



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505

www.osc.gov

The Special Counsel

August 1, 2003

The President
The White House
Washington, DC 20500

Re: OSC File No. DI-01-1273

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report and two supplemental reports provided to this office pursuant to 5 U.S.C. § 1213(c) and (d) by the Honorable Michael P. Jackson, Deputy Secretary of Transportation, and Mr. Jerome M. Mellody, Assistant Chief Counsel, Office of Chief Counsel, Department of Transportation (DOT). The report and supplemental reports set forth the findings and conclusions of the Deputy Secretary of Transportation upon investigation of a disclosure of information allegedly evidencing a substantial and specific danger to public safety arising out of actions by officials of DOT Federal Aviation Administration (FAA) in Alaska and Washington, D.C. The whistleblower alleged that FAA Aviation Safety Inspectors (Inspectors) were not able to obtain multiple-entry visas to Russia. He alleged that without multiple-entry visas, which allow an unlimited number of visits in and out of the country, the Inspectors could not conduct proper safety oversight of U.S. air carriers operating in Russia. As discussed below, I find the agency's report statutorily deficient.

The whistleblower, Mr. Charles W. Lund, consented to the release of his name. He also provided comments on the agency report and supplemental reports to this office pursuant to 5 U.S.C. § 1213(e)(1), which I am also transmitting.

I have carefully examined the original disclosure and reviewed the agency's initial report, the supplemental reports and Mr. Lund's comments. I find the agency's report deficient, because: 1) the agency failed to provide information critical to a determination of whether the agency's findings and conclusions are reasonable. For example, the report did not provide the current number of multiple-entry visas obtained or the current safety oversight needs in Russia (*i.e.*, how many flights are required to be FAA inspected), to establish that FAA is obtaining an adequate number of multiple-entry visas to conduct proper safety oversight of U.S. air carriers in Russia; and 2) the agency's response reflects significant, conflicting findings regarding whether the difficulty in obtaining multiple-entry

The Special Counsel

The President

Page 2

visas for at least a 10-year period affected FAA's safety oversight responsibilities for U.S. air carriers operating in Russia.

Mr. Lund's allegations were referred to the Secretary of Transportation on December 13, 2001. The Secretary referred the matter to the FAA Office of International Aviation for investigation. The agency sought and we granted a 30-day extension of time for submission of the agency's report. The Deputy Secretary forwarded the Report of Findings to this office on March 15, 2002. We determined the report was deficient and, following discussions regarding the deficiencies with Mr. Mellody on July 2, 11 and 19, 2002, the agency was given until September 3, 2002, to submit a supplemental report. The agency requested and we granted an extension of time until October 18, 2002. After follow-up with the agency, on December 24, 2002, Mr. Mellody submitted a partial supplement consisting of a Report of Investigation (ROI) completed by the FAA Security & Investigations Division. On February 14, 2003, an additional supplement, the FAA Flight Standards Service's Report on International Safety Oversight Responsibilities, was submitted by Mr. Mellody.

Due to the foregoing deficiencies, I have determined that the agency's findings do not appear reasonable under 5 U.S.C. § 1213(e)(2). A summary of Mr. Lund's allegations and the agency's response is provided below.

The Whistleblower's Disclosure

At the time of his disclosure to OSC, Mr. Lund was the Manager of International Operations and Programs. In this position, Mr. Lund's duties included, among other things, ensuring that Inspectors were conducting proper safety oversight in Russia. Mr. Lund alleged that since 1993, the Inspectors were not able to obtain multiple-entry visas to conduct safety oversight of U.S. air carriers flying to Russia. Consequently, the Inspectors could not perform their inspection and surveillance duties, and U.S. air carriers were not properly inspected in accordance with FAA regulations.

Pursuant to the "Air Transport Agreement Between the Government of the United States of America and the Government of the Russian Federation," (Bilateral Agreement) Article 5, Paragraph 5, the United States and Russia agreed to grant multiple-entry visas for the purpose of conducting safety oversight of each country's respective air carriers while on foreign soil. In addition, the Bilateral Agreement provides in Article 6 that each country shall be responsible for the safety and airworthiness of its air carriers.

