

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GAIL DUNHAM, Executive Director of the)
National Air Disaster Alliance/)
Foundation, in her personal capacity)
2020 Pennsylvania Avenue, NW #315)
Washington, DC 20006)
)
Plaintiff,)
)
v.)

RAY H. LAHOOD
United States Secretary of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

and

LYNNE A. OSMUS)
Acting Administrator)
Federal Aviation Administration)
800 Independence Avenue, S.W.)
Washington, DC 20591)
)
Defendants.)

Case: 1:09-cv-00370
Assigned To : Roberts, Richard W.
Assign. Date : 2/24/2009
Description: General Civil

COMPLAINT

Gail Dunham, one of the millions of United States citizens who has been, who is at the time of the filing of this complaint, and who will be in the future, a frequent consumer of air travel regulated by the United States Department of Transportation, brings this action in the form of a mandamus pursuant to 28 U.S.C. § 1361 to compel the Secretary of Transportation, Ray H. LaHood, to exercise his statutory authority granted by 49 U.S.C. § 101 *et seq.* and in particular 49 U.S.C. § 106(f)(1) to enact, or to force the Federal Aviation Administrator to enact, safety recommendations from the National Transportation Safety Board that have been identified but unimplemented, in some cases for more than fifteen years.

Additionally, Dunham seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring that, as a matter of law and under the mandate of 49 U.S.C. § 44701, Lynne A. Osmus, Acting Administrator of the Federal Aviation Administration ("FAA"), has a duty to Dunham and those similarly situated to implement these safety recommendations.

Additional known potential defendants, but unnamed as defendants at this time in this action as they are not currently in governmental positions and capable of directing proper government action are the following:

Jane Garvey, in her capacity as Federal Aviation Administrator from 1997-2002, failed and/or refused to carry out her statutory duties to safeguard aviation safety and directly and indirectly caused and contributed to causing these déjà vu aviation disasters.

Furthermore, Jane Garvey as Federal Aviation Administrator presided over the aircraft certification of the Bombardier Q400. After FAA Administrator Garvey left the FAA she accepted a position on the Bombardier Board of Directors and received cash, travel and/or other valuable consideration.

Marion Blakey, in her capacity as Federal Aviation Administrator from 2002-2007, failed and/or refused to carry out her statutory duties to safeguard aviation safety and directly and indirectly caused and contributed to causing these déjà vu aviation disasters.

Robert Sturgell, in his capacity as Acting Federal Aviation Administrator from 2007-2009, failed and/or refused to carry out his statutory duties to safeguard aviation safety and directly and indirectly caused and contributed to causing the déjà vu aviation disasters.

JURISDICTION AND VENUE

1. This is a mandamus action pursuant to 28 U.S.C. § 1361 to compel a United States government official to perform his statutory duty, and an action pursuant to 28 U.S.C. § 2201 for declaratory relief. This Court has jurisdiction over the action pursuant to 28 U.S.C. § 1361 and 28 U.S.C. §§ 1331 and 1337.
2. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) in that the Defendants are resident in this district and the events or omissions giving rise to the claim occurred in this district.

PARTIES

3. Plaintiff Gail A. Dunham is a United States citizen and the Executive Director of the National Air Disaster Alliance/Foundation (NADA/F), a non-profit organization that promotes air safety. Dunham has been an active member of that organization for almost fifteen years, after a long career in the scheduled airline aviation service. Dunham has personally met with members of Congress, and officials from the Federal Aviation Administration, the Department of Transportation, and the National Transportation Safety Board, demanding that these organizations implement certain National Transportation Safety Board recommendations to improve air safety. As a necessity of her work with NADA/F, Dunham must regularly and all too frequently travel throughout the United States and internationally to visit the locations of air crashes, assist family members of air crash victims and survivors, work for aviation safety, train others in aviation safety issues, meet and work with air safety organizations around the world, and plan and attend air crash memorials and services, among other activities. These travels, as well as personal journeys, are conducted on aircraft and air carriers

that are certified "safe" by the FAA, under the supervision of the Department of Transportation.

