UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 97-12
DAVID H. MAYER	Served: February 20, 1997
	Docket No. CP95NM0122

DECISION AND ORDER

Complainant and Respondent, David H. Mayer, have filed cross-appeals from the oral initial decision issued by Administrative Law Judge Ann Z. Cook at the conclusion of a hearing held on October 24, 1995.[1] The law judge held that Mr. Mayer violated Section 91.11 of the Federal Aviation Regulations (FAR), 14 C.F.R. § 91.11,[2] by stuffing a sandwich down the back of a flight attendant's blouse and then demanding the attention of the pilot. She also held that Mr. Mayer violated Section 121.589(e) of the FAR, 14 C.F.R. § 121.589(e),[3] by refusing to stow

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[1] An excerpt from the transcript containing the law judge's oral initial decision is attached. In addition, a copy of the law judge's Order Granting in Part and Denying in Part Complainant's Motion for Decision is attached. (*See infra* note 6.)

[2] Section 91.11 of the FAR 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." 14 C.F.R. § 91.11.

[3] Section 121.589(e), provides: "Each passenger must comply with the instructions given by crewmembers regarding compliance with paragraphs (a), (b), (c), (d), and (g) of this section [pertaining to limits upon and proper stowing of carry-on baggage.]" 14 C.F.R. § 121.589(e).

Subsections (b) and (c) of Section 121.589 are relevant to the facts of this case. They provide as follows:

> (b) No certificate holder may allow all passenger entry doors of an airplane to be closed in preparation for taxi or pushback unless at least one required crewmember

his carry-on baggage. The law judge assessed a $1,000 civil penalty for Mr. Mayer's violation of Section 91.11, but held that only a $150 civil penalty was appropriate for his violation of Section 121.589(e).

On appeal, Complainant argues that the law judge should have assessed the $2,000 civil penalty sought in the Complaint. Mr. Mayer on appeal argues that it was error for the law judge to grant Complainant's motion for decision in part, finding that Mr. Mayer had violated Section 91.11. In this opinion and order, Mr. Mayer's appeal is denied, and Complainant's appeal is granted in part. A total civil penalty of $1,500 is assessed against Mr. Mayer by this order.

Mr. Mayer was a passenger on Alaska Airlines Flight No. 415 from Sacramento, California, to Seattle, Washington, on November 25, 1994. After he boarded the aircraft, Flight Attendant Erin Dahl asked him to stow his carry-on item beneath the seat in front of him. He refused to do so. Ms. Dahl continued to do her duties and then returned later, again asking him to stow his carry-on item. Mr. Mayer did not stow his carry-on item after this request. Mr. Mayer was talking to a friend at the time and, according to Ms. Dahl, Mr. Mayer "either kind of ignored me or he didn't do it again." (Tr. 11). On her next walk-through, she again requested that he stow the carry-on item and explained to him that the front door of

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has verified that each article of baggage is stowed in accordance with this section and § 121.285(c) of this part.

(c) No certificate holder may allow an airplane to take off or land unless each article of baggage is stowed:

(1) In a suitable closet or baggage or cargo stowage compartment . . .; or
(2) As provided in § 121.285(c) of this part; or
(3) Under a passenger seat.

14 C.F.R. § 121.589(b)-(c).

the aircraft could not be closed until his carry-on item was stowed. She stated further that if he did not comply this time, she would have to notify the "A" flight attendant.[4] He indicated to her that she should do whatever she had to do. (Tr. 51, 56-57.)[5] Ms. Dahl then left him and contacted the "A" flight attendant by interphone. By the time that the "A" flight attendant went to see Mr. Mayer, he had stowed the carry-on item.

Ms. Dahl testified that the carry-on item in question was a black nylon bag, like a "duffle tote bag" which had been sitting on the floor between Mr. Mayer and the seat in front of him. (Tr. 8-9, 23.) She testified that his bag was smaller than her 2-foot long carry-on bag. In contrast, Mr. Mayer testified that the item in question was a legal-sized portfolio, with a zipper around three sides, approximately 2 inches thick, weighing about 1 to 3 pounds. (Tr. 50.) Ms. Dahl testified that the legal portfolio was not the carry-on item that she had seen, but if it had been, she would have asked him to stow it in the overhead compartment or in the seat pocket in front of him. (Tr. 21-22.)