Pursuant to FAA regulations and guidelines for inspections and safety oversight, Inspectors are required to conduct various types of inspections, including but not limited to cockpit-en-route inspections. These inspections involve examination of certain areas of airports that are passed through during flights, including runways, taxiways and ramps.

The Special Counsel

The President

Page 3

Inspectors are also required to conduct separate ramp inspections that involve evaluation of ground operations and procedures before and after flight, including inspection of crewmember activities, line station operations, the aircraft, servicing and maintenance, and ramp and gate conditions and activities.

Thus, Inspectors are charged with safety inspection of Russian airports used by U.S. air carriers, including runways, and inspection of Russian facilities. According to Mr. Lund, these duties were of great importance in the Russian Far East, where airports and facilities were in poor condition, and should have been inspected monthly by a team of Inspectors in order to ensure the safety of U.S. air carriers.

Beginning in 1997, the number of U.S. flights to, from, and stopping in Russia increased dramatically. According to Mr. Lund, however, the number of multiple-entry visas for Inspectors did not increase. The inability to obtain multiple-entry visas to Russia adversely affected FAA safety oversight of U.S. air carriers, because FAA could not conduct safety oversight and surveillance unless Inspectors were allowed to travel to, and make multiple landings at, Russian airports. According to Mr. Lund, in order for Inspectors to perform their duties, between 24-30 multiple-entry visas were required. Mr. Lund alleged that through 1999, FAA was obtaining a maximum of four multiple-entry visas in a given year.

Mr. Lund further alleged that although this issue was raised at FAA headquarters in late November 1999 and the number of multiple-entry visas increased, the increase was not sufficient to ensure adequate oversight of all U.S. air carriers operating in Russia. According to Mr. Lund, the problem continues to exist.

The Department of Transportation's Reports

The Initial Report

The agency's initial investigation of the allegations, conducted by FAA's Office of International Aviation, consisted of a document review. The Report of Findings submitted to OSC on March 15, 2002, outlines the evidence obtained from the review of files, an October 1994 Russian Civil Aviation System Safety Evaluation, and minutes from the Russian American Flight Standards Group meetings. The evidence includes a finding that the Bilateral Agreement requires the U.S. and Russia to provide multiple-entry visas to Inspectors. The report also identifies a finding in the 1994 safety evaluation that FAA and its Russian counterpart were both experiencing difficulty in obtaining multiple-entry visas for their Inspectors and an accompanying recommendation for reciprocal agreements between the governments to resolve the problems. In addition, the report lists four instances between 1998 and 2001 where the difficulty in obtaining multiple-entry visas was addressed in Russian American Flight Standards Working Group meetings, and four other

The Special Counsel

The President

Page 4

attempts by FAA, dating back to 1996, to resolve the issue. Mr. Lund points out in his comments that he was involved in, if not directly responsible for, most of those efforts.

The Report of Findings further states that since FAA and the Russian State Civil Aviation Authority agreed to a “formal process” in 2001, FAA has had no problems obtaining visas for over a year. The Deputy Secretary states that even while FAA was attempting to resolve the difficulties in obtaining the multiple-entry visas, FAA was able to maintain adequate safety oversight of U.S. carriers operating in Russia with single-entry visas and a limited number of multiple-entry visas. The report does not explain how it maintained safety oversight while it was still not receiving multiple-entry visas.

In his comments, Mr. Lund refuted this representation that FAA was able to maintain adequate safety oversight with single-entry visas. Specifically, Mr. Lund explained that while FAA was able to obtain some single-entry visas, these visas were insufficient to carry out proper safety oversight, because most U.S. air carriers made more than one stop in Russia, and the single-entry visa allowed only one landing. Thus, an Inspector “used up” his single-entry visa on the first landing in Russia and was not permitted to exit the plane during subsequent stops.