4. Defendant Ray H. LaHood is the United States Secretary of Transportation ("Secretary"). He is sued in his official capacity pursuant to 28 U.S.C. § 1361.

5. Defendant Lynne A. Osmus is the Acting Administrator of the Federal Aviation Administration ("Administrator.") She is sued in her official capacity pursuant to 5 U.S.C. § 701 *et seq.*

FACTS

6. By Act of Congress, the Department of Transportation (DOT), acting through the FAA, is responsible for insuring "safe" air transportation is available throughout the United States by formulating, enacting, and enforcing safety standards that apply to (among others) airlines, aircraft manufacturers, employees of the same, airports, and passengers.

7. By Act of Congress, the National Transportation Safety Board ("NTSB") was established as an independent arm of the United States government. The NTSB was formed for the purpose of investigating transportation accidents and making recommendations to Congress and other governmental agencies "to reduce the likelihood of transportation accidents similar to those investigated by the Board," and "to propose corrective actions to make the transportation of individuals as safe and free from risk of injury as possible . . ." 49 U.S.C § 1116.

8. The NTSB submits recommendations about transportation safety to the DOT Secretary, who must respond in writing within 90 days explaining whether the recommendations will be adopted in whole, adopted in part, or rejected. If

adopted in whole or in part, the Secretary must provide a proposed timetable for carrying out the recommendation(s). 49 U.S.C. § 1135.

9. In furtherance of the DOT's responsibility for the "safe" transportation of passengers in the U.S. air traffic system, Congress mandates that the FAA Administrator "**shall** carry out [his/her statutory duties] in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. § 44701(c).

10. Contrary to the clear intention of Congress expressed in unambiguous mandatory language, the DOT and FAA continue to shirk their duties to the traveling public, including Dunham, by:

- a. Failing to timely evaluate NTSB recommendations;
- b. Failing to timely accept or reject NTSB recommendations concerning known aviation safety hazards that, if implemented, would reduce or eliminate accidents; and
- c. Failing to implement the safety recommendations that would reduce the likelihood of transportation accidents similar to those investigated by the NTSB.

11. As a direct result of the DOT and FAA refusal to adopt the safety recommendations of the NTSB, hundreds of lives have been needlessly lost in "déjà vu" disasters that are repeat occurrences of known aviation safety flaws.

12. Because the NTSB has pinpointed and developed preventative measures for these known aviation safety flaws, the DOT and FAA failure to implement these preventative measures is in contravention of their Congressional mandate and breaches their duty to the traveling public, including Dunham.

NTSB MOST WANTED LIST – RUNWAY SAFETY

13. Since 1990, the NTSB has compiled a list of high priority safety recommendations, most of them gleaned from "lessons learned" from accident investigations, known as the "Most Wanted List" of transportation safety improvements. These safety improvements are considered, in the NTSB's own terms, "critical changes needed to reduce transportation accidents and save lives."

14. In the first "Most Wanted List," issued in September 1990, the NTSB called for immediate action to reduce the possibility of runway incursions, the risk of ground collision or other life-threatening improper operations on the airport surface area.

15. Fatal accidents since that item was issued include:

- a. December 3, 1990 – Ground collision between two aircraft in Detroit Michigan, 8 fatalities
- b. February 1, 1991 – Ground collision between two aircraft in Los Angeles, California, 34 fatalities.
- c. November 19, 1996 – Ground collision between two aircraft in Quincy Illinois, 14 fatalities.
- d. October 31, 2000 – Ground collision between aircraft and construction equipment in Taipei, Taiwan, 83 fatalities.
- e. October 8, 2001 – Ground collision between two aircraft in Linate Italy, 122 fatalities.
- f. August 27, 2006 – Aircraft attempted takeoff from wrong runway in Lexington, Kentucky, 49 fatalities.

16. Despite these horrifying statistics, and eighteen years after first appearing on the "Most Wanted List," the NTSB rates the FAA's response to some of these recommendations, now labeled "Improve Runway Safety" as UNACCEPTABLE.