Aviation Safety Inspector Dennis Harn testified that Alaska Airlines has an FAA-approved carry-on baggage program. He explained that under that program the term carry-on baggage is defined as "[b]asically anything that is carried into the cabin of the aircraft [which] for safety reasons must be properly stowed prior to the door of the aircraft being closed for movement on the surface." (Tr. 28; *see also*

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[4] According to Ms. Dahl's testimony, the "A" flight attendant has the ultimate authority to ensure that all carry-on items are stowed. On this flight, Ms. Dahl was the "B" flight attendant. (Tr. 10.)

[5] Ms. Dahl testified that Mr. Mayer "told me to go ahead and call her in a smart remark." (Tr. 12.)

Tr. 34.) Carry-on items which are not stowed can obstruct the aisles preventing or inhibiting people from quickly evacuating an aircraft during an emergency. Also, carry-on items which are not stowed can become hazardous projectiles if an aircraft stops suddenly on the taxiway or prior to takeoff. (Tr. 31-32.)

Later, after the aircraft was airborne, the flight attendants served meals and beverages to the passengers. Mr. Mayer did not want his sandwich, and he put it on the beverage cart. The flight attendant put the sandwich back on Mr. Mayer's tray, explaining to him that she could not take refuse on the beverage cart due to sanitation reasons. Mr. Mayer tried to put the sandwich back on the beverage cart a few more times, but each time, the flight attendant removed it from the beverage cart. Mr. Mayer testified that the flight attendant then "tossed" the sandwich on his lap. (Tr. 52.) Mr. Mayer left his seat and stuffed the sandwich down the back of the flight attendant's blouse. He walked to the front of the aircraft, knocked on the cockpit door, and complained to the flight crewmember who opened the cockpit door.

On October 16, 1995, the law judge issued an Order Granting in Part and Denying in Part Complainant's Motion for Decision.[6] The law judge held that Mr. Mayer's "conduct in putting the sandwich down the flight attendant's blouse constituted an assault and clearly interfered with the crewmember's duties . . . in violation of Section 91.11." Order Granting in Part and Denying in Part Complainant's Motion for Decision at 3. The law judge denied the motion for decision with regard to the allegation that Mr. Mayer had violated Section 121.589(e) because in her view there were two genuine issues of material fact

[6] When this order was issued on October 16, 1995, it was entitled "Order Denying Complainant's Motion for Decision." The law judge issued an Errata on October 17, 1995, noting that the Order's heading should read "Order Granting in Part and Denying in Part Complainant's Motion for Decision."

related to this allegation. The law judge ruled that a hearing was necessary to resolve two issues: 1) whether Mr. Mayer's *delay* in stowing his carry-on item should be construed as *non-compliance* with the flight attendant's request; and 2) whether the portfolio was too small to be considered as "baggage" under the regulation. The law judge held further that a hearing was necessary to determine the appropriate penalty for Mr. Mayer's violation of Section 91.11, as well as to resolve the question of whether Mr. Mayer violated Section 121.589(e).

A hearing was held on October 24, 1995. Although Complainant's witnesses limited their testimony to the issues which, according to the law judge's order, remained, Mr. Mayer and his friend testified about the incidents giving rise to the allegations pertaining to both regulations. At the conclusion of the hearing, the law judge held that Mr. Mayer had violated both Sections 91.11 and 121.589(e).

Regarding the violation of Section 121.589(e), the law judge explained that it was not necessary to resolve the issue of whether Mr. Mayer had a legal-sized portfolio or a duffle bag with him because both constituted carry-on baggage under Section 121.589(e). (Tr. 72-73.) The law judge held further that the evidence established that Mr. Mayer had refused to stow his baggage "after at least two requests to stow, an explanation by the flight attendant on at least one of those occasions and a public addressed announcement indicating that all baggage should be stowed." (Tr. 73.) Consequently, she held, "technically there was a violation of [Section] 121.589(e)." (*Id.*)

Regarding the issue of sanction for the violation of Section 121.589(e), the law judge rejected the $1,000 civil penalty sought by Complainant and assessed instead only $150 based upon her finding of "substantial mitigating factors." (*Id.*)

The law judge found the fact that Mr. Mayer stowed his carry-on item shortly after his refusal to do so constituted a mitigating factor. The law judge wrote further:

> It's not clear to me on the evidence presented that another flight attendant's actual participation was required . . . to obtain compliance. . . . Mr. Mayer's actions put into motion a course of action which led to the involvement of another flight attendant. But I don't find that it was directly necessitated or that his compliance required the involvement of another flight attendant.

