

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

In the Matter of: SAYED HASAN¹

FAA Order No. 2009-3

Docket No. CP05WP0026

Served: January 12, 2009

DECISION AND ORDER

Respondent Sayed Hasan has appealed from the written initial decision of Administrative Law Judge Richard C. Goodwin served on September 12, 2006.² In that decision, the ALJ held that on February 7, 2002, Hasan entered two airport sterile areas with a Swiss Army knife in his carry-on bag in violation of 14 C.F.R. § 108.9(b) (2002).³ The ALJ assessed a \$1,700 civil penalty against Hasan for these violations. Hasan has appealed. This decision holds that Hasan did not violate Section 108.9(b) because Hasan followed the systems, measures and procedures in use at the time to control access to the

¹ The record in this case contains sensitive security information (SSI). This decision has been redacted to remove SSI.

² A copy of the ALJ's written initial decision is attached.

³ Section 108.9(b) (2002) provided as follows:

No person may enter, or be present within, a secured area, AOA, SIDA or sterile area without complying with the systems, measures or procedures being applied to control access to, or presence in, such areas.

14 C.F.R. § 108.9(b) (2002).

The events in this case occurred prior to the transfer of certain responsibilities from the FAA to the Transportation Security Administration (TSA). (Tr. 192.) The FAA's civil aviation security regulations, including 14 C.F.R. § 108.9(b), were transferred substantially as written to the TSA on February 17, 2002. 67 Fed. Reg. 8340, 8341, 8345 (February 22, 2002). Section 108.9(b) is now codified at 49 C.F.R. § 1540.105(a)(2).

sterile areas and because that regulation did not ban entering or being present in a sterile area with a prohibited item. As a result, no civil penalty is assessed.

I. Facts

A. Background. Before the tragic events of September 11, 2001,⁴ the FAA allowed passengers to take knives with blades less than 4 inches long in their carry-on bags on board aircraft. After the terrorist attacks, the FAA increased the restrictions on carry-on items. On September 26, 2001, the FAA issued Security Directive 108-01-10, prohibiting the carriage of “knives of any length or description” and “cutting instruments of every kind, including ... folding or retractable blades, regardless of blade length or composition, even those less than four inches” in the aircraft cabin or beyond the screening checkpoints in airports. (Complainant’s Exhibit 6 at 2.) The FAA did not release the security directive itself to the public, but instead provided it to all domestic commercial airlines for implementation within 24 hours. The FAA also provided information about the ban to the news media.⁵

B. The Incident. At the time of the events in this case, Sayed Hasan was a captain for Mesaba Airlines. On February 7, 2002, Hasan, dressed in his uniform, arrived at the airport, intending to fly as a passenger on board a flight to * * *.

⁴ On September 11, 2001, terrorists, armed with knives and boxcutters, hijacked four U.S. commercial aircraft. The terrorists flew two of the aircraft into the World Trade Center’s twin towers in New York and flew one aircraft into the Pentagon outside Washington, D.C. The fourth aircraft crashed into a field in southwest Pennsylvania.

⁵ The FAA relied upon the airlines and the news media to educate the public about the stricter rules pertaining to what could be carried on board aircraft and in sterile airport areas. (Tr. 383-384.) The FAA provided information about the ban on “knives of any length, composition or description” to the press. *See e.g.*, Federal Aviation Administration, Washington Headquarters Press Release, Release No. APA 65-01, October 8, 2001, available at http://www.faa.gov/news/press_releases/news_story.cfm?newsID=5440&print=go The FAA also posted information about the ban on all knives on its Web site.

Mesaba had “jump seat” agreements with other airlines allowing Mesaba pilots to fly for free as a passenger on flights flown by other airlines if space was available.⁶ Hasan hoped to be able to fly “jump seat.” He had one roller bag that he planned to carry on board with him. He had a Swiss Army pocketknife with a 1-inch blade (Tr. 41)⁷ on a keychain in the toilet kit packed in his roller bag.

Hasan tried to catch the next departing flight for * * *, which happened to be flown by * * *. He went through the screening process at the * * * concourse, from which America West flights departed, and entered the sterile area.⁸ His pocketknife was not detected during screening. He proceeded to the departure gate and showed his credentials. An * * * * agent informed him that the flight was full and, as a result, that * * * would be unable to accommodate him on that flight. (Tr. 269.)

