

Client Bulletin

April 2008

Kentucky Judge Denies Protective Order for Pilot Safety Reports in Comair Suit

United States District Court Judge Karl S. Forester adopted the opinion and order of Magistrate Judge Todd (*See In re Air Crash at Lexington, Ky., on Aug. 27, 2006*, No. 5:06-CV-316-KSF, 2008 WL 170528 (E.D. Ky. Jan. 17, 2008)), who denied the motion of Comair, Inc. (“Comair”) requesting a protective order to prevent the discovery of pilot and airline personnel safety reports in the litigation surrounding the runway crash of Comair Flight 5191 in August 2006. *See In re Air Crash at Lexington, Ky., on Aug. 27, 2006*, No. 5:06-CV-316-KSF, 2008 WL 474373 (E.D. Ky. Feb. 19, 2008).

The safety reports, referred to as Aviation Safety Action Reports (ASAPs), permit pilots (and other airline personnel) to voluntarily report safety-related incidents to an Event Review Committee (“ERC”), typically consisting of a representative from the airline, the airline pilots’ union and the FAA. To qualify for the program pilots must report any suspected FAR or other safety violations within a specific time frame, usually 24 hours. If this request is the only source of information disclosed, the FAA, as a part of the ERC, may not take any formal enforcement or administrative action against the self-disclosing pilot. In the event the FAA is notified outside of an ASAP self-disclosure by the pilot, the FAA remains limited to administrative action (a letter of correction or a warning notice) provided other program requirements are heeded. Additionally, ASAP reports cannot be used by the airline for disciplinary action, although corrective action may be required. To qualify for the program, the incident “must appear to have been inadvertent, not appear to involve an intentional disregard for safety, criminal activity, substance abuse, controlled substances, alcohol, or intentional falsification of records.” *See FAA Advisory Circular No. 120-66B.*

The ASAP reporting program provides a vehicle whereby pilots and other airline employees, participating air carriers and repair station certificate holders can identify and report safety issues to management and to the FAA for resolution, without fear that the FAA will use reports accepted under the program to take legal enforcement action against them, or that companies will use such information to take disciplinary action.

In this matter, plaintiffs allege that the pilots of Comair Flight 5191 violated basic pilot procedures. Plaintiffs claim that their reason for requesting production of ASAP reports is to determine whether Comair failed to address concerns that their pilots had violated basic flight requirements on prior occasions.

Comair sought a protective order claiming that disclosure of any ASAP reports would contradict the intent of Congress and the FAA and further that the reports were privileged under the self-critical analysis or a common law privilege.

Comair, along with amicus briefs filed by the Air Line Pilots Association (“ALPA”), the Regional Airlines Association (“RAA”), and Southwest Airlines, explained that the production of ASAP reports in litigation would essentially prevent the voluntary flow of critical safety information.

The amicus briefs argued that airline employees would not participate in the ASAP program if the reports could be used in civil litigation and possibly increase the risk of civil liability exposure.

The FAA’s brief in support of Comair suggested that airlines and employees would be less likely to report ASAP information if the reports were not kept from public disclosure.

Plaintiffs argued that the reporting of safety issues is in the best interest of the pilot to ensure that corrective actions are taken and that

Comair's assertions were based on speculation that airline employees would not participate in the ASAP program if the reports were disclosed in this case. Plaintiffs claimed that their use of the reports would be limited to this case and would be subject to the Court's protective order for confidential documents.

The Court noted that Congress did not expressly create a privilege for ASAP reports. The history shows the intent was to preclude release to the general public, but to authorize release by court order. *In re Air Crash at Lexington, Ky., on Aug. 27, 2006*, 2008 WL 474373 at *4.

According to the Court's analysis, the protection given ASAP reports is limited, and simply precludes government agencies from publicly disclosing the information pursuant to Freedom of Information Act requests. *Id.* at *2. The Court noted that disclosure of ASAP reports in litigation was contemplated, as the FAA agreed to produce the reports pursuant to a court order. *See* 49 U.S.C. § 40123 and 14 C.F.R. Part 193. On September 3, 2003, the FAA issued Order 8000.82, providing that the FAA will not release ASAP information unless agreed to by the submitting party or unless ordered by a court of competent jurisdiction.

The Court also rejected Comair's argument that ASAP reports should be deemed privileged under a self-critical analysis privilege or a common law privilege.

The Court noted that the self-critical analysis privilege usually applies to in-house reviews, not reports sent to third parties, like ASAP reports, and that ASAP information is not held in strict confidence by the FAA and can be obliged to release such data for a variety of reasons. Accordingly, the Court found that no self-critical analysis privilege should attach to ASAP reports.

The Court concluded that no common-law privilege extended to ASAP reports because the regulations of the FAA expressly authorizes disclosure by court order.

The Court ultimately stated that the policy arguments made by Comair were presented in the wrong forum and Comair and other interested parties should implore the FAA or Congress to change the regulations or statute to

preclude disclosure to litigants, rather than authorizing disclosure pursuant to a court order as the regulations do now.

As exhibited by the number of amicus briefs filed in this action, the confidentiality of ASAP and similar reporting systems raise considerable concerns throughout the aviation industry. Accordingly, it is anticipated that this subject will be further addressed in the near future, perhaps by the FAA or Congress.



If you have any questions or would like further information concerning the confidentiality of ASAP reports, please contact:

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