

1974

Discovery against Air Carriers

Frank Rox

Recommended Citation

Frank Rox, *Discovery against Air Carriers*, 40 J. AIR L. & COM. 469 (1974)
<https://scholar.smu.edu/jalc/vol40/iss3/10>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

DISCOVERY AGAINST AIR CARRIERS

FRANK ROX*

THE METHODS and tools of discovery against an air carrier are not essentially different from other types of litigation. Thus, the plaintiff's attorney will normally use written interrogatories, requests for admission, production of documents and depositions. Parties may also obtain discovery regarding any matter, not privileged, which is relevant to the subject matter whether it relates to the claim or defense of the party seeking recovery or to the claim or defense of any other party.

Discovery against an air carrier normally starts at the time the National Transportation Safety Board (NTSB) enters upon the scene. It has been my experience that the plaintiff's attorneys (or prospective attorneys) are in constant attendance throughout the NTSB public hearing. While they are not formal parties to the proceeding, they have access to all of the Board's exhibits (from the press table and the public files of the NTSB), and some of the attorneys even record the proceedings as well.

Upon conclusion of the hearings and before the Board hands down its findings, written transcripts of the proceedings are available from the reporting company. While it is true that the NTSB personnel participating in the investigation and public hearings on the accident are not normally attorneys they, nevertheless, do a very creditable job in most cases in developing an enormous amount of factual material which can be and is extensively used in the civil litigation following the accident. One only has to look at the pleadings filed by the plaintiff's attorneys to appreciate the extent to which they rely upon the work done by the NTSB during the investigation and public hearing stages of the accident inquiry. This observation is not meant to be critical but only to point up the fact that the plaintiff's discovery commences the

* Frank Rox is with the Legal Department, Delta Airlines, Atlanta, Georgia.

minute a NTSB investigator arrives upon the scene of an accident.

Following the filing of suit, we as carriers are usually served with a notice and request for the production of documents pursuant to rule 34. Practically all of the documents sought are those which have been exercised by the NTSB panel during the public hearing on the accident. This is further evidence of the assistance provided to plaintiff's attorneys by the investigation conducted by the NTSB.

Of course, some of the plaintiff's counsel who specialize in aircraft accident litigation have over the years developed materials in the form of Requests for Production and Interrogatories that pretty much cover the waterfront, but to particularize their motions they still rely to some extent upon the basic data developed by the NTSB during its investigation.

For attorneys who are not actively engaged in this type of practice I should point out that the Federal Aviation Regulations (FARs) and particularly "Part 121-Certification and Operations: Domestic, Flag and Supplemental Air Carriers and Commercial Operators of Large Aircraft" contains the operational Bible for practically every facet of an air carrier's operations.

The reason I mention these regulations is to point out that the federal government, primarily through its agents in the Federal Aviation Administration exercises a great deal of control over the operations of the air carriers. A review of these regulations will reveal that the government prescribes in minute details the manner in which an air carrier conducts its operations. Thus, a primary and fertile source of information concerning an air carrier's operations is Part 121 of the FARs.

These regulations contain a wealth of information to assist the attorney in preparing intelligent and probative interrogatories to the air carrier and to assist him in discovery generally. For example, these regulations require each air carrier to prepare, and keep current, manuals embodying programs for the use and guidance of the carrier's flight and ground operations personnel in conducting the carrier's operations. One of the most important is the establishment of a maintenance and aircraft alteration program. This program must insure that (a) maintenance, preventive maintenance and alterations performed by the air carrier, or by others on the air carrier's aircraft, are performed in accordance with the regulations and the air carrier's manual, (b) competent personnel and adequate

facilities are provided for the proper performance of these functions, and (c) each aircraft released to service is airworthy and has been properly maintained for operations under the regulations. The program sets forth the method of performing routine and non-routine maintenance and a designation of items that must be inspected as well as procedures to insure that all required inspections are, in fact, performed. Moreover, the air carrier must set forth in its manual a suitable system that provides for preservation and retrieval of such information in a manner acceptable to the FAA.