Mr. Lund’s allegation is supported by a December 10, 1999, memorandum from the former Manager of the Fairbanks, Alaska, Flight Standards District Office, Mr. Larry Dalrymple (Dalrymple Memo). The Dalrymple Memo details the findings of a prior investigation of this issue, which revealed that the inability to obtain multiple-entry visas adversely affected FAA’s ability to conduct proper safety oversight of U.S. air carriers operating in Russia. The Dalrymple Memo provides a similar explanation of why single-entry visas were insufficient for proper safety oversight. The memo reflects that one of the Inspectors interviewed during that investigation, Mr. Brian Staurseth, explained that single-entry visas prevented Inspectors from conducting station facility, fueling, and other types of inspections along the route of flight through Russia. Another Inspector interviewed, Mr. Dennis Harn, explained that without multiple-entry visas, the Inspectors were not able to choose the flights on which they would conduct surveillance. He indicated that this affected the safety oversight. According to the Dalrymple Memo, Mr. Harn also stated that “at no time were personnel in that certificate management unit comfortable with the amount of surveillance being conducted on Alaska Airlines in Russia.”

As noted above, in early July 2002, my office discussed with Mr. Mellody our findings of deficiencies in the agency’s report. In particular, we advised him that the agency had failed to interview any FAA personnel, including Mr. Lund, to determine: 1) whether the difficulty in obtaining multiple-entry visas affected the Inspectors’ ability to conduct proper safety oversight of air carriers operating in Russia; and 2) whether the problem had, in fact, been resolved. We also requested that the agency provide specific information regarding the current number of multiple-entry visas being obtained.

The Special Counsel

The President

Page 5

In addition, we advised Mr. Mellody that there was a potential conflict of interest with the Office of International Aviation conducting the investigation, as Mr. Lund had alleged that officials within that office had failed to take seriously the safety issues caused by the lack of multiple-entry visas. Further, we provided Mr. Mellody a copy of the Dalrymple Memo, which apparently was not discovered by the Office of International Aviation during the course of its investigation.

Supplemental Reports

On December 24, 2002, the agency submitted a partial supplemental report, which consists of a Report of Investigation (ROI) prepared by the FAA Security and Investigations Division. This investigation included interviews with Mr. Lund, Mr. John Duncan, Alaska Region Flight Standards Division Manager, and Mr. Richard Gordon, former Alaska Region Flight Standards Division Manager.

According to the ROI, Mr. Duncan stated that obtaining multiple-entry visas had been a problem, but the problem had corrected itself, because no U.S. carriers are currently flying to Eastern Russia. The report does not specify the number of carriers flying into Russia (or even Eastern Russia), nor does it provide a timeframe for this alleged resolution. Mr. Duncan further indicated that this issue had been investigated a few years earlier, and provided a copy of the Dalrymple Memo to the investigator, which is attached to the ROI as Exhibit 2. Also attached to the ROI is documentation detailing FAA's inspection/surveillance tasks and a copy of Mr. Lund's June 10, 1998, letter to Mr. Frank McCabe, former Senior Representative for Russia and the Commonwealth of Independent States within the Office of International Aviation in Washington, which outlined the problem and explained why single-entry visas were not sufficient.

The ROI also reflects that Mr. Gordon confirmed Flight Standards' difficulty in obtaining multiple-entry visas for Russia, and that he was concerned about their inability to properly conduct safety inspections as a result of that difficulty. According to the report, Mr. Gordon explained that the agency did not cease operations of U.S. carriers in Russia pending resolution of the visa problem, because they reasonably assumed operations within Russia were safe in light of the fact that inspections conducted in the U.S. did not raise any safety concerns. According to the report, however, he admitted that safety of the U.S. carriers operating in Russia "remained a concern and an unanswered question."

Other than the vague, unsupported statement from Mr. Duncan regarding the lack of U.S. carriers operating in Eastern Russia, the ROI does not address the current status of obtaining multiple-entry visas for Russia. The ROI, in the Summary of Findings, concludes that the investigation confirms a "definite problem" in obtaining multiple-entry

The Special Counsel

The President

Page 6

visas, and that the lack of multiple-entry visas contributed to Flight Standards' inability to properly conduct "congressionally mandated aviation safety inspection requirements."