Next, Hasan tried to catch a * * * flight, departing from the * * * concourse. He exited the sterile area in the * concourse, walked through the main terminal area – which is a public area – and proceeded to the * * * concourse. He went through the screening process at the * * * concourse checkpoint without incident and entered the * * * concourse sterile area. (Tr. 270.)

⁶ Actually, when pilots fly pursuant to “jump seat” agreements, they sit in the passenger cabin, not in the cockpit.

⁷ When the knife is opened, the handle and the blade together are about 2 ½-inches in length. (Tr. 360.)

⁸ “Sterile area,” at the time was defined as “a portion of an airport defined in the airport security program that provides passengers access to boarding aircraft and to which the access generally is controlled by an aircraft operator or foreign air carrier through the screening of persons and property in accordance with a security program.” 14 C.F.R. § 108.3 (2002). A substantially similar version of this regulation is currently codified at 49 C.F.R. § 1540.5.

When Hasan arrived at the departure gate for the * * * flight to ...* * *..., the gate agent informed him that there might be a seat available. About 10 minutes before the flight was scheduled to take off, the gate agent instructed Hasan to take his carry-on bag over to a table to be hand-searched.⁹ During the hand-search, the security screener, who worked for Argenbright Security, found the knife. Hasan acknowledged it was his knife. The screener showed the pocketknife to the * * * gate agent, and then informed Hasan that he could not bring the pocketknife on board the aircraft. (Tr. 280, 290-292, 298.)

Hasan testified that he understood that the FAA restricted the carriage of knives in airplane cabins but he thought that the restriction only applied to “aggressive blades” and that smaller blades, such as his pocketknife, were permissible. (Tr. 299-300.)¹⁰ Hasan walked over to the * * * gate agent and asked whether he had determined that the knife was a prohibited item. The gate agent acknowledged that it had been his decision. Hasan testified that he explained to the gate agent that the knife had never been a problem although the bag – with the knife in it – had been subjected to security checkpoint screenings and random hand searches many times, even since September 11, 2001. Hasan wanted to know if the gate agent’s decision was based upon a recent change in the FAA’s policy or upon * * *’s interpretation of the agency policy.

The * * * gate agent gave Hasan this choice: Hasan could leave the knife at the gate and get on the flight, or he could keep the knife and be escorted out of the sterile

⁹ Hasan’s bag was subjected to a random search. (See Tr. 35-36.)

¹⁰ He testified that it was his understanding that blades of certain lengths (not including the handle) were prohibited, and that the rules were changing. He said that if the blade on his knife had been longer, he would have had an easier time accepting that it was a prohibited item. (Tr. 368-369.)

area. (Tr. 300-302.) Hasan decided to keep his knife, and told the gate agent that he would go to another airline – * * * – that did not have a problem with the knife.

(Tr. 302.) The contract security screener escorted Hasan out of the sterile area to the main terminal area and then returned his knife to him. (Tr. 303.)

Hasan put the knife into a side pocket of the roller bag and proceeded to the * concourse to try to get on the next * * * flight to * * *. He went through the screening process without any problem and entered the * * * concourse's sterile area. A metropolitan police officer stationed at the airport met Hasan as he approached the * * * departure gate, and asked him whether he had any guns or knives. Hasan stated that he had a knife and provided it to the officer. (Tr. 33, 35, 308-313.) Hasan was escorted out of the sterile area.

II. Initial Decision

The ALJ held that the evidence established that Hasan brought a prohibited item into a sterile area twice, and that each occasion constituted a violation of 14 C.F.R. § 108.9(b), as alleged.¹¹ In finding that Hasan violated Section 108.9(b) twice, the ALJ held specifically “[t]he state of his knowledge is not a factor.” (Initial Decision at 3.) Nonetheless, the ALJ held that “Captain Hasan knew or should have known that knives ‘of any length or description’ were forbidden inside a sterile area.” (Initial Decision at 5.) The ALJ found that the evidence demonstrated that Mesaba would have distributed information about the contents of the SD to its pilots no later than the end of November 2001, and that Hasan would have received that information about the SD in the regular

¹¹ The evidence established that Hasan entered a sterile area three times that day with a prohibited item in his carry-on bag. However, Complainant only charged Hasan with two violations – taking a prohibited item into the sterile area on his way to the * * * gate, and afterwards, for bringing the prohibited item into the sterile area on his way to the * * * flight.

course of business before this incident on February 7, 2002. (Initial Decision at 4-5.)

