Docket No. SA-530

Exhibit No. 5-W

NATIONAL TRANSPOPRTATION SAFETY BOARD

Washington D.C.

AAMS Response to the "White Paper" Published on the Website of the National Association of State EMS Officials (NASEMSO)

(The NASEMSO Paper has been removed from their website)

(8 pages)

Association of Air Medical Services

November 14th, 2008

Mr. Steve Blessing
President
National Association of State EMS Officials
201 Park Washington Court
Falls Church, VA 22046-4513

Re: AAMS Response to the "White Paper" Published on the Website of the National Association of State EMS Officials (NASEMSO)

Dear Mr. Blessing:

The Association of Air Medical Services (AAMS) recognizes and supports the important role of NASEMSO members in promoting the development and leadership necessary for seamless delivery of quality EMS care across the country. Over the years, AAMS and its membership have worked closely with NASEMSO to this end.

AAMS and its members are committed to assuring that every person has access to safe, quality air medical and critical care transport. We look forward to engaging with NASEMSO and its leaders to craft actions to meet this overall goal.

AAMS has significant concerns regarding inaccurate and misleading statements made in the **"White paper advocating state regulation of air ambulance services"** published on the NASEMSO website (http://www.nasemso.org/Projects/AirMedical/). AAMS offers this letter in a continued spirit of cooperation and the knowledge that productive dialogue on this important matter is essential and must be evidence based.

Facts

AAMS agrees, as stated in the NASEMSO White Paper, that "Air Ambulance Services Play a Critical Role in State Trauma Systems." While air ambulances fulfill a critical role in providing essential patient access to trauma and critical care centers for millions of Americans living in rural areas, this statement understates the role of air ambulances in our country for other needed patient services. For example, air ambulances provide life saving services to patients suffering cardiac emergencies, strokes, preterm infants, and a host of other medical conditions where time is critical, or where a ground ambulance is inappropriate, unavailable, or unable to provide the level of care required by the patient (KS Burns, 2001) (SL Silliman et al, 2003) (Jones AE, et al., 2001). Additionally, air ambulances often operate with a medical crew that provides a different skill set to patients from the typical ALS or BLS ground ambulance response – making them uniquely capable of rapidly delivering patients to tertiary and quaternary care facilities (Foundation for Air-Medical Research and Education, 2007).

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Leading and Serving Transport Medicine

Recently, Helicopter Emergency Medical Services (HEMS) have experienced a tragic and intolerable increase in the number of accidents and fatalities. AAMS joins its association partners in the recognition that this is a significant problem; tragic accidents that end in fatalities are absolutely contrary to the purpose and the goals of air medical transport. AAMS firmly believes in increasing safety through better equipment, better regulation, and enhanced oversight of aviation. To that end AAMS supports H.R. 3939, a bill to increase safety in air ambulances; we have also engaged the Federal Aviation Administration (FAA) in crafting more stringent aviation regulations for HEMS operators. Further, many of the companies and organizations involved in air medical transport have voluntarily taken steps to increase safety in their own operations based on recommendations from the National Transportation Safety Board (NTSB) and on the lessons learned from these tragic accidents.

While safety remains our top priority, AAMS believes that the proposal in question would not directly increase air medical safety as it does not address the regulation of aviation by the FAA. In fact, as referenced in the section below, NASEMSO, like AAMS, recognizes that the FAA has sole authority over the regulation of aviation. While there are significant concerns in safety, this proposal does not address those concerns in the direct manner in which other legislative and regulatory proposals address safety and should therefore not be considered as part of the current and ongoing safety discussion.

Issues

AAMS disagrees with many statements in NASEMSO's white paper, specifically:

1. AAMS takes strong exception with the assertion that air ambulance accidents are linked to a "muddled state" of legal affairs. NASEMSO's White Paper asserts that there is regulatory uncertainty relative to several areas of helicopter emergency medical services (HEMS) oversight including the inability of the FAA to govern medical care.

   AAMS believes the federal oversight by the FAA is appropriate under current federal regulations. Additionally, AAMS contends that medical care oversight, under the jurisdiction of the state health department or state regulatory health care body, is proper. We disagree that a "muddled state" exists, and we reject the notion that any legal interpretation of federal law has a negative impact on aviation safety. None of the examples cited in the Paper directly correlate to safe operation of HEMS.

2. The authors of the White paper suggest that the federal preemption of state regulation of air carrier prices, routes and services under the Airline Deregulation Act (ADA) is undermining air ambulance safety. AAMS believes this assertion is without foundation and there is no published evidence that the federal law is causing accidents.