In addition, records must be maintained by the air carrier to show such matters as the total time and service of the airframe; the current status of life-limited parts of each airframe, engine, and appliance; the identification of the current inspection status of the aircraft; the current system of applicable airworthy directives issued by the FAA, including the method of compliance and a list of current major alterations to each airframe, engine and appliance. Such records must be retained until the work is repeated or superseded, or for one year after the work is performed, except that records of the last complete overhaul shall be retained until the work is superseded by work of equivalent scope and detail. All of the records required to be maintained by this part of the regulations must be transferred with the aircraft at the time the aircraft is sold.

The regulations also prescribe qualifications for the air carriers' pilots and flight engineers specifying such matters as operating experience necessary, certificates required, line checks completed, routes and airports qualification, and knowledge of air traffic control procedures. After its personnel meet the initial qualifications, the air carrier must thereafter establish and maintain flight and ground training programs for its pilots, dispatchers and other operations personnel and submit such programs to the FAA for its approval.

The purpose of such programs is to insure that each employee is adequately trained on a recurrent basis to perform his assigned duties. The regulations also require appropriate training materials, examinations, instruction and procedures for use in conducting the training which is prescribed. They require flight instruction and/or simulator instruction and establish FAA approved "check airmen" to supervise the required flight training and flight checks. Each air carrier must also prepare and keep current a written training pro-

gram curriculum for each type of airplane the air carrier operates.

When an air carrier is involved in a major accident, practically every facet of the company's operation participates in the accident-related activities which follow. Of particular interest to the reader, however, would be the activities of the Flight Operations, Maintenance and Engineering divisions and departments of the company. These departments normally send representatives immediately to the scene of the accident and usually one of these persons is assigned to each of the NTSB committees which are formed the first or second day to conduct the investigation into the probable cause. These air carrier employees not only actively participate in the investigation as members of the NTSB teams, but they and their associates from the carrier's headquarters also begin assembling information and data which will not only be useful in the NTSB investigation but gather facts which will also be available for the civil litigation which may follow.

These people begin to form opinions concerning fault and suggest areas which should be explored and probed by the total investigations force. As a corollary to these activities they keep their management apprised of what is happening at the scene and work closely with representatives of the airplane and component manufacturers in the conduct of tear-down and inspection of almost every major component of the aircraft.

Essentially, all of these materials I have discussed above are subject to discovery in motions for production of documents, interrogatories and in depositions. Thus, if an attorney is thoroughly schooled on FARs and has obtained the transcript of the NTSB accident investigation proceeding, he has the basic tools to proceed with discovery against the air carrier.

Generally speaking, one would not see a pure "products liability" action brought solely against an air carrier. While I suppose a factual situation could arise where such an action would be appropriate, it would be unusual. "Products liability," as I understand the theory, envisions a defect in a "product" which causes injury or damage to person or property rendering the manufacturer, processor or seller of the "product" liable. In an air carrier accident, the "product" we are talking about is an "aircraft," and the manufacturer, processor and seller are usually one and the same. Of course, there may be a problem with some component of the air-

craft not manufactured by the hull manufacturer (an engine or instrument for example) which may also give rise to an action against the manufacturer of the component.

I do not intend to discuss in any detail the subject of an action against the manufacturer since this subject will be covered by other persons. I do wish to note, however, that the typical air carrier accident suit may involve three co-defendants, viz (1) the air carrier, (2) the aircraft manufacturer, and (3) the United States. It may also name a component manufacturer as a co-defendant, depending upon the facts of the case.

While the action against the manufacturer may be a products liability case, predicated on faulty design or assembly of the aircraft, the action against the air carrier is usually outside a products liability theory, i.e., it is premised upon the negligent operation of the aircraft by the pilots or the negligent maintenance of the aircraft by the air carriers' employees. Similarly, the allegations against the government usually embrace a charge of negligence on the part of the Air Traffic Controllers in the performance of their duties.

So you are now ready to begin discovery against the air carrier! What happens next? Well, if the accident involves a number of injuries or fatalities in a single accident, the plaintiff's counsel is usually faced with an attempt by the air carrier to have all of the cases consolidated for pretrial proceedings.

While consolidation provides enormously more efficient handling of the litigation, it complicates the matter for plaintiff's counsel since he may be forced to participate in pretrial activities in a jurisdiction quite remote from the one of his choice.

