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UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

SHARON DORFMAN

FAA Order No. 99-16

Served: December 22, 1999

Docket No. CP98SW0005

DECISION AND ORDER¹

Complainant has appealed from the written initial decision by Administrative Law Judge Burton S. Kolko² in which he found that Respondent Sharon S. Dorfman did not violate the regulations as alleged, and as a result, he dismissed the complaint and assessed no civil penalty. Complainant argues on appeal: 1) that the law judge should have dismissed Ms. Dorfman's request for hearing because she failed to file a timely answer, and 2) that the law judge's findings that Ms. Dorfman did not violate 14 C.F.R. §§ 91.11,³ 121.317(f),⁴ and 121.317(k)⁵ should be reversed.

¹ The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 64 Fed. Reg. 58879, 58895 (November 1, 1999).

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

³ Section 91.11 of the Federal Aviation Regulations, 14 C.F.R. § 91.11, provides as follows:

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

⁴ Section 121.317(f) of the Federal Aviation Regulations, 14 C.F.R. § 121.317(f), provides as follows:

After consideration of the record and the briefs filed on appeal, Complainant's appeal is denied.

Ms. Dorfman was a passenger on board American Airlines Flight 2039 from Chicago, Illinois, to Austin, Texas, on May 17, 1997. Complainant alleged in the complaint as follows:

2.... at a time when the "Fasten Seat Belt" signs were lighted, you repeatedly unfastened your seat belt and refused to fasten the seat belt despite repeatedly (sic) requests by flight attendants.

3. You also refused to comply with flight attendant instructions to remain seated throughout the flight.

4. When told to remove your knees and legs from the aisle in order to allow a flight attendant to continue with her duties, you refused, requiring the flight attendant to climb over your legs to continue with the performance of her duties.

5. Your actions required that the Captain of the flight leave the cockpit in order to speak to you regarding your behavior.

(Complaint, dated April 20, 1998.) Complainant sought a \$3000 civil penalty⁶ for alleged violations of three regulatory provisions. Ms. Dorfman was notified of the

Each passenger required by § 121.311(b) to occupy a seat or berth shall fasten his or her safety belt about him or her and keep it fastened while the "Fasten Seat Belt" sign is lighted.

⁵ Section 121.317(k) of the Federal Aviation Regulations, 14 C.F.R. § 121.317(k), provides as follows:

Each passenger shall comply with instructions given him or her by a crewmember regarding compliance with paragraphs (f), (g), (h), and (l) of this section.

Complainant mistakenly alleged in the complaint that Ms. Dorfman had violated Section 121.317(g)(pertaining to smoking on board an aircraft), rather than Section 121.317(k). The law judge granted Complainant's motion at the hearing to amend the complaint to substitute Section 121.317(k) for Section 121.317(g). (Tr. 5.)

⁶ During the oral argument following the presentation of the evidence, the agency attorney argued that a civil penalty of \$2,250 would be appropriate. (Tr. 202.)

requirement to file an answer in a letter from agency counsel dated April 20, 1998.⁷ Ms. Dorfman did not file a timely answer.

On November 23, 1998, the law judge issued a Notice of Hearing, in which he notified Ms. Dorfman that if she did not file an answer, the hearing would be cancelled and a judgment would occur in favor of the FAA. The law judge ordered that "[i]f not already filed, the answer is due in Washington, D.C., on December 1, 1998."

Ms. Dorfman did not file an answer by December 1, 1998. Consequently, on January 26, 1999, the law judge issued an order to show cause. The law judge noted in the order that Ms. Dorfman had not yet filed an answer, that a hearing was scheduled, and that Complainant had filed a motion to limit the hearing to the question of the amount of the civil penalty. The law judge ordered Ms. Dorfman to file a document to be received in Washington, DC by February 5, 1999, in which she demonstrated why the request for hearing that Ms. Dorfman had filed⁸ should not be dismissed. He ordered her further to demonstrate good cause for her failure to file an answer as of that time. Finally, he ordered her to file an answer to the complaint. Ms. Dorfman responded by letter, dated February 2, 1999,⁹ addressed to the law judge.¹⁰ The law judge subsequently issued an order vacating his order to show cause. He wrote that he was accepting Ms. Dorfman's

⁷ Ms. Dorfman was required to file her answer to the complaint under 14 C.F.R. § 13.209(a) not later than 30 days after service of the complaint.