(Tr. 73-74.) Also, the law judge found that a penalty substantially less than the maximum was appropriate because there was no immediate threat to safety in light of the fact that the carry-on item was stowed before takeoff. According to the law judge, while Mr. Mayer's refusal to stow did pose some threat to the authority of a flight attendant, this was not "much of an aggravating circumstance" given the timing and his eventual compliance. Based upon this reasoning, she held that a $150 civil penalty would serve as an adequate deterrent and reflect the severity of the violation. (Tr. 75.)

The law judge also denied Mr. Mayer's motion to reconsider her previous finding of a violation of Section 91.11. The law judge held that the evidence established that Mr. Mayer had interfered with the crewmembers' performance of their duties when: 1) he put the unwanted sandwich on the beverage cart two or three times; 2) he stuffed the sandwich down the flight attendant's blouse; and 3) he insisted upon speaking with a pilot. (Tr. 75.). The law judge held further that there were no mitigating factors regarding the violation of Section 91.11. The law judge stated that whether the flight attendant dropped or threw the sandwich into Mr. Mayer's lap was immaterial because neither would have justified impeding the flight attendant from attending to her duties or sticking the sandwich down her back. (Tr. 76.) The law judge concluded by noting as follows:

> And so I conclude that a penalty of the maximum amount of $1,000 is appropriate in this case. And I again reiterate that . . . flight attendants are not waitresses. They have many other responsibilities. And if there were other passengers who behaved in this manner and required the attention that Mr. Mayer had, that it would be very difficult to operate airplanes safely.

(Tr. 76-77.) Based on this reasoning, the law judge imposed a total civil penalty of $1,150 for Mr. Mayer's violations of Sections 91.11 and 121.589(e).

On appeal, Mr. Mayer challenges the law judge's finding that he violated Section 91.11. He argues that there was no support for the law judge's finding in her pretrial Order Granting in Part and Denying in Part Complainant's Motion for Decision that he stuffed the sandwich down the flight attendant's blouse *after* she had walked away from him to attend to other duties.

The law judge made this finding when she determined that Mr. Mayer was not acting in self-defense when he put the sandwich down the flight attendant's blouse. It appears from Mr. Mayer's Answer, as the law judge found, that Mr. Mayer's act of putting the sandwich down the flight attendant's blouse was simply an act of revenge, and not one of self-defense. Order at 3. Mr. Mayer stated in his Answer that after the flight attendant "threw" the sandwich on his lap, "I was enraged . . . and I stood up to speak with the plane's captain. As I was passing the flight attendant, I placed the sandwich under her collar at the back of her blouse." Answer at 2.

Also, at the hearing, despite the law judge's pretrial finding that Mr. Mayer had violated Section 91.11, the law judge allowed Mr. Mayer and his friend to testify regarding the sandwich incident which gave rise to that violation. Mr. Mayer testified that after the flight attendant tossed the sandwich in his lap:

> I then sat for a moment and I decided to get up and go see the captain to let him know what was going on and the treatment that I was getting from the stewardesses.
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> *As I was passing her I did a very impulsive thing. I would say that I did a stupid thing at that point* and I turned around, she was facing the back of the plane. I pulled the back of her blouse . . . and I just put the sandwich on the back of her neck and I continued on without saying anything.

(Tr. 52.) Thus, regardless of whether there is support for the law judge's pretrial finding that the flight attendant had actually walked away to attend to other duties, there is ample evidence both in the pleadings and in the testimony indicating that Mr. Mayer did not act in self-defense.[7] The bottom line here is that there was simply no legal justification for Mr. Mayer's outrageous conduct.