Usually in catastrophic aircraft accidents, the air carrier involved is faced with litigation involving a multitude of plaintiffs as a result of the one accident. The suits may be and are frequently scattered throughout the various states from Maine to Florida to California, making orderly discovery a difficult and burdensome task. In years past, air carriers attempted to obtain consolidation of these cases under section 1404A of Title 28 of the U.S. Code, which provides that "for the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought." While transfer under section 1404A serves the purpose of economic and expeditious discovery, there were many objections

to such transfers by the plaintiff's bar, since under section 1404A the case is transferred for all purposes.

Effective April 29, 1968, section 1407 of Title 28 of the U.S. Code was enacted establishing a Multi-District Litigation Panel which considers transfer of Multi-District Litigation to a single court for "pretrial proceedings" only. The statute provides that when

civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the Judicial Panel on Multi-District Litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such action. Each action so transferred shall be remanded by the Panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.

Since section 1407 was promulgated, the trend in major aviation accident litigation has been toward consolidation of discovery and pretrial activity through the multi-district procedure.

There does appear to be one flaw in the section 1407 procedure. That is where one of the plaintiffs brings his case in a state court and makes it non-removable by joining a resident defendant. If the plaintiff's attorney will not cooperate and participate and accept the discovery held under section 1407, then you have to go through it twice, or more.

I suggest that the Federal Aviation Act should be amended to provide that all civil litigation brought against an air carrier for death or injury to a passenger while aboard an air carrier engaged in interstate, overseas or foreign commerce must be brought in a U.S. District Court. In other words, complete federal preemption of suits against a certificated air carrier engaged in interstate commerce. In my opinion, a more orderly and efficient handling of aviation accident cases, particularly those involving major air disasters, would result from such a procedure.

In Delta's recent Boston accident, Delta moved for transfer of all the civil actions to the United States District Court for the District of Massachusetts pursuant to section 1407 for coordinated and

consolidated pretrial proceedings. Our motion was based upon the following grounds:

- A. All the civil actions now pending involve one or more common questions of fact and law.
- B. The civil actions are pending in six different federal judicial districts, namely: District of Massachusetts, District of Vermont, District of New Hampshire, Middle District of Florida, Middle District of Tennessee and Southern District of New York.
- C. Transfer of these proceedings will be for the convenience of the parties and witnesses:
 1. The site of the accident was Boston, Massachusetts.
 2. All the eyewitnesses to the accident reside in or around Boston.
 3. All of the air traffic controllers, meteorologists, and rescue personnel involved reside in or around Boston.
 4. All the relevant records and documents pertaining to the accident are located in various places throughout the United States.
- D. Plaintiff's counsel maintains offices in various geographical areas throughout the United States.
- E. Transfer and consolidation of discovery proceedings will promote the just and efficient prosecution of said accident in that:
 1. Duplication of pretrial discovery by interrogatories and depositions will be reduced.
 2. Duplication of documentary production will be reduced.
 3. The cost of conducting the aforesaid actions will be reduced.
 4. The expense and inconvenience of producing witnesses will be reduced.

As of February 13, 1974, separate cases involving the Boston accident have been filed against Delta in six different states. In my opinion, the Boston accident litigation is particularly suited for consolidated discovery under the Multi-District Litigation procedure. The hearing before the panel took place in Atlanta on February 7,

1974, and the matter probably will be decided before this paper is printed.

Initially under the Multi-District Panel, there were instances where pretrial discovery was excessive and extended over long periods of time. More recent experience has shown that discovery under the Multi-District Litigation procedure can be handled expeditiously and to the benefit of all parties. I am informed that through consolidation pursuant to section 1407, discovery in the recent air crash disaster in the Florida Everglades was conducted and concluded in a matter of months, which attests to the desirability of the procedure.

Handling of death claims arising out of a major air disaster is indeed a grim business. Aside from the fact that the liability exposure is staggering, a fact which the air carrier cannot take lightly, it is incumbent upon the defendant's and plaintiff's attorneys handling the litigation to dispose of the cases as expeditiously as possible consistent with equitable compensation to the families involved, but also consistent with just treatment of the air carrier, the manufacturer and the government, all of whom will be suffering the financial burden of the tragedy. It, therefore, behooves counsel to realistically appraise the facts and to bend every effort to settle the cases without costly and prolonged litigation. Such a result can be achieved by creating an atmosphere where the parties at interest are talking and thinking positively toward settlement whenever possible.

