

1985

## Casenotes and Statute Notes

Barry Douglas Johnson

---

### Recommended Citation

Barry Douglas Johnson, *Casenotes and Statute Notes*, 51 J. AIR L. & COM. 243 (1985)  
<https://scholar.smu.edu/jalc/vol51/iss1/7>

This Case Note 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>.

**EVIDENCE — EXPERT WITNESSES — 49 C.F.R. § 835,** which limits testimony by National Transportation Safety Board employees, does not bar testimony of a former Board employee where his testimony is unrelated to his Board activities. *Loftleidir Icelandic Airlines v. McDonnell-Douglas*, 158 Cal. App. 3d 83, 204 Cal. Rptr. 358 (1984).

On June 23, 1973, an aircraft owned and operated by Loftleidir Icelandic Airlines (Loftleidir) crashed while on its landing approach to John F. Kennedy International Airport in New York,<sup>1</sup> when the pilot prematurely extended the ground spoiler system.<sup>2</sup> The aircraft fell thirty feet onto the runway.<sup>3</sup> Although there were no deaths, there were several injuries,<sup>4</sup> and there was extensive damage to the aircraft.<sup>5</sup> This action was brought in a California state court by Loftleidir against McDonnell-Douglas, the manufacturer of the aircraft.<sup>6</sup>

At trial, Loftleidir asserted two theories for recovery, strict liability and negligence.<sup>7</sup> The litigation centered around the design of the aircraft's ground spoiler system.<sup>8</sup> Loftleidir asserted that the design of the system permitted early deployment and therefore caused the accident.<sup>9</sup> In

---

<sup>1</sup> *Loftleidir Icelandic Airlines v. McDonnell-Douglas*, 158 Cal. App. 3d 83, 204 Cal. Rptr. 358, 359 (1984).

<sup>2</sup> *Id.* The ground spoiler system consists of ten hinged panels on the upper surface of the wings. They are designed to enhance braking on the landing or during an aborted takeoff of an aircraft and serve no in-flight function. *Id.* at n.1.

<sup>3</sup> *Id.*

<sup>4</sup> At the time of this appeal all of the actions for personal injury arising from this accident had been resolved. *Id.* at n.2.

<sup>5</sup> *Id.* at 359.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 359-60.

<sup>9</sup> *Id.* at 360. The DC-8 airplane involved in this accident was originally equipped with what was known as a Mark I anti-skid system. *Id.* In the air, the ground spoiler system could only be deployed by overcoming sixty-five to seventy pounds of resistance from the deployment handle. *Id.* In 1962 the Mark I system

support of this theory Loftleidir sought to introduce the testimony of Mr. Charles O. Miller,<sup>10</sup> a former employee of the Bureau of Aviation Safety.<sup>11</sup> The Bureau is the division of the National Transportation Safety Board (NTSB), which investigates aircraft accidents.<sup>12</sup> Mr. Miller was, at time of trial, president and principal consultant of System Safety Incorporated, and was qualified as an expert in the area of human factors analysis.<sup>13</sup> He was scheduled to testify regarding the human factor aspects of the design of the ground spoiler system.<sup>14</sup> McDonnell-Douglas filed a motion *in limine*<sup>15</sup> to exclude the testimony of Mr. Miller,<sup>16</sup> alleging that a federal regulation limited the scope of permissible testimony of NTSB employees.<sup>17</sup> The trial court granted McDonnell-Douglas' motion.<sup>18</sup> Verdict was in favor of McDonnell-Douglas on both the negligence and

---

was replaced with the Mark II system. *Id.* In-flight deployment was blocked by thirty-five pounds of resistance. *Id.* At times, however, the in-flight deployment of the ground spoilers required only nine pounds of pressure. *Id.* The Mark II System utilized an electronic actuator. If this actuator did not move to the "full retract" position, or if it received a spurious signal, the pilot would encounter only nine pounds of resistance before the spoiler handle could be moved in-flight. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Human Factors Analysis, or Human Factors Engineering, applies information about human behavior to the design of products. Human Factors Analysis encompasses the designing of products to match the capabilities of the users of the products by considering the user, the product, and the environment in which the product is used.

The primary purpose of Human Factors Analysis is to determine design features which may cause potential injury or involve anticipated misuse of a product. The results can then be used to design a product which is safe for human use by eliminating accidents that can cause extensive damage to products and equipment or can seriously injure or kill people. See FRUMER & FRIEDMAN, PRODUCTS LIABILITY, § 71.05 (1983).