Significantly, however, the cover letter accompanying the ROI, signed by Mr. Mellody, states that "the Flight Standards Service . . . does not agree with any statement in the enclosed supplement that indicates the absence of multiple-entry visas resulted in inadequate safety oversight of U.S. carriers that flew into Russia." The cover letter states that Flight Standards was able to meet its oversight obligations, contrary to the findings in the ROI, "by using established inspection protocols with both single- and multiple-entry visas." However, the letter does not explain or provide information illustrating how this was accomplished. The cover letter further indicates that within 60 days, the Flight Standards Service would provide an explanation of its international oversight obligations related to this matter.

In his comments regarding this supplemental report, Mr. Lund states that he believes the ROI is "very accurate," and that Mr. Gordon's "credibility as an expert in international aviation safety is above reproach." He points out, however, that there are other potential witnesses who were not interviewed who have firsthand knowledge of the difficulties in obtaining multiple-entry visas and the "significant derogation of safety and security of U.S. air carriers flying to and from Russia." Further, Mr. Lund disputes Mr. Mellody's representation that FAA was able to meet its oversight obligations, explaining that the Inspectors were clearly unable to meet FAA guidelines for compliance with FAA regulations.

On January 9, 2003, my office advised Mr. Mellody of our concern regarding the supplemental report. He advised us that Flight Standards Service also had concerns regarding the ROI, and therefore was preparing a supplemental report that would provide an explanation of their oversight responsibilities.

On February 13, 2003, the agency provided its second additional supplemental report, entitled Report on International Safety Oversight Responsibilities. This report generally summarizes FAA international oversight responsibilities under the Convention on International Civil Aviation (Chicago Convention). The report explains that under the "State of the Operator" provision of the Chicago Convention, FAA is required to certify the safety and provide continued oversight of U.S. air carriers that are issued Air Operator Certificates (AOCs) under 14 C.F.R. Parts 119 and 121. It further explains that because aviation operators under 14 C.F.R. Part 135, such as those referenced by Mr. Lund, are not issued AOCs, FAA does not have any State of the Operator responsibilities for those operators. The report goes on to explain that FAA has oversight responsibilities under the "State of Registry" provision, but that FAA "normally does not travel outside the U.S. to conduct surveillance activities on the airworthiness of U.S.-registered aircraft or the

The Special Counsel

The President

Page 7

qualifications of their crewmembers except in conjunction with the oversight of . . . [a] U.S. air carrier operating overseas.”

The report further explains that the Flight Standards Service reviewed the inspection and surveillance reports for U.S. air carriers operating in Russia for the last 10 years and determined that there were “no significant safety surveillance issues identified during that period.” The report also describes the process for obtaining visas to conduct official business outside the U.S., and notes that “most recently” Russia has been issuing multiple-entry visas to FAA employees. The cover letter accompanying the report states that, according to the Flight Standards Service Division Manager in Alaska, several Inspectors have received multiple-entry visas over the last two years. The report does not address inspection and oversight requirements under FAA regulations, or provide any specific information on the current number of multiple-entry visas or current oversight needs (*i.e.*, based on the number and size of U.S. carriers currently operating in Russia).

In his comments, Mr. Lund points out that this report fails to show what the duties and responsibilities of FAA Inspectors are, and instead provides inaccurate and irrelevant information. He explains that in addition to FAA’s responsibilities under the Chicago Convention, FAA Inspectors are responsible for ensuring that U.S. air carriers comply with FAA regulations and other federal laws. He states that those laws and regulations generally maintain a higher safety standard than the Chicago Convention. He asserts that the agency could have included excerpts of FAA handbooks, which provide guidance for conducting inspections to ensure compliance with “the myriad aviation safety laws and regulations.” Instead, the agency provided documents on FAA visa application procedures and general travel policies.