Immediately following an air disaster, the air carrier, the manufacturer and the government should each independently measure their individual exposure in terms of liability. If the carrier decides that the facts cast the full blame upon the manufacturer or the government, then it may wish to completely disassociate itself from the other defendants and go it alone. The same would be true of the manufacturer and government if either believed its exposure to be nil.

On the other hand, if the co-defendants recognize that each of them has some exposure, then I suggest it is in their best interest (as well as those of the next-of-kin), to reach an agreement which I would call a sort of "non-aggression" pact. This agreement would relate *only to the passenger and cargo claims* and should contain the following elements:

1. Immediate establishment of a realistic working fund by the co-defendants to be used in the settlement of all such claims. The amount to be contributed by each would not necessarily coincide precisely with the contribution each would ultimately make to the final settlements.
2. A provision that all such claims would be settled. No such case would be tried unless all of the co-defendants agreed that settlement was not possible because of the unrealistic demands of the plaintiff.
3. A formula establishing the basis upon which each co-defendant would ultimately share in the final expense of each settlement, *i.e.*, 1/3, 1/3, 1/3 or 40, 40, 20, etc. Naturally the formula agreed upon would reflect an objective and realistic appraisal of counsel as to his client's share of the liability exposure. It will be quickly apparent that good faith on the part of all counsel is absolutely essential if such a formula is to be negotiated. Once agreed to, it cannot be altered and must be applied in all settlements. It would be highly desirable that this formula be agreed upon in advance of settlement of the first claim. However, the parties could agree to arbitrate the formula if such an agreement cannot be reached prior to actually settling some of the claims.
4. The parties would engage in discovery against each other only for defense purposes and then only after all defendants agreed a claim must be tried because of the unreasonable demands of the plaintiff's attorney. There would be no attempt on the part of a defendant to affirmatively shift liability to another co-defendant.
5. No co-defendant would attempt to discover documents from the others except for use in defense of a claim that had to be litigated.
6. No cross claims would be filed by one defendant against another even if one or more of the cases had to be tried.
7. All rights of the individual co-defendants would be reserved to proceed against each other in all cases except liability relating to the passenger and cargo claims. Of course, it would be desirable to resolve the question of the hull loss in this agreement as well, but such may not be feasible. Set-

tlement of the passenger and cargo claims, however, should not await resolution of the hull loss issue, and this question can be deferred and handled after all the passenger and cargo claims have been settled. The parties could even agree to extend the statute of limitations on these issues pending resolution of the passenger and cargo claims.

The purpose of such a "non-aggression" agreement is to permit the defendants to receive, analyze, and settle all of the passenger and cargo claims as expeditiously as possible, and without litigation. The plaintiffs are the real beneficiaries of such an approach to claims handling because the money is paid to the heirs promptly and they do not have to wait while the air carrier, the manufacturer, and the government slug it out in protracted litigation extending over a 5-year period before their claims are disposed of.

In my opinion the claimants do not suffer because of the agreement but, to the contrary, they benefit because a settlement atmosphere has been created. And, so long as the attorneys representing the plaintiffs approach the negotiations with realistic claims, much time, effort, and cost of litigation will be saved. If the claim is unreasonable, then the co-defendants will agree not to settle and the case will be litigated. On the other hand, should the defendants be unreasonable in their appraisal of the value of the claim, then the attorney representing the passenger will not settle, and the case would be tried. Thus, the procedure I suggest has inherent checks and balances which will, in fact, serve the ends of justice by:

- (a) Prompt payment of reasonable settlements to the innocent victims.
- (b) Alleviation of crowded court dockets.
- (c) Significant savings in cost of preparing and trying multiple law suits.
- (d) Avoidance of continuous unfavorable publicity attendant to prolonged litigation.

The objective of the procedure I have suggested is to not delay the disposition of the passenger claims by squabbling between co-defendants, but to make a peace pact, a funding arrangement to compensate the victims, and then fight it out over the hull loss if you have to.

But I repeat, the ability to reach such an agreement really depends on the advice given by the lawyer to the respective client. It has to be objective and realistic as opposed to adversary. This is no different than what usually happens in major air carrier accident cases but only after the co-defendants have beat each others' brains out for a couple of years and hundreds of thousands of dollars in defense costs later.

