121.580.

By blocking Linn-Schmidt’s cart and intimidating her, Kuhling interrupted the beverage service. In addition, as a result of Kuhling’s actions, Linn-Schmidt sought the

Corp., FAA Order No. 1999-5 (August 31, 1999). However, there does not appear to be any reason why the contents of the letter cannot be used to show what the FAA knew when it initiated this action, or, in other words, whether the FAA’s position when it initiated this action was substantially justified.

captain's advice regarding whether a passenger could touch or stop a cart, and she then prepared an in-flight incident report.³⁴ The FAA could reasonably argue that these interruptions of Linn-Schmidt's normal duties were significant enough to constitute a violation of Section 121.580.³⁵

The question here involved only the *degree* of interference – whether the interference was significant enough to amount to a violation of Section 121.580. As the ALJ aptly wrote:

Whether Kuhling's interference was ... too inconsequential to make out a violation is a matter of a little more, or a little less. Passenger interference cases can walk a factual fine line, about which reasonable people can differ. The agency is entitled to "err" on the side of bringing close cases to trial to fulfill its mandate of enforcing/ensuring air safety.

(EAJA Initial Decision at 4.) Congress did not intend that the EAJA should deter Federal agencies from "advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." In the Matter of Pacific Sky Supply, FAA Order No. 1995-18 at 12 (August 4, 1995), *quoting* H.R. Rep. No. 96-1418, 96th Cong. 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Ad.

³⁴ In addition, pushing against a heavy beverage cart is dangerous because the cart might tip over and the hot beverages in pots on top of the cart might spill on the passengers. (Tr. 75.) If it was held that Kuhling blocked the cart physically, then the risk that the cart might have tipped over would have been an aggravating factor to consider regarding penalty.

³⁵ Although the FAA did not specifically allege in the complaint that Kuhling caused Linn-Schmidt's back injury by blocking the cart, the FAA argued at the hearing that Linn-Schmidt became unable to perform her duties due to the back injury. (*E.g.*, Tr. 10, 224.) This position may have been reasonable when the FAA initiated these proceedings in light of Linn-Schmidt's belief that her back injury was caused by Kuhling blocking her cart. (Tr. 63; Exhibit C-1.)

However, when this argument is viewed against the whole record in this case, it is not supported because there was no evidence, other than Linn-Schmidt's belief, to connect Kuhling with the injury. Linn-Schmidt testified that she did not feel any sensation in her back when she was unable to push the cart forward to Kuhling's row. (Tr. 58.) On the contrary, she testified that she did not feel the tightening in her back until she released the cart in the aft section of the airplane, approximately 10 to 15 minutes *after* the incident with Kuhling. (Tr. 57.)

News 4984, 4990. The FAA was entitled to prosecute this case involving an irate passenger who intimidated the flight attendant, allegedly blocked her cart, and interrupted the beverage service in the interest of aviation safety, even though the Administrator eventually held that the interference was not significant enough to amount to a violation of Section 121.580.

Contrary to Kuhling's argument, the holding in In the Matter of Dorfman³⁶ did not make the FAA's position unreasonable as a matter of law. In that case, the Administrator affirmed the ALJ's finding that Dorfman caused only a momentary and inconsequential interference with the performance of the duties of the flight attendant (collecting glasses) when she failed to move her legs, which were blocking the aisle. When Dorfman ignored the flight attendant's requests to move her legs, the flight attendant simply pushed Dorfman's legs out of the aisle and continued to do her duties. Neither the ALJ nor the Administrator found any other interference with the performance of the flight attendant's duties in that case.³⁷ In contrast, Kuhling did more than create a momentary disturbance. He not only interrupted the service, but made it necessary for Linn-Schmidt to alter the normal way in which she performed her duties. Hence, the Dorfman case is

³⁶ FAA Order No. 1999-16 (December 22, 1999).

³⁷ The ALJ refused to find that Dorfman pushed the flight attendant into the closet, in violation of 14 C.F.R. § 91.11, which like Section 121.580, prohibits a person from assaulting, threatening, intimidating or interfering with a crewmember's performance of duties aboard an aircraft. The ALJ held that he would not find such a violation because the FAA had not alleged in the complaint that Dorfman had pushed the flight attendant into the closet. The ALJ further noted in dictum that Dorfman only accidentally jostled the flight attendant, who was facing into the closet and had her back to Dorfman, and as a result, Dorfman had not committed a battery. On appeal, the Administrator declined to disturb the ALJ's credibility finding that Dorfman had jostled the flight attendant accidentally, and affirmed that such an unintentional act did not constitute a battery in violation of the regulation.

distinguishable from this one, and as a result, the holding in Dorfman did not make the FAA's litigation position unreasonable as a matter of law.

Reasonable persons could differ as to whether Kuhling's actions interfered with the performance of Linn-Schmidt's duties in violation of Section 121.580.³⁸ The FAA's position in this litigation, therefore, was substantially justified.³⁹

V. Conclusion

In light of the foregoing, Kuhling's appeal of the ALJ's initial decision is denied.⁴⁰

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15th day of August, 2005.

³⁸ In his appeal brief, Kuhling argues that Kuhling's actions caused less of an interference than Dorfman's because the captain was required to come out and speak to Dorfman about her behavior. (Appeal Brief at 16.) However, the ALJ in the Dorfman case specifically held that Dorfman's conduct did not *necessitate* the pilot leaving the cockpit to talk to her, and on appeal, the Administrator sustained that finding. In the Matter of Dorfman, at 15-16.

³⁹ In the Matter of Pacific Sky Supply, at 12 (August 4, 1995) (holding that the FAA's position was substantially justified because reasonable people could differ as to the appropriateness of the FAA's proposed legal standard.)

⁴⁰ Under 14 C.F.R. § 14.29, the applicant may, within 30 days of the date of this decision, file a petition for review with the appropriate United States Court of Appeals. (See 49 U.S.C. § 46110 and 14 C.F.R. § 13.235.)