The ALJ wrote further as follows:

And it is fair to add that, while the type of pocket knife Respondent carried had been permitted on aircraft prior to the multiple hijackings of September 2001 (1 Tr. 124), afterwards it was “pretty clear” that no object usable as a weapon – and Hasan’s knife clearly could be used as a weapon (2 Tr. 378) – could be brought into a secured area (1 Tr. 36). For would-be passengers to refrain from carrying such items simply was ... “common sense after 9/11” (1 Tr. 45). Against this background, Captain Hasan should have understood that the status as legitimate carry-ons of knives of any type was, at best, suspect. He was on notice; he had been warned.

(Initial Decision at 5.)

Nonetheless, the ALJ held that “it was not unreasonable” for Hasan to believe, when he entered the * * * concourse sterile area to board the * * * flight, that his pocketknife “was not objectionable” because he had been able to carry it through security many times without incident, even after the September 11, 2001, terrorist attacks. Consequently, the ALJ imposed a \$600 civil penalty, rather than the \$1,100 sought by Complainant, against Hassan for this violation of Section 108.9(b). (Initial Decision at 5-6.) He assessed the maximum \$1,100 civil penalty for the subsequent violation of Section 108.9(b), in contrast, because, as he wrote, “when Respondent brought his carry-on back to * * * sterile area at the B concourse, he well knew and understood that his knife was a forbidden item.” (Initial Decision at 6.)

III. Analysis

Complainant alleged, and the ALJ held, that Hasan violated Section 108.9(b) (2002), which provided as follows:

No person may enter, or be present within, a secured area, AOA, SIDA or sterile area without complying with the systems, measures or procedures being applied to control access to, or presence in, such areas.

Hence, the issue to address is whether Hasan entered the sterile area without complying with the systems, measures or procedures in use at the time to control access to and presence in the sterile areas on Concourses * * * and * * * Hasan correctly argues that he complied with the existing systems, measures and procedures on both concourses, and as a result, he did not violate then Section 108.9(b). The evidence indicated that he did everything that was asked of him: he went through the security screening at both checkpoints, submitted his bag for a random search, and chose the option to forego the * * * flight and have his knife returned to him upon leaving the sterile area. In other words, he did not evade or circumvent any of the systems, measures or procedures in place at the time to control access to the sterile areas.

In determining that Hasan violated this regulation twice, the ALJ, like Complainant, blurred the distinction between the ban against bringing a knife of any length or description into a sterile area and the systems, measures and procedures used at the time to control access. Section 108.9(b) dealt with such systems, measures and procedures as having persons walk through the magnetometer, submit their carry-on luggage for x-ray screening and for random searches, display badges, etc. The ban against bringing knives of any length or description into a sterile area did not constitute a system, measure or procedure in use to control access.

That is not to say that the Administrator condones Hasan's behavior that day. It defies credulity that Hasan, an airline captain and frequent traveler, did not know that the FAA had banned bringing knives of any length or description into a sterile area. The ban was well-publicized in the media even if the security directive itself was not released to the public. As one witness testified at the hearing, it was "pretty clear that you're not

supposed to take any sharp object, ... knives ... across that sterile side of the checkpoint.” (Tr. 36.) He also testified that it was “common sense” after September 11, 2001, that a person could not bring a knife through the security checkpoint. (Tr. 44-45.)

Moreover, as a pilot, Hasan would have had access to company information pertaining to security directives, even if he did not receive a copy of the security directives themselves. Consequently, Hasan’s actions that day were, to put it bluntly, outrageous and reprehensible. Regardless, he did not violate the only regulation alleged in the complaint, and, the Administrator, on appeal cannot find a violation of a regulation that was not alleged in the complaint by Complainant.¹²

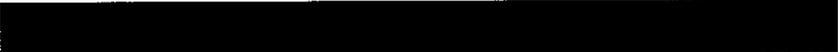
IV. Conclusion

In light of the above, Hasan’s appeal is granted and the initial decision is reversed. No civil penalty is assessed.

[Original signed by Robert A. Sturgell]

ROBERT A. STURGELL
ACTING ADMINISTRATOR
Federal Aviation Administration

¹² This decision makes no finding regarding whether Hasan violated any other FAA regulation in effect on that day (or a current TSA regulation).