⁸ Ms. Dorfman filed a request for hearing on April 5, 1998.

⁹ Received in the Department of Transportation's Office of Hearings in Washington, DC, on February 4, 1999.

¹⁰ She attached a copy of a letter that she wrote to Aviation Safety Inspector James A. Hayes, dated June 20, 1997, and a letter written by her son, Marc A. Dorfman, M.D., to Ms. Bernal, dated September 12, 1997.

letter as an answer denying the allegations contained in paragraphs I.3-6 and II.1-2 of the complaint.¹¹ Complainant filed a motion urging the law judge to reconsider the order vacating the order to show cause. Ms. Dorfman filed two additional documents in response to the complaint. The law judge, by order dated March 1, 1999, denied the motion to reconsider and held a hearing on May 25, 1999.

The Testimony

1. Before Takeoff

When Ms. Dorfman arrived at the American Airlines reservations desk for Flight 2039 on May 17, 1997, the ticket lift gate agent asked to see Ms. Dorfman's identification. Ms. Dorfman had not brought any identification with her to the airport, and as a result, the ticket lift gate agent informed Ms. Dorfman that she would not be allowed to board. Ms. Dorfman, who intended to travel with her family¹² to Austin for a long-planned surprise party for a relative, became very upset and agitated.¹³ She contacted her nephew who brought the identification to the airport. However, by the time that the nephew arrived at the airport, the jetway had been pulled.

¹¹ The law judge mistakenly wrote paragraphs III.1-2.

¹² Ms. Dorfman was traveling with her husband, her mother, and her grown children and their families.

¹³ The ticket lift agent testified that Ms. Dorfman was very angry and abusive. She stated that Ms. Dorfman screamed and pounded on the counter for about 1 hour. (Tr. 11.) She explained that Ms. Dorfman was crying, swearing and creating a disturbance. (Tr. 29-30.) Ms. Dorfman testified that she cried and was very upset, but that she did not blame anyone. (Tr. 166-7, 168-169.) Ms. Dorfman testified that she never uses foul language and that she did not swear at anyone that day. She said that she understood that she was responsible for having left her identification at home. (Tr. 172.) She testified that she is an emotional person. (Tr. 173.) Mr. Dorfman testified that while his wife was crying, the ticket lift gate agent kept saying to his wife, "It's your fault, it's your fault." (Tr. 159.)

Prior to takeoff, two passengers decided to get off the flight. (Tr. 70.) Because this was a positive bag match flight, the aircraft could not take off until the baggage handlers identified the baggage belonging to the passengers who had left the flight and removed it from the aircraft.¹⁴ (Tr. 21, 24, 35-36, 71.) During the resulting delay, American permitted Ms. Dorfman, who now had her identification, and some family members who had waited with her, to board the aircraft. (Tr. 35-36, 71.)

In accordance with protocol, the customer service manager notified the flight crew about Ms. Dorfman's preboarding behavior. (Tr. 13-14.) The ticket lift gate agent also prepared a passenger name record describing Mr. and Ms. Dorfman's behavior at the gate. (Tr. 14.)

The number 1 flight attendant, Tammy Wiper, was bending over, trying to make room in the forward closet for Ms. Dorfman's baggage, when Ms. Dorfman and her husband boarded. Ms. Wiper thought that it would calm the situation if room was available in the closet for Ms. Dorfman's luggage. (Tr. 72.) Ms. Wiper testified that Ms. Dorfman, who was upset, pushed her into the closet. (Tr. 72, 73.) Ms. Wiper assumed that Ms. Dorfman had pushed her because Ms. Wiper felt something on her back and then fell into the closet. When she looked up, she saw Ms. Dorfman. (Tr. 96, 101.) Ms. Wiper had her back to Ms. Dorfman when she fell into the closet. According to Ms. Wiper, when she looked up, she heard Mr. Dorfman admonish his wife to calm down. (Tr. 72, 96.)

