

Enlightened Policies in Safety Compliance, Enforcement, and Information Protection



IASS 2015 - International Air Safety Summit

Nobu Eden Roc, Miami Beach, FL - November 2, 2015



Kenneth P. Quinn
Cell (202) 468-1058
Office (202) 663-8898
kquinn@pillsburylaw.com

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The Use of Safety Information For Non-Safety Purposes

The **Comair Flight 5191** crash involved the takeoff from an incorrect runway and 49 fatalities.



Aviation Safety Action Program

The Event Review Committee, made up of Comair's Corporate Flight Safety Office, the FAA, and ALPA Safety Committee, has been tracking the following safety trends:

Update

Rushing

Please slow down. The majority of ASAP reports have shown that mistakes occur when crews get in a hurry to complete tasks. It is the most common factor in reports and therefore the biggest safety threat at Comair. Pilots must take their time and be methodical, especially with the new checklists.

Fatigue Calls

We have seen a rise in fatigue calls, and we strongly urge pilots to call the ASAP Safety Hotline within 24 hours of a fatigue call. Making this call gives a pilot five days to file an ASAP computer report.

Safety is data-driven. ASAP allows us to track safety threats and trends. We realize how fatiguing it is to have less than eight hours behind a hotel door and then report to the gate 30 minutes before departure. The Company also is scheduling airport breaks in excess of five hours after short overnights. Please file an ASAP so we can identify why pilot rest is being compromised—it is up to each pilot to assess his or her fitness to fly, and being well-rested is part of being fit.

Runway Incursions

Five runway incursions have been reported to ASAP since October. In two of these incursions, there was a loss of separation, and pilot deviations were filed against the crews. We have seen some common trends in these runway incursions:

1. The first officer is often heads-down, completing checklists.
2. The first officer is on the number 2 radio talking to the gate or ramp while the captain is listening to the number 1 radio.

We are asking all crews to recognize that any taxi can become high-threat when the first officer is heads-down completing checklists or using the number 2 radio.

To reduce the risk of a runway incursion:

1. NEVER accept a clearance to cross a runway or hold on a runway unless both crewmembers hear the original clearance. If unsure, ask ATC to read back the clearance.
2. Brief the first officer before landing to "hold all checklists until nearby runways are crossed." There shouldn't be any hurry to reconfigure the aircraft after landing if there are nearby runways to cross.

3. Follow the new checklist and brief every taxi for both departure and landing. Make sure both pilots agree with, and understand, the clearance after it is given. The route you have been cleared on may be very different from what you expected when you gave your initial briefing.

Altimeter Errors/Crossing Restrictions

WARNING: The "Altimeters" cross-check on the new Arrival Checklist may not be read until the crew is descending through 10,000 ft. The cross-check has been moved to the Prior to Approach portion of the Arrival Checklist. This checklist may not be completed until only 30 miles from the airport.

Crews need to be extra diligent about cross-checking the altimeters when descending through 10,000 ft. and to make sure the correct setting is verified by both pilots. Waiting for the checklist item to be read may put both pilots at risk of an altitude deviation.

Altimeters are being set to the wrong number when descending through Flight Level 180. Sometimes it is a wrong setting like 29.35 vs. 30.35, or it is leveling off at FL 180 and pushing the Barometric Altimeter button prematurely, locking in the 29.92 setting. Both crewmembers should verbalize the altimeter setting to verify the number when descending through FL 180. If unsure, query Air Traffic Control before descending through FL 180.➔

- In 2006, magistrate judge in a negligence action against the airline: ASAP were **discoverable for purposes of the litigation.**
- Despite the plea of airline, industry, and organized labor that disclosure would "dry up" voluntary reports and harm safety, court **found no law or legislative intent to protect the reports** from discovery and no common law or self-critical analysis privilege applied to the records.

Disclosure of Cockpit Voice Recorders (CVRs) into Evidence in Canada

*Société Air France v. NAV Can.,
2010*

*Jetport Inc. v. Glob. Aerospace
Underwriting Managers, 2014*

The Ontario Court of Appeal:

"no basis" to conclude that release of CVR "would interfere with aviation safety, would damage relations between pilots and their employers, or would impede investigation of the aviation accidents."