17. Despite the fact that "Improve Runway Safety" has been on the "Most Wanted List" since 1990, in 2007, the GAO issued a report that said air travelers face a "high risk of a catastrophic runway collision" because federal regulators have lost their focus on reducing the potential for such accidents.

18. NTSB reports have documented at least 105 lives lost, and millions more put at risk, because of the defendants', and the known unnamed former administrators', failure to carry out their statutory duties.

19. Absent action by the DOT/FAA, more lives will doubtless be lost in similar tragedies.

NTSB MOST WANTED LIST – FLIGHT IN ICING CONDITIONS

20. In 1994, a turboprop aircraft crashed in Roselawn, Indiana as a result of a flight into icing conditions that exceeded the deicing capability of the aircraft. There were 68 fatalities.

21. The NTSB determined that the FAA certification requirements for demonstrating aircraft performance in icing conditions were inadequate and outdated.

22. On August 15, 1996, the NTSB recommended that the FAA revise icing certification and evaluation criteria to correct shortcomings uncovered in the Roselawn crash.

23. On January 9, 1997, near Detroit Michigan, a turboprop aircraft crashed in icing conditions, resulting in 29 fatalities.

24. In 1997, the NTSB added "Reduce Dangers to Aircraft Flying in Icing Conditions" to the "Most Wanted List."

25. In 1998, the NTSB determined that the probable cause of the Detroit accident was "the Federal Aviation Administration's (FAA) failure to establish adequate aircraft certification standards for flight in icing conditions."

26. Since 1994, fatal accidents that are attributable to icing include:

a. October 31, 1994 - Roselawn Indiana, turboprop aircraft entered icing conditions, departed controlled flight, and crashed, 68 fatalities (NTSB found that FAA inaction was a contributing factor to the crash);

b. January 9, 1997 - Detroit, Michigan, turboprop aircraft entered icing conditions, departed controlled flight, and crashed, 29 fatalities (NTSB found that FAA inaction was the probable cause of the crash);

c. February 16, 2005 - Pueblo Colorado, business jet crashed in icing conditions on approach to airport, 8 fatalities (NTSB found that FAA inaction was a contributing factor to the crash).

27. In addition to these fatal accidents, on January 2, 2006, a turboprop aircraft operating in icing conditions departed controlled flight at 11,500 feet. The aircraft rolled up to 140 degrees and reached a pitch down attitude of approximately 50 degrees before the pilot recovered after a loss of 5000 feet of altitude. Fortunately, there were no injuries. The NTSB has not yet released a probable cause report for this incident.

28. In December 2008, the NTSB released a Safety Alert addressing the operation of leading edge deicing boots.

29. On February 12, 2009, a turboprop aircraft operating in icing conditions on approach to Buffalo, New York, departed controlled flight and crashed, killing all 49 persons on board and one person on the ground. The NTSB investigation of this incident is ongoing.

30. The "Reduce Dangers to Aircraft Flying in Icing Conditions" has been on the "Most Wanted List" since 1997.

31. Despite these horrifying statistics, and twelve years after first appearing on the "Most Wanted List," the NTSB rates the FAA's response to this recommendation as UNACCEPTABLE.

32. As documented in NTSB reports, at least 105 lives have been lost, and millions more put at risk, because of the defendants', and the known but unnamed former FAA Administrators', failure to perform their statutory duties.

33. Absent action by the DOT/FAA, more lives will doubtless be lost in similar tragedies.

34. As a direct result of the FAA and DOT's failure to exercise mandated statutory authority, Dunham is exposed to substantially greater risk when flying.

35. Because Congress mandates that the FAA Administrator "**shall** carry out [his/her statutory duties] in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation," the failure of Acting Administrator Osmus, and Jane Garvey and other former FAA Administrators, to implement the NTSB "Most Wanted List" air safety recommendations for which the NTSB rates the FAA response UNACCEPTABLE years after their promulgation constitutes an injury-in-fact to Dunham.

FIRST CAUSE OF ACTION

36. The allegations contained in paragraphs 1 through 35 above are incorporated by reference as if fully set forth herein.