¹⁴ Ms. Dorfman testified that Ms. Wiper appeared "frazzled" when the two passengers got off the plane.

Mr. Dorfman characterized the attitude of the American Airlines ticket counter personnel as "nervous" and "totally unsympathetic towards my wife, not caring." (Tr. 158.) He felt that they went out of their way to be difficult. *Id.* He testified that the flight crew on board the aircraft treated his wife in a hostile fashion. (Tr. 161, 162-163.)

Ms. Dorfman testified that she did not notice Ms. Wiper when she boarded the aircraft, that she would never push an airline employee whose back was turned to her, and that it is possible that she brushed past her. (Tr. 170.) Her husband, Robert Dorfman, testified that he was behind her when she boarded the plane. He said that he saw the flight attendant, bending over and partially blocking the aisle, but he did not see any contact between his wife and the flight attendant. (Tr. 153.)

Ms. Wiper asserted that Ms. Dorfman was yelling about what had happened to her prior to boarding. Ms. Wiper said that she asked Ms. Dorfman to be seated several times, but Ms. Dorfman did not sit down. (Tr. 72-73.) Ms. Wiper notified the captain,¹⁵ who asked Ms. Dorfman to listen to the flight attendants and to take her seat. He told her in essence that he wanted the flight to be normal regardless of whether she felt she had been mistreated in the airport. (Tr. 38-39.) Ms. Wiper testified that the pilot told her, "If you have anything to say ... leave it in Chicago." (Tr. 176.) After talking to the captain, Ms. Dorfman took her seat, and the aircraft was able to push back and take off. (Tr. 74-75, 176.)

Ms. Dorfman testified that she thought the pilot met with her in response to her request to talk to him.¹⁶ Upon boarding, another passenger from Winnetka described a similar experience that she had had to Ms. Dorfman. According to Ms. Dorfman, this passenger from Winnetka had once forgotten her identification and the airline accepted a faxed copy of the identification. Ms. Dorfman was upset that the American gate

¹⁵ According to Ms. Wiper, Ms. Dorfman was still standing when Ms. Wiper went to the captain. (Tr. 74.)

¹⁶ The pilot testified that he did not remember anyone telling him that Ms. Dorfman wanted to speak with him. (Tr. 56.)

personnel had not given her that option. She testified that she wanted to ask the captain why she had not been given the option to have her identification faxed to the airport, and for that reason, she asked a flight attendant if she could speak with the captain. (Tr. 171-176.)

Ms. Dorfman's son, Marc Dorfman, M.D., explained that his mother has spinal stenosis, which is a painful back condition. (Tr. 136-7.) As a result, she does not carry her own luggage or put her luggage on the luggage racks. When Ms. Dorfman boarded the flight, her husband carried her baggage as well as a prosthetic seat cushion. (Tr. 154-155.)

Ms. Dorfman testified that she typically has trouble finding her seat belt to put it on because she usually places her prosthetic seat cushion on top of the seat belt. It is difficult to adjust the seat cushion and seat belt so that she is comfortable. (Tr. 190.) If she takes the seat belt off to adjust the seat, she may lose the seat belt again. (Tr. 191.) She testified that she did not recall whether that is what happened on this date. (Tr. 191.)

2. Takeoff.

According to Ms. Wiper, when the aircraft reached 10,000 feet and was still climbing, she made an announcement instructing the passengers to please remain seated with their seat belts fastened. She testified that as soon as she said this, Ms. Dorfman stood up. (Tr. 75-76.) She repeated that announcement, but Ms. Dorfman did not sit down. As a result, she stated, "Ma'am, please sit down," and Ms. Dorfman complied. (Tr. 76.) Ms. Wiper testified that Ms. Dorfman stood straight up when the announcement was made to remain seated. She did not regard this action as consistent with someone

who was having difficulty with a seat belt. Ms. Wiper said that she was never advised that Ms. Dorfman was having trouble with her seat belt. (Tr. 114.)