U.S. DEPARTMENT OF TRANSPORTATION
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FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

SAYED HASAN,

Respondent.

FAA Docket No. CP05WP0026
(Civil Penalty Action)

DMS No. FAA-2005-21758

**INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN**

Found: 1. Complainant violated 14 C.F.R. §108.9(b) on two occasions as charged; and
2. Respondent is assessed a civil penalty of \$1,700.

I. Background

Respondent Sayed Hasan (hereinafter "Respondent" or "Captain Hasan") is a pilot (2 Tr. 239-40). For the past ten years he has been employed by Mesaba Airlines, an air carrier which operates primarily as a feeder in Northwest Airlines' Airlink system (1 Tr. 148-49). On February 7, 2002, Captain Hassan arrived at [REDACTED] (hereinafter "the Airport") intending to fly as a passenger. Twice he attempted to proceed through a security checkpoint with an item forbidden to travelers, a knife (1 Tr. 44). On that basis Complainant Federal Aviation Administration ("Complainant," "FAA," or "the agency") charged Captain Hasan with two violations of former Federal Aviation Regulation ("FAR") 14 C.F.R. §108.9(b). The agency, tracking the language of the regulation, contends that

¹ I have sealed the record in this case. 1 Tr. 28. This Initial Decision contains sensitive security information (SSI) and must be maintained in a confidential manner to prevent compromising civil aviation security. It may not be disclosed except in accordance with 49 C.F.R. Part 1520. Anyone who violates Part 1520 is subject to a civil penalty and other enforcement or corrective action.

Hasan twice failed to comply with the systems, measures, or procedures applied to regulate access to or presence in secured or sterile airport areas.²

The FAA asks for a civil penalty of \$1,100 per violation, or a total assessment of \$2,200. Captain Hasan does not dispute the facts underlying the charges but denies the violations.

A hearing was held in Las Vegas on May 15 and 16, 2006. The parties have filed briefs and the case is ready for decision.

II. Findings and Conclusions

Captain Hasan had arrived at the Airport in full uniform intending to fly to ██████████ as a passenger in order to visit a friend (2 Tr. 261, 263). As a pilot, Captain Hasan enjoys jump-seat privileges. These permit him to travel *gratis* in the cabin of another airline on a space-available basis (2 Tr. 259-60).

Captain Hasan determined that ██████████ operated the earliest scheduled departure to ██████████ after his arrival, so he presented himself at the carrier's gate in the ██████████ concourse (2 Tr. 263, 270). As was his habit, he carried a knife in a toilet kit in a side pocket inside his carry-on roller bag. The knife was a type of pocket knife known as a Swiss Army knife and featured a blade of about one inch in length (1 Tr. 41; 2 Tr. 265, 289-90, 294-95, 297, 308, 356; see Exh. R-2). Captain Hasan went through the screening process in the sterile area,³ including a luggage X-ray and a metal detector, without incident (2 Tr. 265-66, 308). But because the flight was full, he was unable to board (2 Tr. 269). Captain Hasan then exited the sterile area and the ██████████ concourse (2 Tr. 270).

Southwest Airlines was operating the next most convenient ██████████-bound flight, so Captain Hasan then walked to the carrier's location at the Airport's ██████████ concourse. He entered ██████████ security checkpoint and was again screened without incident (2 Tr. 269-71). But a contract screener executing a second, hand search of his luggage – routine for pilots not acting as required crew members (2 Tr. 321) – uncovered his knife (1 Tr. 35; 2 Tr. 279-80, 289-90).

An FAA-issued Security Directive (SD) in force since September 27, 2001 had barred knives (among other carry-on items) from sterile areas or in aircraft cabins (1 Tr. 182-85; Exh. C-6). Captain Hasan was informed that the knife was a prohibited item. He protested. The gate agent gave him a choice: board the aircraft without the

² 1 Tr. 178. This regulation was transferred substantially as written from FAA to the Transportation Security Administration (TSA) effective February 17, 2002. See 67 Fed. Reg. 8339 *et seq.* (February 22, 2002); 2 Tr. 382. The regulation is now codified at 49 CFR §1540.105(a)(2).

³ A "sterile area" was defined at the time of the incident as an airport area to which access was controlled by the inspection of persons and property under an FAA-approved security program. See former 14 CFR §107.1(b)(6); *James J. Horner*, FAA Order No. 2000-19 (August 11, 2000). Today the TSA controls access. The current definition is found at 49 CFR §1540.5.

knife or exit the sterile area and receive it back. He chose the latter (2 Tr. 301-03, 344).