   The ADA does not address safety. The intent of the ADA was to promote competition and to foster innovative business models. The NASEMSO paper implies that exemption from the ADA would provide states the authority to regulate the economic aspects of air

carriers engaged in air ambulance operations. That is false; states do not have, and were never granted, this authority. Rather, the intent of the preemption clause of the ADA was to prevent states from assuming economic and regulatory authority over airlines once that authority was partially deregulated by the federal government.

3. The white paper states that "the FAA has limited its involvement" in air ambulance safety, to provide support for the conclusion that the ADA is to blame for air ambulance accidents.

   As set out before, the ADA does not apply to federal aviation safety regulation. Moreover, the FAA has been more actively involved directly with air ambulance safety, regulation and oversight during the past several years than ever before.

   This argument is also contrary to the previous statement that the FAA should retain sole authority over the regulation of aviation safety. It is not possible to address a perceived shortfall of the FAA's interest in aviation safety by increasing state authority over the economics of aviation, unless the intent of the proposal is to provide some means for state regulatory authorities to usurp or assume duties currently retained by the FAA.

4. The white paper and its accompanying grassroots letter erroneously draw the conclusion that federal legislation is necessary to preserve the medical care prerogatives of state officials. AAMS does not support this position. The power and role of state officials over medical care certification, regulation, and standards associated with air ambulance operations is not now and never have been in question. States currently have the ability to regulate all medical aspects of air ambulance operations. (McGinnis, Judge, & O'Connor, 2007)

   AAMS does not believe there is need for new, far-reaching federal legislation to clarify that States have the right to regulate medical care. Federal Courts and the United States Department of Transportation (DOT) have repeatedly done so by stating that the Federal preemption established by the ADA does not limit a State's ability to control medical care. Most recently, in the North Carolina case decided on September 26, 2008, the Federal District Court Judge held that limiting competition through a CON process was indeed preempted by Federal Law. However, the Judge clarified that this would not impact a State's ability to oversee and regulate medical care:

   "As detailed above, those portions of the challenged laws and regulations that relate primarily to patient care are not preempted, and the state's interest in overseeing the medical aspects of air ambulance service is thus not unduly compromised."

   IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION NO.5:07-CV-222-FL
   September 26, 2008

5. The NASEMSO paper is misleading in implying a CON process increases the availability of air ambulance services to a community. AAMS can find no factual or anecdotal support of this assumption. However, it is true that there is reasonable disagreement among interested parties on this matter.

   The data reviewed by AAMS seems to suggest that the exact opposite is true. History has shown that those few States that implemented CON-type regulatory schemes designed to regulate the number of air ambulance providers stifled competition, resulting in fewer, not more air ambulances, and this, in turn, results in less, not more availability to the public, thus decreasing access to life-saving services. In a twenty year period between 1986 and 2006, there were eight instances where States attempted to limit the number of air ambulance providers in their jurisdiction based on a CON-type regulation. In each of these cases (Minnesota 1986, Arizona 1987, Nebraska 1989, Missouri 1997, Kentucky 1998, New York 2000, Tennessee 2002, Hawaii 2006), the State reversed their position either as a result of a court order, or at the direction of their State's Attorney General, thus allowing more air ambulances to operate within their jurisdiction. In each of these instances, there was, and continues to be, a net increase in the number of air ambulances providing services in those states, and therefore a net increase in availability of the service to the public.

   According to another document found on the NASEMSO website "Backgrounder: Air Ambulance Service," only six (6) States continue to attempt to regulate the number of air ambulance providers through a CON process (Connecticut, Maine, Michigan, Massachusetts, North Carolina, and Vermont). According to data from the Atlas and Database for Air Medical Services (ADAMS), (The Center for Transportation Injury Research [CenTIR] , 2008, NHTSA, 2005) those states that regulate the number of helicopters via a CON process have fewer helicopters relative to their population than do states that allow free market competition to dictate the number and location of helicopter air ambulances. While this fact alone may not tell the entire story as population density and the distances between major hospitals should also be considered, it is consistent with the experience of the past twenty years, in that the CON process tends to limit rather than expand the number of air ambulances. The national average is 1 helicopter per 346,000 people. By comparison, those few States that attempt to limit the number of helicopter air ambulances average far less than half that ratio:

   Connecticut -- 1 helicopter for every 1,702,783
   Maine -- 1 helicopter for every 637,462
   Michigan -- 1 helicopter for every 903,495
   Massachusetts -- 1 helicopter for every 1,587,274
   North Carolina-- 1 helicopter for every 536,621
   Vermont-- 0 helicopters for a population of 608,827 (served by aircraft based across state line in NH)

   This is a complex issue subject to varied interpretations. The proponents of CON's and other state controls argue that the necessity of public safety overrides business and

competition factors. States are obligated to provide public safety services to all of their citizens, regardless of where they live. All agree that population densities are a critical part of the equation along with actual population. The state may be obligated to ensure availability of these services, to the extent possible, to less densely populated areas of that state. CON's are but one methodology a state might employ to insure that distribution of public safety modalities is balanced.