The Ontario Court of Appeal:

"it is highly unlikely that ordering production of the CVR in this case would inhibit communication between pilots or adversely affect aviation safety."



Admission of Accident Reports in the UK

UK Court of Appeal Decision *Hoyle v. Rogers*, 2014



- The entirety of accident report admitted into civil litigation to establish liability.
- AAIB reports admissible as evidence for "its record of factual evidence [...] and its expert opinion."
- AAIB and IATA opposed the admission of the report into evidence and said this was "a direct threat to aviation safety."
- The judge was not convinced that admitting the AAIB report would affect the report of safety information by aviation stakeholders.

Disputes Between Prosecutors and Accident Investigators

2013 Super Puma Accident in North Sea:

- AAIB refused to provide the CVRs to the judicial investigators based on EU Regulation 996/2010 that requires an order from a court.
- Court ordered AAIB to make the CVRs available to the Crown Office, Procurator Fiscal, and Police Scotland as "both in the public interest and in the interests of justice."
- British Airline Pilots Association (BALPA) challenged that decision arguing that it could damage an open safety culture amongst pilot if data was to be used to apportion blame or liability.
- On October 27, 2015, BALPA dropped its appeal



Spanair Flight 5022 at Madrid Barajas Airport (August 20, 2008)



- The court ordered the production of all specific declarations made by all persons who contributed to the safety investigation and all technical documentations provided by the parties.
- This decision was contested on the basis of the Regulation 996/2010 provisions that protect the confidentiality of such documents.
- The First Instance Judgment concluded that it was necessary to restrict the disclosure of the information. The Association of Victims of Flight 5022 appealed the decision.
- The Court of Appeal dismissed the appellant's claim balancing the interests of safety and the duty of confidentiality with the rules on admission of evidence.

Protection Is Vital to SMS



Jeff Shane, IATA -(Oct. 22, 2015):

- A persistent "prosecutorial imperative" lead judges, prosecutors, and trial lawyers to seek access to safety information and they have succeeded.
- This will result in essential report of aviation safety information to dry up.
- A "Just Culture" approach yields greater benefits than a regime characterized by enforcement penalties.



Plan of Action for countries:

- At the national level: States need to implement a stronger safety information protection framework through binding legislation and regulation, and advance arrangements and modern enforcement policies to protect sensitive safety information.
- At the corporate level: Organizations need to implement internal rules of Just Culture to encourage employees to report essential safety information.

ICAO Safety Information Protection Task Force



- **The ICAO High Level Safety Conference 2015** requested that each experts' groups harmonize their recommendations.
- **The Experts Coordination Committee prepared consolidated proposals** to the Secretariat and ANC, which put them forth in a new State Letter for comments and changes from ICAO Member States.
- **The deadline** for States to submit comments was October 15, 2015.
- **Applicability date for new standards and recommended practices is expected on 8 November 2018.**

Advance Arrangement between the BEA and the French Ministry of Justice

Advance arrangement "relating to Safety Investigations between the French ministry of Justice and the BEA." (September 16, 2014)

- Ensures the coordination between the BEA and the judicial investigators.
- Elements gathered during a Safety Investigation must be communicated immediately to the judicial authorities. For example, flight recorders are placed under seal by the judicial authorities and handed to the BEA to be read out under its control.
- Upon an aviation accident, the safety investigation and the judicial investigation are conducted in parallel but are independent.



Advance Arrangements in the UK

- **2008 MoU between AAIB and the Crown Prosecution Service** protects the sharing of evidence and information,
- **2012 MoU between AAIB and Association of Chief Police Commissioners** ensures the cooperation between the two agencies while maintaining their independence, and
- **2013 MoU between the AAIB and the Coroner's Society of England and Wales** recognizes each parties' statutory powers and the need for cooperation, but protect safety information collected by the AAIB against disclosure to the coroner.



