Safety Management Systems Liability Concerns

The proponent of a Just Culture in the context of a Safety Management System is faced with a logical dilemma. A Just Culture requires "…an atmosphere of trust in which people are encouraged, and even rewarded, for providing essential safety-related information…"[i] This standard is contrary to the processes and protections that exist in aviation law and regulation. The company puts itself and its employees at substantial risk from the legal community's ability to use that same information adverse to the company. The company puts itself and its employees at substantial risk from the FAA's use of that same data.

The United States is bound by the 2001 ICAO requirement to install SMS in its aviation system. The FAA Air Traffic Organization began implementation of SMS in 2005 and implemented a system in 2010. That same year, it proposed rulemaking requiring SMS at Part 139 airports.[ii] Other parties in the aviation industry would be well-advised to watch how SMS plays out for airports, because that will give an indication of how it will work for them.

The Notice of Proposed Rulemaking describes a Safety Management System with four components:

- Safety Policy
- Safety Risk Management
- Safety Assurance.
- Safety Promotion

Safety Policy

Safety Policy is fundamentally an exercise in developing, documenting and staffing a safety management plan for implementing the other three components.

Safety Risk Management

Safety Risk Management is a process to identify hazards, analyze and assess potential risks, and design appropriate risk mitigation strategies.

Safety Assurance

Safety Assurance is confirmation that the organization is implementing the risk mitigation strategies developed in Safety Risk management.

Safety Promotion

Safety Promotion includes training, communication of critical safety issues, and confidential reporting systems.

Implicit in the proposed rule is the establishment of a robust and confidential reporting system, into which members of the organization can report specific hazards. This paper does not describe the challenges associated with getting employees to report hazards, which is described in *Just Culture – Acceptable Behavior*.[iii] Instead, we are concerned here with the legal hazards of having created a database of known hazards in the organization, and further, a database of the mitigation progress (or not) associated with those hazards.

Part 139 airport operators are particularly interested in the protection of SMS data. One airport operator asked, "Does the FAA plan to seek legislative protection to limit civil tort liability of airports resulting from maintaining SMS information?" In a written response, the FAA said, "The issues of SMS data protection and civil liability are being considered by Congress as part of the FAA Reauthorization Bill. Section 337 of H.R. 658 (112th Congress) limits the use of SMS information in a judicial proceeding. Likewise, section 554

of S. 223 (112th Congress) also provides for protections for certain types of SMS data, information, and reports."[iv]

A review of the FAA Reauthorization (PL112-95) will show that neither Section 337 nor Section 554 made it into law. There is no statutory protection for participants in an SMS program. The data in an SMS database is subject to discovery in the case of a lawsuit.

The FAA went on to say, "the FAA does not believe tort liability concerns should impact the way an airport would structure its SMS." This author respectfully disagrees.

One airport posts this notice on its SMS reporting form:

> Hartsfield-Jackson's policy is that an employee can file a report under the Hartsfield-Jackson hazard and incident reporting system without any fear of retribution, and his or her identity will be kept confidential to the extent permissible by law.

One might ask the extent of the confidentiality. The Georgia Sunshine Laws make no protection of airport safety reports. To be fair, the Georgia statute provides protection for any data if federal law requires it. Federal law (49 USC 40123) provides protection for data originating in FAA databases, but not in the original databases of any third party.

Safety Management Systems are not cheap. From its own studies of airport SMS, "The FAA concluded that the benefits exceeded costs." The same document described benefits ranging from $0.64 to $0.99 for every dollar spent. The benefits calculation included air carrier accidents that, potentially, would have been prevented. The airport operators asked whether this was an air carrier benefit or airport benefit. The response was, "The averted accidents are societal benefits and therefore are relevant to both airport operators and airline operators." In short, these benefits are double-counted.

What then, is an organization to do when faced with a mandatory implementation of SMS? It's risky and it's expensive.

The organization still needs to show commitment by publishing a plan, assigning responsibility, training, and doing internal publicity. It needs to develop risk mitigation procedures and follow them to completion. What it does not need to do is develop a data collection system and take the risk that no one contributes. Instead, the organization can leverage the data collection system provided by the NASA Aviation Safety Reporting System. Data gathering can be done in one of two ways: paper forms or web-based input. Data download is straightforward; the website dumps data in easy-to-use formats (for a programmer).

The advantages of such a system are manifold:

- ASRS already has credibility in the aviation community.
- Reporters have legal protection.
- Public sector organizations can deny access to data in the case of lawsuit
- The organization as minimal data collection costs
- An organization can use ASRS data to learn from other organizations

Conclusion

An organization wishing to implement a Safety Management System need not reinvent the wheel. It can leverage the already successful Aviation Safety Reporting System to quickly and cost-effectively implement its SMS.;

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[i] Reason, James, Managing the Risks of Organizational Accidents, Ashgate Publishing 2007
ii NPRM 2010-0997 http://www.regulations.gov/#!documentDetail;D=FAA-2010-0997-0001
iii Hadow, R Just Culture – Acceptable Behavior www.bestinflight.net/DocLibrary/Just Culture Acceptable Behavior 121206.pdf
iv FAA, FAA Responses to Clarifying Questions About Proposed Rulemaking for Safety Management System for Certificated Airports For Docket Number FAA-2010-0997