Ms. Dorfman's son, Dr. Dorfman, testified that he noted once while the Fasten Seat Belt sign was on, his mother stood up to adjust her seat, and the flight attendants rudely asked her to sit down. (Tr. 140.) Ms. Dorfman testified on direct that it is possible that she stood up during takeoff while the Fasten Seat Belt sign was lit and then sat back down. (Tr. 177-178.) She said that the only reason that she would stand up would be because either her back hurt her or she was feeling very nervous. (Tr. 181.) On cross-examination she stated, "I said that I got up for two reasons: my back was bothering me, and I felt very agitated." (Tr. 192.) She testified further that she did not recall the flight attendant's announcements to the passengers in general, and to her in particular, to sit down. (Tr. 192-193.)

3. Blocking the Aisle.

Later in the flight, after the food service, Ms. Wiper was helping another flight attendant by picking up glasses. Ms. Wiper could not get past Ms. Dorfman who was sitting on the armrest of an aisle seat, with her legs on the armrest of the seat across the aisle. Ms. Dorfman's legs were blocking the aisle. (Tr. 77, 106-108.) Ms. Wiper testified that she asked Ms. Dorfman to move her legs several times but was ignored. (Tr. 77.) Finally, she just pushed Ms. Dorfman's legs out of the way. (Tr. 110.) Ms. Dorfman acknowledged that she had been sitting with her legs across the aisle while she talked with another passenger, that the flight attendant asked her twice to remove her legs, and that the flight attendant pushed her legs out of the way. (Tr. 178-179.)

At another point while the Fasten Seat Belt sign was unlit, Ms. Wiper noticed a long line of passengers waiting to use the front bathrooms. According to Ms. Wiper, the passengers had come up front because several Dorfman family members were blocking the access to the aft bathrooms. Ms. Wiper walked down the aisle, checking on seat belts, but then could not get past the standing Dorfman family members. As a result, she could not continue to check seat belts. (Tr. 78-79, 90-91.) She testified that when she asked the family members to sit down, they ignored her. (Tr. 94.) Finally, she asked the pilot to turn on the Fasten Seat Belt sign to clear the aisle. (Tr. 78.) According to Ms. Wiper, the family members, including Ms. Dorfman, were at first hesitant to sit down, but they eventually did. (Tr. 78.) She testified that Ms. Dorfman would not sit down for landing until after the Fasten Seat Belt sign was lit, and the flight attendants had asked Ms. Dorfman to sit several times. (Tr. 79.) In response to the law judge's questioning, Ms. Wiper replied that she did not see Ms. Dorfman standing with her family members, blocking the aisle. (Tr. 91.) However, she testified, she did recall that Ms. Dorfman and a few of her daughters did not sit down and continued to stand and talk. (Tr. 91-92.)

4. Landing.

The pilot and Ms. Wiper decided to call ahead and have security meet the aircraft. (Tr. 81.) Two members of the Austin Police Department met the airplane upon its arrival in Austin. (Tr. 44.)

The Law Judge's Decision.

Section 91.11. The law judge wrote that the atmosphere was tense because of the positive bag match requirement in effect that day, the overbooking of the flight, and the deplaning of two passengers, resulting in a delay that would be contrary to the airline's commitment to on-time departures. (Initial Decision at 3.) In addition, Ms. Dorfman was upset, as were her family members. The result was, he found, "an environment in which little allowance is made for distressed behavior." (Initial Decision at 3.)

The law judge did not find that the incident in which Ms. Wiper was either bumped or pushed into the closet constituted a violation of Section 91.11. Complainant failed to allege in the complaint that Ms. Dorfman had bumped into the flight attendant when boarding and that this constituted an assault in violation of Section 91.11. Hence, the law judge held, he would not find that this incident was a violation of Section 91.11 because Complainant is bound by the allegations set forth in the complaint. (Initial Decision at 4.)¹⁷

Regarding the allegation in the complaint that Ms. Dorfman's actions made it necessary for the captain to leave the cockpit to speak to her, the law judge held that the pilot's decision to talk to Ms. Dorfman might have been prudent, but not necessary. (Initial Decision at 4.) The law judge noted that the flight had been delayed and as a result, the crew wanted to be able to eliminate any obstacles preventing them from making an immediate takeoff. He wrote:

¹⁷ The law judge found that even if this allegation had been in the complaint, Complainant failed to prove that there was a violation. He found the testimony of Ms. Dorfman and her husband that the bumping, if it occurred, was accidental, to be credible. He noted that they had a better view of the incident than Ms. Wiper, who was facing into the closet. Such an accidental jostling, he stated, does not constitute a violation of Section 91.11. (Initial Decision at 4, fn. 4.)