37. By Act of Congress, the DOT Secretary "**shall** carry out the duties and powers, and controls the personnel and activities of the [Federal Aviation] Administration." 49 U.S.C. § 106(f)(1)(emphasis added).

38. By Act of Congress, the Administrator shall carry out the duties and powers of the Secretary of Transportation related aircraft safety. 49 U.S.C. § 106(g)

39. By allowing the "Most Wanted List" safety recommendations of the NTSB to languish for up to thirteen years without implementation, during which time aircraft safety is compromised to the point that "déjà vu" crashes occur repeatedly, the Administrator has failed to carry out the duties and powers of the Secretary of Transportation related to aircraft safety.

40. Accordingly, the Secretary of Transportation must be compelled pursuant to 28 U.S.C. § 1361 to fulfill his clear and unambiguous statutory duty to provide for "safe" air transportation by United States regulated carriers by implementing the following NTSB "Most Wanted List" air safety recommendations for which the NTSB rates the FAA response UNACCEPTABLE regarding runway safety and aircraft operation in icing conditions;

- a. Safety Recommendation A-00-066 [Ground Movement Safety System Implementation];
- b. Safety Recommendation A-00-67 [Runway crossing ATC procedures];

- c. Safety Recommendation A-00-68 [Runway crossing ATC instructions];
- d. Safety Recommendation A-07-57 [Compute landing distances];
- e. Safety Recommendation A-96-54 [Revise icing certification criteria];
- f. Safety Recommendation A-96-56 [Require demonstration of icing capability, or prohibit operations in undemonstrated regimes];
- g. Safety Recommendation A-07-16 (replaces A-98-100) [review icing certification of pneumatic deice boot –equipped aircraft].

SECOND CAUSE OF ACTION

41. The allegations contained in paragraphs 1 through 35 above are incorporated by reference as if fully set forth within.

42. The FAA Administrator has the congressionally mandated duty to promote safe flight of civil aircraft by prescribing minimum safety standards that reduce and eliminate accidents. 49 U.S.C. § 44701

43. By failing to prescribe minimum safety standards that are designed to reduce or eliminate aircraft accidents, the Administrator breaches a duty to Dunham, who must not only endure increased workload as the Executive Director of NADA/F due to the number of accidents that, but for the implementation of the NTSB Safety recommendations, would otherwise be preventable, but must also expose herself to greater danger in the process because of the necessity for her to travel by air.

44. Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, this Court should issue an order that the failure of the Acting Administrator to exert her

statutorily required responsibilities has caused injury in fact to Dunham, which is redressable only by implementation of the NTSB "Most Wanted List" air safety recommendations for which the NTSB rates the FAA response UNACCEPTABLE listed in the First Cause of Action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court issue:

1. A Declaration pursuant to 28 U.S.C. § 2201 finding that:
 - a. the Acting Administrator, as a matter of law, has failed to properly execute her statutorily mandated duties to reduce and eliminate the possibility or recurrence of accidents in air transportation.
 - b. the failure of the Acting Administrator to carry out these statutorily mandated duties has resulted in injury-in-fact to Dunham, redressable only by implementation of the NTSB "Most Wanted List" air safety recommendations for which the NTSB rates the FAA response UNACCEPTABLE listed in the First Cause of Action.
2. A preliminary and permanent injunction that:
 - a. compels the Secretary of Transportation to perform his statutory duty to mandate that the FAA adopt NTSB "Most Wanted List" air safety recommendations for which the NTSB rates the FAA response UNACCEPTABLE, relating to runway safety and aircraft operation in icing conditions and listed in the First Cause of Action.

- b. compels the Secretary of Transportation to show cause if these "Most Wanted List" air safety recommendations listed in the First Cause of Action are not adopted within 30 days of the order.
 - c. Compels the Secretary to produce a schedule for implementation of the NTSB's "Most Wanted List" air safety recommendations listed in the First Cause of Action within 90 days of entry of this order.
 - d. Grants this Court continuing jurisdiction to insure that the Secretary complies fully with any and all orders of the Court.
3. Grant other such relief as this Court may deem appropriate.

This 24th day of February, 2009.

Respectfully submitted,

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