

ELEVENTH AIR NAVIGATION CONFERENCE

Montreal, 22 September to 3 October 2003

Agenda Item 2: Safety and security in air traffic management (ATM)

2.1 Safety management systems and programmes :

THE PROTECTION OF SOURCES OF SAFETY INFORMATION

(Presented by the Secretariat)

SUMMARY

The free flow of safety information, obtained through established industry safety data acquisition systems, or voluntarily submitted by operational personnel, is a fundamental requisite of a systems safety approach, as exemplified by safety management systems (SMS) (AN-Conf/11-WP/5 and AN-Conf/11-WP/24 refer). This paper advocates the need to develop an international strategic framework that protects information obtained through all safety data acquisition sources.

Action by the Conference is at paragraph 3.

1. INTRODUCTION

1.1 International civil aviation enjoys an outstanding safety record. This is primarily due to three key factors:

- a) the dedication to safety by aviation organizations and their people;
- b) a continuous learning process, based on free flow of safety information; and
- c) the ability to turn errors into preventive actions.

1.2 For years, lessons from accidents and incidents have been used to improve equipment design, maintenance procedures, flight crew training, air traffic control systems, airport design and functions, weather support services, and other safety-critical aspects of the air transportation system, on a continuous basis.

More recently, information from safety monitoring and data collection systems has complemented accident and incident data and has been used to develop and implement corrective actions, and proactive long-term strategies.

1.3 The proliferation, over the last decade, of safety monitoring and data acquisition systems has allowed international civil aviation to develop an understanding of operational errors: why they happen, what can be done to minimize their occurrence, and how to contain their impact in safety. It is undisputed that the majority of operational errors in aviation are inadvertent: well-trained, well-intentioned people make errors while maintaining, operating, or controlling well-designed equipment. For those rare situations where errors are a result of willful acts, substance abuse, sabotage or violations, both industry and governmental enforcement systems in place ensure that the chain of accountability remains unbroken. This dual approach, combining an enlightened understanding of operational errors with appropriate enforcement of rules, has served the industry and the traveling public well, safety-wise, while ensuring that there are no harbours for violators.

1.4 Recent years, however, have shown a disturbing trend in international civil aviation when dealing with operational errors leading to occurrences. More and more, information from accident and incident records and safety monitoring and data acquisition systems has been admitted as evidence in judicial proceedings. These proceedings have also resulted in criminal charges being brought against individuals involved in occurrences.

1.5 The immediate effect of bringing criminal charges into aviation occurrences is that it would stifle the free flow of information, by creating an environment of fear and incrimination among the parties involved. Since flow of information has been a cornerstone of the safety record of international civil aviation, it is not far-fetched to think about this type of action as a potential threat to aviation safety that would likely increase the risks faced by the travelling public. It is vital that concerted industry action takes place to counteract this trend that, if unchecked, could undermine in a very short period of time, years of progress in aviation safety.

2. DISCUSSION

2.1 A number of industry initiatives have attempted to address the protection of sources of safety information, and no doubt should be cast as to the positive effects of efforts by different parties. However, given the sensitivity of the question at hand, a strategic framework that provides unity of purpose and consistency among industry efforts is essential. Informed efforts to ensure the protection of sources and free flow of safety information must strike a very delicate balance of interests between the need to protect privileged information, and the right and responsibility to administer proper justice. A most cautious approach should be taken in this regard, since unthoughtful proposals, incompatible with the proper administration of justice, might be unacceptable to judicial systems in Contracting States.