Thus a lapse in conduct which would, in a calmer atmosphere, fall "under the radar screen," here became magnified out of proportion to its true character. The pressure for timely departure generated both exaggerated reports of Respondent's pre-boarding behavior and a more ready decision by the PIC to head off possible trouble.

(Initial Decision at 5.) He also considered the ticket lift gate agent, who had been employed by American for two years¹⁸ to be relatively inexperienced, and, he found, if she had had "the benefit of long-range perspective, she undoubtedly would have made a more tempered evaluation of Respondent's conduct." (Initial Decision at 5.) He wrote that other members of the Dorfman family were agitated and the staff may have been attributing the behavior of these irate family members to Ms. Dorfman. He wrote further:

Indeed, the accounts did in fact confuse the individuals involved in the conduct complained of. Captain Conant had been informed that Respondent was not cooperating in stowing her luggage (Tr. 38, 40; Exh. C-3). But Dorfman credibly testified that her ailing back prevents her from handling her luggage at all (Tr. 180-81). It was Dorfman's husband, Robert Dorfman, who had hauled her luggage (Tr. 154). In sum, the circumstances at play when the captain agreed to discuss matters with Sharon Dorfman suggest that the notion that she posed a risk of interference with the flight crew was considerably overstated. As such, I find and conclude that Complainant failed to prove the § 91.11 charge based on this incident.

Initial Decision at 5.

The law judge also found that Ms. Dorfman had not violated the seat belt requirements contained in 14 C.F.R. § 121.317(f) and (k). The law judge concluded that Ms. Dorfman may have stood up while the Fasten Seat Belt sign was lit just as the flight attendant made the general announcement at 10,000 feet that the passengers should remain seated. If Ms. Dorfman did stand, he found, it was to alleviate the pain in her back. "And in the absence of evidence tending to show that Dorfman failed to follow

¹⁸ The ticket lift agent had started working for American in 1995. (Tr. 8, 19.)

directions for more than a moment or two," the law judge wrote, "I conclude that the agency did not demonstrate a violation." (Initial Decision at 5.)

The law judge found further that other agency testimony offered to prove that Ms. Dorfman ignored the flight attendants' instructions or the seat belt signs showed only that Ms. Dorfman may been slow once or twice in complying with those instructions. The crew, he found, was in no state to cut her any slack. (Initial Decision at 6.)

Disposition of Complainant's Arguments on Appeal.

Failure to File an Answer.

Ms. Dorfman did not provide a satisfactory reason for her failure to file a timely answer. However, at this point, after a hearing was held and briefs on the merits were filed, the question whether the law judge should have held a hearing on the merits is a moot question.

Background.

Complainant argues that the law judge's findings that the airline personnel were overwrought and harried is not supported by the record. (Appeal Brief at 4.) Undoubtedly, the circumstances of this flight— the positive bag match, the overbooking, the delay caused by the two passengers who deplaned, and the vocal and agitated Dorfman clan —made this flight memorable for the crew. That does not necessarily mean that the crew could not cope professionally with Ms. Dorfman under those circumstances. However, because they were in a rush to be ready to take off (Tr. 75, 102), the flight

attendant might have been inpatient with Ms. Dorfman's agitation, her failure to take her seat immediately upon boarding, and her slow compliance during the flight.¹⁹

Section 91.11 allegations.

Complainant argues that the law judge should have found that the incident in which Ms. Wiper was pushed into the closet constituted a violation of Section 91.11. According to Complainant, the weight of the evidence proves that the flight attendant was pushed, not inadvertently bumped, into the closet and that Ms. Dorfman did the pushing. Complainant's argument must be rejected.

Complainant fails to recognize that the primary reason that the law judge did not find that this incident constituted a violation of Section 91.11 was because Complainant did not specifically include this incident in the complaint. The law judge's discussion of the inadequacy of the evidence in a footnote was dictum.