Mr. Mayer also challenges the law judge's conclusion that he assaulted the flight attendant, thereby violating Section 91.11. He argues that there is no evidence of any willful attempt or threat to inflict bodily injury upon the flight attendant or that the flight attendant ever was in fear for her safety. He argues that at best the record indicates that there was a "technical battery, and unprivileged touching and nothing more." (Appeal Brief at 3.) This argument, too, is unpersuasive because the Administrator in In the Matter of Ignatov, FAA Order

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[7] Mr. Mayer argues in his appeal brief that there was testimony that the flight attendant followed him down the aisle toward the front of the aircraft and that this fact gives rise to another disputed issue of material fact. This argument is both immaterial and unsupported. Despite her ruling in her Order Granting in Part and Denying in Part Complainant's Motion for Decision that Mr. Mayer had violated Section 91.11 during the sandwich incident, she allowed Mr. Mayer to introduce evidence on that point at the hearing. At the conclusion of the hearing, she revisited her ruling and denied Mr. Mayer's request for reconsideration of her ruling on that issue. Also, contrary to Mr. Mayer's representation in his appeal brief, the testimony indicated that the flight attendant followed Mr. Mayer up the aisle to the cockpit door *after* he put the sandwich down her back. *See, e.g.,* Mr. Weckner's testimony that Mr. Mayer got up to talk to the captain, squeezed by the flight attendant, and then turned around and dropped the sandwich down the flight attendant's blouse. (Tr. 59.)

No. 96-6 (February 13, 1996) interpreted the term "assault" as it is used in Section 91.11 to include both assaults and batteries.

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 & Keaton 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* a harmful or offensive contact, as distinguished from an actual contact. In the Matter of Ignatov, at 8; Prosser & Keaton on the Law of Torts § 10, at 43.

The Administrator has interpreted the word "assault" as used in Section 91.11 as including both assault and battery. In the Matter of Ignatov, at 9. Section 91.11 specifically prohibits assaults on crewmembers, but does not mention batteries. The Administrator wrote in In the Matter of Ignatov:

> [T]he terms "assault" and "battery" are often used interchangeably, both in common usage and in certain laws. Common sense demands that the term "assault" as used in Section 91.11 be read to include both assault and battery. To hold otherwise would result in the illogical and undesirable result that shaking one's fist under a crewmember's nose would constitute an assault under Section 91.11, but actually hitting the crewmember would not.

Id., at 9.[8] Thus, it does not matter that the evidence does not indicate that the flight attendant was afraid that Mr. Mayer would physically touch her in an offensive way. Mr. Mayer actually touched her and her clothing when he pulled her blouse collar and shoved his sandwich down her back, thus committing a battery.

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[8] As the Administrator noted in that FAA No. Order 96-6, the terms "assault" and "battery" are frequently used interchangeably and the distinction between the two terms has been blurred. In the Matter of Ignatov, at 9 and n.8.

Moreover, even if there was no assault, the law judge also found that Mr. Mayer interfered with the crewmembers' performance of their duties several times during the flight. Interference with a crewmember's duties is a separate offense under Section 91.11. *Id.,* at 8.[9] The law judge found that Mr. Mayer interfered with the flight attendant's performance of her duties by insisting upon putting his trash on the beverage cart, and later by putting the sandwich down her back (which took her away from her normal duties.) Also, the law judge found, Mr. Mayer interfered with the performance of the duties of the pilots when he insisted upon complaining to the captain. (Tr. 75-76.)

Mr. Mayer writes in his appeal brief:

> By reason of Judge Cook's finding on this issue, Respondent was deprived, at hearing, of the opportunity to present a full and complete record. None of the witnesses upon whom Judge Cook relied in reaching her decision were presented and exposed to either direct testimony or, more importantly, cross examination. Indeed, due process of law was the loser in this transaction.

(Appeal Brief at 3). As discussed above, the law judge's conclusions in her pretrial Order Granting in Part and Denying in Part Complainant's Motion for Decision were supported by the record. Quite simply, Mr. Mayer admitted in his Answer putting the sandwich down the back of the flight attendant and there was no claim

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[9] As was explained in In the Matter of Ignatov:

> In contrast, Section 91.11 lists each of the following as distinct types of violations: assaulting, threatening, intimidating, and interfering with the performance of a crewmember's duties. The regulations states: "No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties." . . . Because of the use of the disjunctive "or" to connect the various acts described, the violation of interfering may be found even in the absence of an assault or intimidation.

