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BY EDVALDO PEREIRA LIMA

Investigation Turns Criminal

Pilots, controllers indicted in wake of collision that rocked Brazil.

More than two years after the crippled Gol Boeing 737-800 crashed in the Amazon rain forest, the global aviation community received much-anticipated news about legal cases resulting from the midair collision that downed the 737, killing 154 people.

A few days before the Aeronautical Accident Investigation and Prevention Center (CENIPA, a unit of the Brazilian Air Force) made public its final report on the collision in December 2008, federal judge Murilo Mendes pronounced his first verdicts in a parallel investigation by federal police that indicted the two pilots of the ExcelAire Embraer Legacy business jet that collided with the 737, and two air traffic controllers (ATCOs) and two assistant ATCOs who were on duty when the accident occurred.

His decisions to drop some charges and amend others related to a federal policy

inquiry that was initiated immediately after the accident and later turned into a criminal investigation by federal prosecutor Thiago Lemos de Andrade. Contrary to the traditional global aviation paradigm of non-criminalization of air accidents, the justice system in Brazil went by the letter of the law, Article 261 of its penal code. The article paves the way for criminal punishment of people “who expose aircraft to peril” with imprisonment for six months to 36 years, depending on whether the person’s actions resulted in a crash and loss of life.

Other articles of the penal code establish two different degrees of guilt, depending on whether the event is judged to have resulted from intentional or unintentional criminal behavior. Unintentional behavior includes poor airmanship (the lack of proper professional skills), negligence (careless performance) and imprudence.

The ExcelAire pilots, Joseph Lepore and Jan Paul Paladino, faced charges of unintentional guilt for neglecting prescribed procedures when radio communication problems with the Brasília Area Control Center (ACC) began, but Mendes dropped those charges. However, the pilots still face charges of imprudence for not following a flight plan that designated a descent from Flight Level 370 to FL 360 soon after crossing the Brasília VOR (VHF omnidirectional radio) and poor airmanship for allegedly inadvertently turning off their transponder. Lepore and Paladino are likely to continue being judged *in absentia* through a legal treaty between Brazil and the United States that has allowed them to testify before U.S. court officers who are cooperating with their Brazilian counterparts.

Mendes dropped all charges against Brasília ACC assistant ATCOs Felipe Santos dos Reis and Leandro José de Barros, and reduced the charge against ATCO Jomarcelo Fernandes dos Santos from intentional to unintentional guilt in his handling of the Legacy and for providing incorrect flight level information when handing off the flight to ATCO Lucindo Tibúrcio de Alencar. Alencar is now free from a charge of unintentional negligence but still is to be judged on charges of imprudence, or poor professional performance, in not trying to re-establish radio communication with the Legacy pilots through alternate frequencies.

Mendes now wants to bring a fifth ATCO to court. João Batista da Silva was in charge of ground control at the São José dos Campos airport when the Legacy departed on its flight to the United States via Manaus. The contention is that Silva issued an instrument flight rules clearance that included the initial flight level, 370, but did not clarify that a descent to FL 360 was required after crossing the Brasília VOR and that a climb to FL 380 was required for a later flight segment. This allegedly caused the pilots to believe that they would maintain FL 370 all the way to Manaus. The Gol 737 was en route from Manaus to Brasília

at FL 370 when the collision occurred. Silva contends that the clearance he relayed to the Legacy pilots adhered to standard operating procedure.

The ATCOs are all sergeants in the Brazilian Air Force, which manages both civilian and military air traffic control in the country. Their attorney, Roberto Sobral, points out that the dismissed charges against two of the controllers prove his defense thesis, that the real problem is systemic, involving poor management by the military.

The collision stirred a reaction by ATCOs that nearly dragged the Brazilian air transport system to its knees on three different occasions when they slowed down or stopped air traffic and publicly denounced poor working conditions and safety threats (ASW, 11/07, p. 18). The air force took the position that because ATCOs are members of the military by the free choice of their enlistment, they are subject to military ruling, and thus placed many of them on trial. About 98 members of the Brazilian Federation of ATCO Associations have been sued, fired or jailed since then, actions that attorney Sobral sees as retaliation.

For this and other reasons, Sobral has sent statements to the Supreme Court of Brazil denouncing Lt. Air Brig. Juniti Saito, commander of the air force, and his predecessor, Lt. Air Brig. Luís Carlos Bueno. He says that if the ATCOs are judged guilty, he will appeal to the Supreme Court and, if that does not work, his next move will be to appeal to the United Nations International Court of Justice for violation of human rights.

As these legal proceedings move forward, it is apparent that the issues resulting from the collision include criminalization versus the nonpunitive standard designed to protect the free flow of aviation safety information and, in Brazil, the effectiveness of military control of the ATC system. Brazil is approaching crossroads on both issues. 🌀

Edvaldo Pereira Lima is an aviation journalist living in Brazil.

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