The law judge was correct that this incident should have been specifically included in the complaint. Section 13.208(c) provides that "[a] complaint shall set forth the facts alleged, any regulation allegedly violated by the respondent, and the proposed civil penalty *in sufficient detail to provide notice of any factual or legal allegation* and proposed civil penalty." 14 C.F.R. § 13.208(c)(emphasis added.) Having failed to include this incident in the complaint, Complainant is precluded from arguing that the law judge should have found that this incident constituted a violation.

Moreover, even if this incident had been alleged specifically in the complaint, Complainant failed to prove that it constituted a violation of Section 91.11. Section 91.11 states: "No person may assault, threaten, intimidate, or interfere with a

¹⁹ That the flight attendant thought that Ms. Dorfman had deliberately pushed her into the closet may also have predisposed the flight attendant against Ms. Dorfman.

crewmember in the performance of the crewmember's duties aboard an aircraft being operated." 14 C.F.R. § 91.11. Presumably, Complainant is arguing that Ms. Dorfman assaulted the flight attendant when she pushed her into the closet.

The Administrator has held that the term "assault" as used in Section 91.11 includes the intentional torts of assault and battery. In the Matter of Mayer, FAA Order No. 97-12 (February 20, 1997); In the Matter of Ignatov, FAA Order No. 96-6 (February 6, 1996). The Administrator has explained these terms as follows:

A battery is an intentional tort, involving a "harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." In the Matter of Ignatov, at 8, *quoting* W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 9, at 39 (5th ed. 1984). An assault is also an intentional tort, arising from intentional acts causing another person to be in fear of harmful or offensive contact, as distinguished from an actual contact. In the Matter of Ignatov, at 8; Prosser & Keeton on the Law of Torts § 10, at 43.

In the Matter of Mayer, at 9. The flight attendant's back was to Ms. Dorfman as the latter boarded the plane and either bumped or pushed the flight attendant into the closet. Hence, the flight attendant was not in fear of being hurt by Ms. Dorfman. The law judge wrote that "the preponderance of the credible evidence showed that Respondent had accidentally jostled the flight attendant, behavior which does not constitute a violation of § 91.11." Indeed, accidental jostling does not amount to a battery because it lacks the element of intent. The only possible evidence of intent was the statement by Mr. Dorfman to his wife, "Calm down, Sharon" and that can hardly be viewed as such compelling evidence that the law judge's credibility assessment in favor of Ms. Dorfman should be reversed. The law judge's finding that Ms. Dorfman accidentally jostled

Ms. Wiper who was partially blocking the aisle (Tr. 99) and who was probably too upset to say the polite "excuse me" is perfectly reasonable based on the evidence.

Complainant argues further that the law judge should have found that Ms. Dorfman blocked the aisle, thereby interfering with the flight attendant's performance of her duties in violation of Section 91.11. The weight of the evidence establishes that when Ms. Dorfman had her legs stretched across the aisle, she did block Ms. Wiper from continuing down the aisle to collect glasses. The flight attendant asked Ms. Dorfman a few times to move her legs and Ms. Dorfman ignored the requests. (Tr. 77, 89; 109, 178-179.) However, as the law judge found, this interference was only momentary and inconsequential. When Ms. Dorfman did not move her legs, the flight attendant pushed them out of the way and was able to continue to do her duties.

The law judge held that this momentary and inconsequential interference was too insignificant to rise to the level of a violation of Section 91.11. While the Administrator does not wish to condone behavior by passengers that interferes with the performance of duties of a flight attendant, the Administrator agrees that this behavior does not rise to the level of a violation of Section 91.11.