Captain Hasan placed the knife back in his carry-on and returned to the [REDACTED] concourse. He had indicated to the screener who had escorted him out of [REDACTED] sterile area that he would return to the [REDACTED] concourse to board an [REDACTED] flight (1 Tr. 31-32, 52-53, 57-58; 2 Tr. 309, 345; Exh. C-1). The screener and [REDACTED] passed the word. So when Captain Hasan completed the security process – which took place without incident – and approached [REDACTED] departure gate, Officer David Dodd of the [REDACTED] police was waiting. He and an FAA agent asked Captain Hasan if he was carrying any guns or knives. They knew the answer, of course. And Captain Hasan knew why they had approached him. He admitted carrying the knife and readily produced it (1 Tr. 32-35, 41-42, 44, 53; 2 Tr. 308-11, 347). The knife was confiscated (1 Tr. 41, 46).

Although Respondent maintained that he had been in compliance with the FARs at all times (2 Tr. 330-31), he admitted these facts. They establish that he violated §108.9(b). Twice he had brought a knife, a prohibited item, to a sterile area of the Airport. Each occasion constitutes an FAR violation. The state of his knowledge is not a factor. As such, I find and conclude that Respondent Sayed Hasan twice violated §108.9(b) as charged.

III. Penalty

I have determined to assess Respondent a total civil penalty of \$1,700. The penalty is divided as follows: \$600 for the first violation, and \$1,100 for the second.

Respondent stated in his defense that he believed that [REDACTED] security personnel who initially informed him that his knife was forbidden had applied an unduly strict and arbitrary interpretation of governing rules; that the knife should not have been disallowed in any event because it was small and unthreatening; that he had been through the screening process many times before without security personnel flagging anything; and that he was unaware of directives prohibiting sharp objects of any description from being brought into sterile areas. These contentions each involve the question of penalty and are now considered.

Captain Hasan left his encounter with [REDACTED] personnel convinced that he had been subject to an unduly strict reading of the carry-on rules (2 Tr. 302-04, 307, 313-14, 329-30). Gate agents generally were inconsistent in their interpretation of security regulations, he maintained (2 Tr. 304). Perhaps the restriction to which he had just been subject was airline-specific, he thought, or even that the decision of the security staff to confiscate was flat wrong (2 Tr. 351, 363). Another airline would have different, more relaxed standards, he believed, and he would be able to bring the knife through (2 Tr. 302, 307-08, 364).

Captain Hasan was unaware, he said, that knives such as his were completely banned from air transportation (2 Tr. 331, 367). Before the incident he had not received security training concerning prohibited objects (1 Tr. 123, 127). Neither had he seen any detailed list of prohibited items (2 Tr. 315-16), nor had he received any memos or directives on the subject (2 Tr. 324-25, 328-29, 339). And no Airport signage that he saw indicated that his type of knife was illegal (2 Tr. 314). In fact, Respondent said, he still did not believe that his Swiss Army knife constituted a prohibited item (2 Tr. 307).

I must reject these assertions. The preponderance of the evidence shows that Captain Hasan had been informed that, in sterile or secure areas, knives of any description were prohibited. He was not permitted to speculate or assume that [REDACTED] action constituted an "interpretation" of permissible carry-on items or that another carrier might be operating under different guidelines.

Captain Hasan's training provided him with knowledge of security procedures sufficient to afford him no excuse for his subsequent actions. Mesaba pilots are obligated to undertake security training. Captain Hasan's last training prior to the incident was in June 2000. The course had instructed him to obey screening requirements and to refrain from attempting to circumvent security measures (1 Tr. 74-77, 80; Exh. C-4). On this basis alone, Captain Hasan may not be heard to complain that such measures were applied to him arbitrarily or incorrectly. He knew that he was required to follow them -- as he acknowledged (2 Tr. 348-49). His private musings afforded him no excuse to evade the rules applied. Individuals may not substitute their own judgment for that of security personnel. *Teresa Zoltanski*, FAA Order No. 2002-12 (April 26, 2002), p. 12.