2.2 Within ICAO, a number of provisions address the protection of certain sources of safety information. These include:

- a) Assembly Resolution A33-17; *Non-disclosure of certain accident and incident records*, inter alia, urges States to review and amend legislation regarding protection of

accident/incident records, and instructs ICAO to provide guidance materials to support States in such review/amendment;

- b) Assembly Resolution A33-16, *ICAO Global Aviation Safety Plan (GASP)*, inter alia, instructs ICAO to participate in efforts by States to improve safety information reporting and exchange, with due consideration to protection of privileged information; urges States to review and amend relevant legislation; and instructs ICAO to provide guidance materials to support States in such review/amendment;
- c) Annex 13 — *Aircraft Accident and Incident Investigation*, paragraph 5.12, establishes that statements from persons, communications, medical and private information, cockpit voice recorders (CVR) and transcripts, and opinions expressed in analysis of information shall not be made available for purposes other than for accident/incident investigation, unless the appropriate authority for the administration of justice in the State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations;
- d) Annex 13, paragraph 8.3, establishes that voluntary incident reporting systems shall be non-punitive and sources of information shall be protected; and
- e) Annex 6 — *Operation of Aircraft*, paragraph 3.2.4, establishes that flight data analysis programmes shall be non-punitive and shall contain safeguards to protect source(s) of data.

2.3 ICAO provisions protecting accident and incident records are explicit regarding their admissibility in judicial proceedings. The same explicit protection is not evident for voluntary incident reporting systems and flight data analysis programmes. In the absence of explicit wording such as in Annex 13, 5.12, the standard industry practice is that voluntary incident reporting systems and flight data analysis programmes information is protected by internal agreements between individual organizations and their workforces. The real extent of legal protection afforded to safety data by such agreements, within different judicial systems in Contracting States, is beyond a blanket assessment.

2.4 Furthermore, there are newly-developed sources of safety information available to international civil aviation. Within the flight deck environment, initiatives such as the Aviation Safety Action Partnership (ASAP), and the Line Operations Safety Audit (LOSA), among others, are sources of proactive safety data that are obtained during uneventful flights, based upon the voluntary exchange and free flow of information. Within the ATM and its supporting services environment, air traffic services providers are developing and implementing internal routine monitoring systems, internal investigation systems, voluntary reporting systems, Human Factors reporting confidential systems, and similar initiatives. They are pillars of modern safety management systems (SMS), and they provide a significant volume of safety data that adds to other established sources. ICAO provisions are by force silent regarding these sources of safety information, which are clearly outside the protection of existing international or national legislation.

2.5 It can be concluded that, while existing ICAO provisions regarding protection of sources of safety information have served international civil aviation well, industry developments dictate the need to generate a strategic framework that: a) encompasses the protection of all relevant sources of safety information; and b) ensures that efforts are the product of industry consensus, and compatible with the

cautious approach expressed in paragraph 2.1 above. Such a framework would furthermore acknowledge that most discussions on matters related to the protection of sources of safety information have so far taken place at the technical level, with limited participation of the legal community; and that existing international law as well as national law and regulations in many States may not be fully adequate to deal effectively with the issue.

2.6 In developing the proposed framework, a multi-disciplinary approach is essential. The framework should build upon, and broaden as necessary, existing ICAO provisions on the protection of sources of safety information. It should, inter alia, address the following conceptual issues:

- a) no group or workforce should be above the law;
- b) public interest should be set against individual rights to compensation: anything that hinders aviation safety investigations hinders the public interest, and a balance needs to be struck in favour of the collective rights of users of safe travel;
- c) a level of immunity prevents the use of certain evidence, but not the prosecution if other evidence discloses an offence;
- d) evidence other than that obtained from sources of safety information should be used for conviction or compensation for grossly negligent actions by operational personnel; and
- e) protection of sources of safety information is not intended to provide operational personnel with immunity from prosecution, but to preserve the sources.

3. ACTION BY THE CONFERENCE

3.1 The Conference is invited to:

- a) note the safety concern underlying the use of sources of safety information as evidence in judicial proceedings;
- b) note the detrimental effect in the free flow of safety information of the use of safety information as evidence in judicial proceedings;
- c) note the close linkage between the integrity of sources and free flow of safety information and a systems safety approach, as exemplified by SMS (AN-Conf/11-WP5 and AN-Conf/11-WP/24 refer); and
- d) agree on the following recommendation:

Recommendation 2/ — The protection of sources of safety information

That ICAO develop, through a multi-disciplinary project, a strategic framework enabling States to adopt adequate measures of national law, for the purpose of protecting the sources and free flow of safety information, while observing the right and responsibility to administer proper justice.

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