The law judge found that Ms. Dorfman's conduct did not necessitate the pilot leaving the cockpit to talk with her, although such a discussion may have been prudent. (Initial Decision at 4-5.) The law judge believed that the American personnel may have blamed Ms. Dorfman for the conduct of her other irate family members. The law judge cited the report that the pilot received that Ms. Dorfman would not stow her luggage and sit down. The law judge found that this could not have been the respondent because she testified credibly that because of her bad back, she did not carry any luggage and had no

luggage to stow. The Administrator sees no reason to disturb this credibility finding by the law judge that apparently it was not Sharon Dorfman who would not stow her luggage and take her seat. Moreover, even if it was Ms. Dorfman, it was not established that Ms. Dorfman even heard the flight attendant's requests that she sit down. Also, there was no evidence of how much time elapsed between the first request and the flight attendant's decision to get the captain involved.²⁰ Hence, the law judge's finding that Complainant did not prove that Ms. Dorfman violated Section 91.11 by necessitating that the pilot speak to her is sustained.

In addition, to establish a violation of Section 91.11, Complainant had to prove that there was an interference with the performance of the captain's duties. The captain testified that he could not remember if the cockpit door was closed when the flight attendant came up to see him and he could not recall specifically what he was doing at that time. He stated, "*I imagine* we were doing preflight checks." (Tr. 39)(emphasis added.)

Seat belt allegations – Section 121.317(f) and (k).

Complainant also argues that the law judge erred in finding that Ms. Dorfman stood up during the climb out at about 10,000 feet. He argues that Ms. Dorfman's bad back does not constitute an excuse for standing despite instructions to keep her seat belt on and Ms. Dorfman did not prove that she stood up at any time to alleviate back pain.

The law judge held that there was no evidence that Ms. Dorfman stood for more than a moment during the climb out, and he found the evidence that she stood up in

²⁰ Also, while the Ms. Wiper testified that Ms. Dorfman was standing when the flight attendant went to see the captain, there was no evidence whether Ms. Dorfman was still standing when the flight attendant finished talking with the captain.

response to the instruction to remain seated to be unconvincing. The law judge wrote that Ms. "Dorfman's demeanor did not suggest that she would flout flight attendant instructions." Initial Decision at 5. Instead, if she stood during the climb out, it was not deliberately to disobey instructions but to ease her back pain.²¹ The Administrator sees no reason to disturb this credibility finding. Ms. Dorfman did testify that while she did not recall whether she had trouble adjusting the seatbelt on this flight, she recalled generally that she stood up because her back was bothering her and she felt agitated. (Tr. 192.)

The law judge found that the additional agency testimony about the seat belt charges, which the agency offered to show that Ms. Dorfman ignored crew instructions, instead showed that Ms. Dorfman may have been slow in complying with instructions to sit down and fasten her seat belt. (Initial Decision at 6.) The law judge's finding is supported by the evidence. For example, Ms. Wiper testified that Ms. Dorfman did comply with the Fasten Seat Belt sign "hesitantly, but she did eventually." (Tr. 78.)

There was no clear evidence that Ms. Dorfman ignored the flight attendant's requests to be seated prior to the turning on the Fasten Seat Belt signs. The evidence pertaining to whether Ms. Dorfman was part of the group that was standing in the aisle, blocking the access to the aft lavatory, is unclear. Ms. Wiper testified:

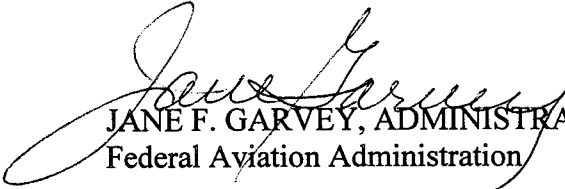
Now, I did not see her back with those people, her family members, so I cannot say that she was actually blocking the whole bathrooms, but from what everybody was telling me, that they were blocking the bathrooms, when I went back there, halfway through the cabin, I could see her group of family back there.

That's when I went back up to tell the captain, if we can put the seat-belt sign on, we can have them just be seated.

²¹ When asked by her counsel whether she had stood when the Fasten Seat Belt sign was on, she replied, "You know, the thought that just crossed my head is, is it possible that I stood up, got like this, and then sat down? That's possible. But am I a rule breaker and obstinate? Never." (Tr. 177-178.)

(Tr. 91.) The above-quoted testimony supports the law judge's statement that Ms. Dorfman "may have been faulted for the conduct of others." (*Id.*)

In light of the foregoing, Complainant's appeal is denied, and the law judge's decision is affirmed.²²


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st of December, 1999.

²² Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1999).