

SERVED: December 21, 2011

NTSB Order No. EA-5610

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of December, 2011

_____)	
MICHAEL P. HUERTA,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-18616
)	and SE-18607
)	
JAMES E. AUSTIN and)	
JANICE R. McCALL,)	
)	
Respondents.)	
_____)	

ORDER DENYING RECONSIDERATION

The Administrator petitions for reconsideration and/or modification of our May 5, 2011 opinion and order remanding this case to the law judge for analysis concerning the FAA's Aviation Safety Program (ASAP)¹ Advisory Circular (AC). We deny the Administrator's petition.

¹ Advisory Circular 120-66B (Nov. 15, 2002), *available at* [http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/61c319d7a04907a886256c7900648358/\\$FILE/AC120-66B.pdf](http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/61c319d7a04907a886256c7900648358/$FILE/AC120-66B.pdf).

Section 821.50(c) of our Rules of Practice requires a petition for reconsideration “state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon.” The Administrator’s arguments largely focus on the FAA’s legal interpretation of the AC. Since the law judge granted the Administrator’s motion in limine, the law judge did not hear these arguments and make rulings on this issue. For that reason and in order to protect the due process rights of both parties, we find the law judge should review and make appropriate findings on this issue. However, to ensure no confusion exists concerning our prior decision, we will briefly re-summarize our instructions on remand:

- The law judge should accept respondents’ ASAP reports and, if applicable, the National Aeronautics and Space Administration’s Aviation Safety Reporting Program (ASRP) reports² into evidence.
- The law judge should accept briefs, evidence, and/or testimony on the issue of whether the Board has jurisdiction to review the ASAP program and its applicability to this case. See Moshea v. FAA, 570 F.3d 349 (D.C. Cir. 2009).
- The law judge should review the ASAP Memorandum of Understanding (MOU) between the FAA and Southwest Airlines.
- The law judge should permit argument and evidence from both parties concerning whether respondents properly submitted ASAP reports, whether the event review committee (ERC) accepted either respondent in the program, and/or whether the ERC terminated their participation in the program, as applicable.
 - Relating to this issue, the Administrator specifically should explain how the FAA contends that AC 120-66B, in conjunction with the MOU, permits the FAA to take enforcement action against respondents’ certificates despite respondents’ submission of ASAP reports. The law judge should consider this aspect in light of whether either respondent was accepted in the program by the ERC.
- In our opinion and order, we noted the AC is, on its face, contradictory on the issue of whether respondents’ filing of their respective ASAP reports protects *one* or *both* of them from FAA enforcement action. By way of example, we cited to several paragraphs of the AC (specifically, ¶¶ 9(a), 9(d) and 11(c)(3)) to demonstrate the confusing nature of this AC. In doing so, we were not stating those paragraphs were relevant for resolution of this case, but merely pointing out the apparent contradictions in the AC. Given the law judge’s exclusion of evidence surrounding the ASAP reports, it was impossible for us to determine any relevancy of those paragraphs. If the parties believe those

² FAA guidance concerning the ASRP is contained in AC 00-46, *available at* [http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/64358057433fe192862569e7006da716/\\$FILE/AC00-46D.pdf](http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/64358057433fe192862569e7006da716/$FILE/AC00-46D.pdf). With regard to the ASRP report, we note Respondent Austin mentioned filing an ASRP report as an affirmative defense. Our understanding is that under certain ASAP programs, an ASRP report may be automatically generated by the filing of an ASAP report. Thus, in resolving this case, we believe it necessary to consider the potential interaction between ASAP and ASRP. If ASRP reports are not at issue, the parties can stipulate such to the law judge.

paragraphs or any other paragraphs in the AC are relevant to the resolution of this case, they should argue such to the law judge at the hearing on remand.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's petition for reconsideration and/or modification of NTSB Order No. EA-5583 is denied.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.