Advance Arrangements in Spain

MoU Between the Law Enforcement Agencies and the Air Accident Investigation Board (February 2, 2015)



- Based on EU Regulation 996/2010 (amended by EU Regulation 376/2014) the MoU
- Recommends that the two agencies maintain their independence without interfering with each other's functions,
- To ensure confidentiality of the CVRs through the safety investigation agency,
- Mentions when an investigator can participate in a judicial process as a witness or an expert,
- Limits the use of the safety report by judges during a judicial process and
- Adds a recommendation to judges being assisted by independent experts in order to assess criminal liabilities.

Areas Advance Arrangements Should Cover

- **Confidentiality:**

- Require the confidentiality of voluntary safety reports.
- Encourage the protection of mandatory reports of safety information.
- When competent authority reviews disclosure, require balancing test and suitable safeguards if disclosed.

- **Witnesses and Disclosure to the Judicial Body:**

- Protect the identity of accident investigation witnesses,
- Protect against disclosure of statements taken from persons to safety investigators,
- Protect against disclosure of cockpit voice and image recordings.



European Corporate Just Culture Declaration (October 1, 2015)



Signed by the European Commissioner for Transport and aviation industry stakeholders including CANSO, ACI Europe and IFATCA.

- This non-binding Declaration considers Just Culture within the context of an organization to develop guidance and industry best practices to assist the implementation of Just Culture,
- Analysis of reported occurrences by organizations should focus on system performances and not apportion blame or liability, except in cases of gross negligence, wilful violations and destructive acts.
- Organizations at all level should focus on determining if actions, omissions or decisions taken were commensurate with the experience and training.



Enlightened Views of Compliance and Enforcement

Compliance action: Where person is willing and able to comply, address root cause through training, counseling, or education. Demonstrate responsibility, share openly, and promptly implement corrective action.

Administrative Action: Where compliance will not ensure future compliance, use Warning Notice or Letter of Correction.

Legal Enforcement Action: Reserved for intentional conduct, reckless conduct, failure to complete corrective action, or conduct creating or threatening to create an unacceptable risk to safety.



States Are Adopting Enlightened Views on Compliance and Enforcement

FAA Order No. 8000.373 on "Compliance Philosophy"

"It's about finding the problem, fixing the problem, and making sure it stays fixed." *Michael Huerta, FAA Administrator (October 6, 2015)*



- Many **violations or non-compliance** are due to **simple mistakes**, flawed procedures, lack of understanding, or diminished skills.
- These can be remedied by **additional training or education**, rather than **punitive measures**.
- **Except in cases of willful or flagrant violations**, or refusal to cooperate in corrective action.



Re-establishing Trust Between the Regulator and the Regulated

Australia's aviation safety system and officials are among the most respected in the world

Disconnects can happen in systems where “cop-on-the-beat” mentality or undue focus on finding violations exist.

Best practices envision adoption of performance-based systems with a focus on a “Just Culture,” placing more trust in the operators to carry out their activities in compliance with the applicable regulatory scheme.



The Forsyth Report and CASA's embrace of reform represent huge steps toward embracing modern safety management and oversight . . . but embracing change takes time and effort.



Australian Government

Civil Aviation Safety Authority

CASA's New Regulatory Philosophy (September 15, 2015)

- **"Just Culture" Principles Endorsed:** an environment where *"people are not punished for actions, omissions or decisions taken by them that are commensurate with their experience, qualifications and training, but where gross negligence, recklessness, wilful violations and destructive acts are not tolerated."*
- **In Practice:** Instead of discipline or punishment, CASA takes appropriate actions in proportion to the circumstances (further training, suspension of the privileges of a relevant authorization pending the successful demonstration of competence).
- **Safeguards:** Policies to be developed and implemented to ensure the efficiency of this approach and guard against inappropriate punitive actions.



FSF Legal Advisory Committee (LAC)

Inaugural meeting to be held at the International Air Safety Summit (Nov 2-3, 2015) in Miami.



Membership/Goal: Composed of leading international lawyers to assist FSF efforts in advancing flight safety with immediate efforts designed to enhance safety information protection and encourage advance arrangements.



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