That principle took on added importance after the dramatic increase in security concerns in September 2001 following the multiple airline hijackings and consequent great loss of life. The heightened concerns were subsequently reflected in directives setting out tighter measures. A Mesaba memo dated September 13, 2001, two days after the attacks, warned that knives in secured areas were subject to "severe restriction" (1 Tr. 85-87; Exh. C-5). Shortly thereafter the agency issued a Security Directive ("SD"), SD 108-01-10, which covered these matters more specifically and in greater detail. Dated September 26, 2001, it stated (among other things) that no one was permitted to carry beyond the screening checkpoint "knives of any length or description" (Exh. C-6, p. 2; 1 Tr. 51, 94-96, 99-102, 182-83; see I.D., p. 2).

The SD was issued to all domestic airlines. It overrode the existing security program they had shared (1 Tr. 180, 186). It directed recipients to implement its measures within 24 hours, or by September 27, 2001 (1 Tr. 187).

Captain Hasan denied knowledge of the SD. He said he had never seen it. But the evidence demonstrated that he had received it in the normal course of business. As such, whether he actually knew about it, read it, or remembered it is

beside the point. He is charged with knowledge of its contents. He may not plead ignorance.

The SD was issued by Mesaba officials to all of its pilots. Mesaba has a regular procedure for assuring that its pilots receive SD information (1 Tr. 151). The directive was distributed either as a memo or as an amendment to the pilots' flight operations manual, or both (1 Tr. 128, 151-52). Mesaba pilots receive this information as early as the next day, if a memo of sufficient urgency, but in any case no later than one-two months later, when SDs as a matter of standard procedure are absorbed into a revision of the pilots' flight operations manual (1 Tr. 95, 97, 99, 152-53, 160). Two months after September 26, 2001 is near the end of November, 2001. So Hasan certainly would have received the SD well before February 7, 2002 (1 Tr. 153). That no evidence shows Mesaba pilots actually receiving it is of no moment. It is sufficient proof that, as the evidence demonstrated, the SD was distributed to the pilots in the regular course of business.

Moreover, additional evidence suggests that Captain Hasan received both the September 13, 2001 memo and the SD. Pilots are required to keep their manuals current (1 Tr. 92-93, 134). Recurrent line and proficiency checks test the pilots' observance of this obligation. Captain Hasan's last proficiency check before the incident took place on January 21, 2002. The SD would have been absorbed into his manual by then. Had he failed to keep his memo log or manual current, either fact would have been recorded. But no notation was made (1 Tr. 93, 100-02, 154-55, 163). As such, it may be assumed on this basis also that Captain Hasan had received both the memo and SD prior to the incident. And he is charged with knowledge of their contents.

These points dispose of the knowledge question. Captain Hasan knew or should have known that knives "of any length or description" were forbidden inside a sterile area.⁴ And it is fair to add that, while the type of pocket knife Respondent carried had been permitted on aircraft prior to the multiple hijackings of September 2001 (1 Tr. 124), afterwards it was "pretty clear" that no object usable as a weapon – and Hasan's knife clearly could be used as a weapon (2 Tr. 378) – could be brought into a secured area (1 Tr. 36). For would-be passengers to refrain from carrying such items simply was, in the words of Officer Dodd, "common sense after 9/11" (1 Tr. 45). Against this background, Captain Hasan should have understood that the status as legitimate carry-ons of knives of any type was, at best, suspect. He was on notice; he had been warned.

On the other hand, I find it a mitigating factor that Respondent had brought his knife through security many times previously without incident, both as a crew

⁴ In this connection I reject Captain Hasan's assertion that his relatively small knife – Officer Dodd's report of the incident refers to it as a "mini Swiss Army knife" (Exh. C-1; 1 Tr. 43) – made it "non-objectionable." 2 Tr. 365; *see also* 2 Tr. 299-300 (arguing that knives with "aggressive" blades were forbidden, but not those with smaller blades like his). He had no justifiable basis for this understanding. The SD plainly forbade *all* knives. Exh. C-6; 1 Tr. 217.

member and as a passenger, and even after the multiple aircraft hijackings had dramatically heightened security concerns (see 2 Tr. 321-22). It was not unreasonable for him to believe, based on that experience, that his knife really was not objectionable and would pass through when he presented his carry-on bag at Southwest Airlines' sterile area (see I.D., p. 2; 2 Tr. 350, 363-64). Against that background, I will assess Respondent for the first violation a civil penalty of \$600. That amount, I conclude, is commensurate with the nature and context of that violation while also appropriately promoting the agency's policies of compliance and deterrence.