In addition, Mr. Lund strongly refutes the statement in the report that FAA did not have State of the Operator oversight responsibilities for the carriers he referenced. He contends that most of the U.S. air carriers that were flying to the Russia were indeed covered under 14 C.F.R. Part 121, and were thus required to have AOCs. According to Mr. Lund, even those carriers that were covered under 14 C.F.R. Part 135 were engaged in revenue passenger operations and had AOCs. Thus, he asserts that the characterization of those carriers as “general aviation operators” is inappropriate, and FAA did have State of the Operator safety oversight and inspection responsibilities over those carriers.

Mr. Lund also takes issue with the representations in the report regarding the FAA’s handling of the 1998 Air Alaska incident (in which a plane was forced to abort take-off due to runway conditions) and FAA Inspectors’ lack of authority or obligation to conduct runway inspections. He argues that, despite an invitation from Russian authorities, FAA Inspectors were unable to participate in the Air Alaska investigation, because they did not have current multiple- or single-entry visas. He further explains that he conducted numerous inspections of Russian airports. He includes with his comments

The Special Counsel

The President

Page 8

excerpts from FAA Handbook 8400.10 and excerpts from the 1994 Russian/American Joint Aviation Safety Evaluation of Russian Aviation.

Comments and Conclusion

Despite substantive discussions with the agency regarding the deficiencies in the agency's initial report, and several extensions of time granted over a period of more than one year to correct those deficiencies, neither of the supplements provides information to show that the deficiencies have been corrected. Further, it is most troubling that the initial report and two supplemental reports present internally conflicting findings regarding a critical issue in this matter – whether the difficulty in obtaining multiple-entry visas for a period of at least 10 years adversely affected FAA's ability to provide proper safety oversight of U.S. air carriers operating in Russia.

Additionally, there is internal disagreement within the agency over the conclusions of the ROI. Specifically, Flight Standards Service itself disagrees with the conclusion in the ROI by the FAA Security and Investigations Division that the lack of multiple-entry visas affected safety oversight. However, Flight Standards provides no evidence supporting its position, or countering the evidence presented in the ROI. Thus, in light of the information presented, I have determined that the agency's finding that safety oversight was not adversely affected by the lack of multiple-entry visas appears to be unreasonable.

In addition, despite several requests for information regarding the current status of obtaining multiple-entry visas to Russia, the agency failed to provide any information regarding the current number of visas being obtained or the current oversight needs for U.S. carriers operating in Russia. In the initial report, the agency represents that the problem has been resolved and Inspectors now "routinely" receive multiple-entry visas. Evidence presented in the ROI, to the contrary, reflects that the problem has allegedly been resolved because of a decrease in U.S. air carriers flying to Eastern Russia. Further, the Report on International Safety Oversight Responsibilities does not adequately clarify FAA's specific inspection and oversight responsibilities – currently or during the time frame relevant to the disclosure – for U.S. air carriers operating in Russia. Rather, that report appears instead to diminish the agency's safety oversight responsibilities altogether.

Thus, after more than one year, several substantive conversations with agency counsel, and several extensions of time, the agency's response remains deficient. Without more specific information on the current oversight needs and the number of multiple-entry visas now provided, I am unable to determine whether the agency's finding that the problem of obtaining multiple-entry visas has been resolved is reasonable.

As discussed above, I have determined, pursuant to 5 U.S.C. § 1213(e)(2), that the agency's report and supplemental reports are deficient, and in light of the information

The Special Counsel

The President

Page 9

presented, several of the findings of the agency head do not appear to be reasonable. As required by 5 U.S.C. § 1213(e)(3), I have sent a copy of the report, supplemental reports, and Mr. Lund's comments to the Chairmen of the Senate Committee on Commerce, Science and Transportation and the House Committee on Transportation and Infrastructure. We have also filed copies of the report, supplemental reports, and Mr. Lund's comments in our public file and closed the matter.

Respectfully,

William E. Reukauf
Acting Special Counsel

Enclosures