In the Matter of Ignatov, at 8 (emphasis in the original).

or indication of self-defense or any other legally acceptable justification for his act. Moreover, Mr. Mayer and his friend, Mr. Weckner, were allowed to testify about the factual circumstances that gave rise to the violation of Section 91.11.

Mr. Mayer argues further on appeal that the $1,000 civil penalty assessed for his violation of Section 91.11 is unfairly high. He argues that it is inappropriate to assess the maximum civil penalty for this violation.

It is held in this case that the $1,000 civil penalty for Mr. Mayer's violations of Section 91.11 is not excessive. Simply stated, the sandwich incident was outrageous and unjustified. Such conduct cannot be tolerated in an airplane environment, not only because such inappropriate conduct distracts the flight crewmembers from the performance of their duties, but also because such conduct undermines the authority of the flight attendants. As the law judge noted, the flight attendants are responsible for more than serving food; they play an important safety role as well. For this reason alone, the $1,000 civil penalty would be appropriate. Moreover, as the law judge found, Mr. Mayer committed multiple violations of this regulation by interfering with the performance of the flight attendants' and the pilots' duties. The maximum civil penalty for multiple separate violations of Section 91.11 exceeds $1,000. 49 U.S.C. § 46301(a)(1).

Based upon the foregoing, Mr. Mayer's appeal is denied. Mr. Mayer has not demonstrated any reason to reverse any of the law judge's findings or to reopen the hearing on the conclusion that he violated Section 91.11.

Complainant in its appeal seeks the reversal of the law judge's determination that a mere $150 was an appropriate civil penalty for Mr. Mayer's violation of Section 121.589(e) when he refused to stow his carry-on baggage.

Complainant argues that it was error for the law judge to hold that Mr. Mayer had only committed a "technical" violation of Section 121.589(e). Complainant correctly notes that this violation should not be regarded as a mere technical violation because Mr. Mayer did not simply fail to stow his carry-on baggage, but instead he *refused* to stow his carry-on item after multiple requests by the flight attendant. After her last request and explanation regarding why carry-on items must be stowed, Mr. Mayer not only refused to stow, but he told her to do whatever she had to do, which, as he had been told, was notifying the "A" flight attendant. Although he had stowed the carry-on item before the "A" flight attendant went back to see him, he did not stow until after Flight Attendant Dahl had departed to seek the "A" flight attendant's assistance. In light of this behavior, there can be no question about his noncompliant attitude and his disregard for the safety rules. The deliberate nature of the violation and Mr. Mayer's impudent and confrontational attitude constitute aggravating factors to which the law judge failed to give sufficient weight in setting the penalty.

Furthermore, as Complainant notes, it was inappropriate for the law judge to find that Mr. Mayer's stowing of his carry-on item before the "A" flight attendant spoke with him constituted a mitigating factor. First, Mr. Mayer should have stowed the item before Ms. Dahl went for help. Second, Mr. Mayer's refusal to stow his carry-on item caused a second flight attendant, the "A" flight attendant, to be called away from her normal duties. In this instance, the "A" flight attendant had been standing at the only open door to the aircraft. As Inspector Harn testified, if while she was away from her position it became necessary to evacuate the plane, there would have been no crewmember at the only open door to direct the flow of

passengers off the airplane. (Tr. 33.). The law judge wrongly focused on the fact that Mr. Mayer had stowed the carry-on item before the "A" flight attendant came to see him, thereby giving too little consideration to the potential safety and security consequences that may arise when an unruly and obstinate passenger's actions call a flight attendant away from her normal duties.

In light of these aggravating factors, the token $150 civil penalty imposed by the law judge for this violation of Section 121.589(e) is too low. A $150 civil penalty is no more than a slap on the wrist, and it is inappropriate in the presence of the aggravating factors exhibited in this case. However, despite these aggravating factors, this violation does not warrant the maximum $1000 civil penalty sought by Complainant. As the law judge noted, Mr. Mayer had stowed his carry-on item before takeoff. A $500 civil penalty for this violation should serve as an adequate deterrent to Mr. Mayer and others against similar future violations.

Based on the foregoing, a $1,500 civil penalty is assessed against Mr. Mayer for his violations of Sections 91.11 and 121.589(e).[10]

BARRY L. VALENTINE
Acting Administrator
Federal Aviation Administration

Issued this 19th day of February, 1997.

[10] 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).