The maximum penalty of \$1,100 is warranted for the second violation, however. When Respondent brought his carry-on back to [REDACTED] sterile area at the B concourse, he well knew and understood that his knife was a forbidden item. He had just been explicitly refused passage with it (1 Tr. 207-08). He should have in any event been aware that the knife was prohibited. And he had been trained to, and was required to, obey the orders of screeners. But he decided nonetheless to make another attempt. He slipped the knife back into a pocket of his carry-on and proceeded to a different carrier and concourse. He did not tell security personnel (2 Tr. 345). Against this background, Captain Hasan's conduct constituted simply an attempt to circumvent the rules (1 Tr. 207).

That Respondent had earlier in the day and on other occasions presented his carry-on to screeners without being flagged cannot excuse this behavior. He now had actual knowledge that he could not carry the knife past a checkpoint. Under these circumstances, Captain Hasan's action in returning to [REDACTED] sterile area with the knife tucked into a pocket of his carry-on amounted to evasive as well as violative behavior and justifies assessment of the maximum civil penalty (see 1 Tr. 178, 201).

IV. Other Arguments

Respondent contends that the regulation he is charged with violating is void for vagueness. He also argues that the agency's case should be barred on account of laches. I reject these claims.

A regulation may be void for vagueness if it does not define the conduct it prohibits so that an ordinary person would know what is required. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1440, n. 10 (9th Cir. 1996). A regulation that does not fairly inform a person of what is commanded or forbidden is unconstitutional as violative of due process. *Trans World Airlines, Inc.*, FAA Order No. 98-11 (June 16, 1998), p. 10, citing [*Airport Operator*], FAA Order No. 96-1 (January 4, 1996), p. 7. This is not the case with the challenged regulation. Former section 108.9(b) clearly spells out the type of behavior forbidden. A person of ordinary intelligence would understand that the regulation commanded would-be passengers to comply with measures or systems in place in secured areas. Such a person would

comprehend that prohibitions set out by such systems must be respected. The challenged regulation is not unconstitutionally vague.

Respondent's claim of laches also is unpersuasive. Laches, an equitable doctrine, is an affirmative defense requiring its proponent to show that undue prejudice to it resulted from the other party's inexcusable or unreasonable delay in asserting a claim. *John J. Carroll*, FAA Order No. 90-21 (August 16, 1990), p. 3. Respondent has made no such showing in this proceeding. Respondent proved no prejudice to it resulting from unwarranted delay. The proceeding was brought within statutory limits. And it has not been otherwise demonstrated how the time elapsed in this matter might have unduly prejudiced Respondent. Respondent in fact showed only that the passage of time may have hampered the FAA's case. The agency failed to produce certain witnesses who had retired in the interim (see Brief of Respondent, p. 18, *citing* 1 Tr. 209). Respondent's claim of laches fails.⁵

I have considered all other arguments advanced by Respondent and reject them without further comment as without merit.

On the basis of the foregoing, I hereby assess a civil penalty of \$1,700 against Respondent Sayed Hasan for two violations of 14 C.F.R. §108.9(b) as set out in this Initial Decision.⁶

SO ORDERED.



Richard C. Goodwin
U.S. Administrative Law Judge

Attachment(s) – Service List

⁵ Moreover, although the FAA has expressed a willingness to consider "laches-type" defenses in civil penalty actions, courts have often held that laches may never be asserted against the United States when, as here, it is enforcing a public right or protecting the public interest. The strong interest in the unencumbered functioning of the state would be significantly impaired by successful laches claims. *See, e.g., Savoury v. U.S.*, 449 F.3d 1307, 1320 (11th Cir. 2006); *United States v. Arrow Transportation Co.*, 658 F.2d 392, 394 (5th Cir. 1981), *cert. den.* 456 U.S. 915 (1982).

⁶ Any appeal from this order to the Administrator must be in accordance with section 13.233 of the Rules of Practice, which requires 1) that a notice of appeal be filed no later than 10 days (plus 5 for mailing) from the date of this order and 2) that the appeal be perfected with a written brief or memorandum not later than 50 days (plus 5 for mailing) from the date of this order. Each is to be sent to FAA counsel and particularly to the Federal Aviation Administration, 800 Independence Avenue, S.W. Washington, DC 20591, Attention: Appellate Docket Clerk, AGC-430, Wilbur Wright Building – Room 2014.