Without expressing a position on CON's, AAMS can find no evidence that CON laws increase access to air ambulances. AAMS and its members suggest that further study is required to validate and substantiate the effects CON's have on HEMS. (J.Botti, 2007)

In a written statement prepared for a Joint Session of The Health and Human Services Committee of the State Senate and The CON Special Committee of the State House of Representatives of the General Assembly of the State of Georgia, on February 23, 2007, by Mark J. Botti, Chief, Litigation I Section, U.S. Department of Justice, Antitrust Division, stated

> *"The Antitrust Division's experience and expertise has taught us that Certificate of Need laws pose a substantial threat to the proper performance of healthcare markets. Indeed, by their very nature, CON laws create barriers to entry and expansion and thus are anathema to free markets. They undercut consumer choice, weaken markets' ability to contain healthcare costs, and stifle innovation. We have examined historical and current arguments for CON laws. They do not provide an economic justification for depriving consumers of the benefits of free markets. To the extent non-economic goals are pursued, the use of CON laws to help pursue them imposes substantial costs. Those goals can be better achieved through other mechanisms."*

He went on to add:

> *"CON laws appear to raise a particularly substantial barrier to entry and expansion of competitors because they create an opportunity for existing competitors to exploit procedural opportunities to thwart or delay new competition."*

6. The NASEMSO white paper asserts that states need new federal legislative authority to prevent a practice referred to as "call jumping," it defines as "when an air ambulance operator responds to a scene to which that operator was not dispatched, often at night or in poor weather conditions." AAMS believes this specific claim is not the cause of a single specific accident and therefore cannot be considered a systemic problem.

   It may be a rare occurrence, and often, with further investigation, it has been determined the air ambulance was in fact requested by one of the many EMS first responders who may not have properly notified or coordinated with other EMS agencies. The break down in communication by 911 EMS dispatching systems is indeed problematic, but it is

already clearly under the jurisdiction and control of State and local EMS authorities. State and local officials do not need any additional federal legislative authority to improve upon their 911 dispatch systems.

Finally, the allegation of "call jumping" was attributed to an anonymous third party in a report from the GAO rather than first hand knowledge by State EMS officials. If this were a recurring situation, AAMS would expect that state authorities would be aware of it and are currently empowered to act on improving dispatch policies and procedures. While poor weather conditions or faulty dispatch decisions are an issue in some accidents, these issues must be addressed through enhanced regulation and oversight for all air medical providers, not only those operating in states that are able and/or willing to provide effective interventions. There is no hard evidence existing that either supports or refutes call-jumping.

Summary

AAMS appreciates the essential role of NASEMSO's members in regulating the medical aspects of air ambulance operations and values our collegial relationship. We look forward to working with NASEMSO to craft positions which will positively impact our patients and constituents. AAMS strongly believes that future discussions on this matter must be based on evidence.

AAMS encourages NASEMSO to consider the following actions:

1. Working collaboratively to draft sample best practice model rules (i.e., "model state legislation') to support appropriate use of air medical resources.
2. Encouraging the development of air medical use task forces within jurisdictions to establish multirole emergency activation plans.
3. Providing leadership in the development of and ensuring multi-agency radio interoperability.
4. Establishing collaborative forums to execute air medical resource review by multi-disciplinary teams.
5. Providing leadership in the establishment of multi-association forums to ensure annual review and validation of air medical activation criteria.

Given the facts, as stated by NTSB accident investigation teams, AAMS believes that the majority of air medical accidents are the result of human factors. (National Transportation Safety Board, 2008) To date, there is not one specific action or activity that can correct the myriad of issues that make up human factors.

The experts in human factors often point to complexity of systems and ineffective communication as the core of error. (FAA, 2008) AAMS and its members encourage NASEMSO to work with us to simplify, clarify and streamline EMS systems' processes and encourage on-going multi-disciplinary communication in your spheres of influence.

We thank you for your time and attention to this important issue, and again look forward to continued dialogue for the benefit of the patients and the public that we serve.

Sincerely,

Sandra Kinkade
President

Dawn M. Mancuso, MAM, CAE
Executive Director/CEO

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