<sup>14</sup> *Loftleidir*, 204 Cal. Rptr. at 361.

<sup>15</sup> *Id.* A motion *in limine* is a motion presented either before or during trial to foreclose testimony on certain prejudicial issues. The purpose of such a motion is to avoid injection into trial of matters which are inadmissible or prejudicial. See *Sacramento & San Joaquin Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963).

<sup>16</sup> *Loftleidir*, 204 Cal. Rptr. at 361.

<sup>17</sup> The regulation is 49 C.F.R. § 835 (1975). For detailed discussion of the regulation and the pertinent test see *infra* notes 112-125 and accompanying text.

<sup>18</sup> *Loftleidir*, 204 Cal. Rptr. at 361. The court originally suggested that Mr. Miller's testimony would be admitted provided that he made no reference to the

strict liability issues.<sup>19</sup> Loftleidir filed a motion for new trial which was denied.<sup>20</sup> *Held, reversed*: 49 C.F.R. § 835, which limits testimony by National Transportation Safety Board employees, does not bar testimony of a former Board employee where his testimony is unrelated to his Board activities. *Loftleidir Icelandic Airlines v. McDonnell-Douglas*, 158 Cal. App. 3d 83, 204 Cal. Rptr. 358 (1984).

## I. LEGAL BACKGROUND

### A. *The Civil Aeronautics Act of 1938*

In 1938, Congress passed the Civil Aeronautics Act (CAA).<sup>21</sup> The CAA sought to regulate all aspects of aircraft operation in the United States.<sup>22</sup> Title VII of the CAA created the Air Safety Board (Board).<sup>23</sup> The duties of the Board included making rules and regulations concerning aircraft accident investigation.<sup>24</sup> The Board's primary responsibility was to investigate aircraft accidents and to report to the Civil Aeronautics Authority the probable cause of such accidents.<sup>25</sup> The sole purpose of the Board's accident report was to prevent similar accidents in the future by making recommendations to the Civil Aeronautics Authority.<sup>26</sup>

The CAA also provides in section 701(e) that the accident reports of the Board will be preserved and open for

---

opinions contained in the NTSB accident report. *Id.* at 360. But, one week into the trial a hearing on the motion was held and the motion was granted. *Id.* at 361.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Civil Aeronautics Act of 1938, 52 STAT. 973 (1938) (repealed 1958)[hereinafter "CAA"].

<sup>22</sup> The CAA, in addition to forming the Air Safety Board, also provided a comprehensive set of economic regulations involving licensing, carriage of mail, and tariffs. *See id.* Title IV.

<sup>23</sup> *Id.* Title VII.

<sup>24</sup> *Id.* § 702(a)(1).

<sup>25</sup> *Id.* § 702(a)(2).

<sup>26</sup> *Id.* § 702(a)(3). The statute reads: "It shall be the duty of the Board to. . . make such recommendations to the Authority as, in its opinion, will tend to prevent similar accidents in the future. . . ." *Id.* The Board is also authorized to act on citizen complaints, and to conduct special studies to "reduce or eliminate the possibility of, or recurrence of, accidents. . . ." *Id.* § 702(a)(5).

public inspection<sup>27</sup> and that "no part of any report or reports of the [Air Safety] Board or the [Civil Aeronautics] Authority relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."<sup>28</sup> From the language of the statute it is clear that the reports of the Board may not be used as evidence in a civil action.<sup>29</sup> However, the statute does not address the question of testimony of Board employees.<sup>30</sup> The scope of the testimonial privilege granted in section 701(e) was left to the courts to define.<sup>31</sup>

Section 701(e) was first addressed by a court in *Ritts v. American Overseas Airlines*.<sup>32</sup> In *Ritts*, a witness (not a Board employee) called by the Board to testify at an accident investigation was also called at trial to testify regarding the same accident.<sup>33</sup> The defendant airline objected based on section 701(e).<sup>34</sup> The federal district court held that section 701(e) was a bar only to admission of reports of the Board.<sup>35</sup> The court, however, held that section 701(e) did not bar the use of testimony by witnesses examined by the Board.<sup>36</sup> In reaching its conclusion the court relied heavily upon the policy beneath the prohibition:

The reason for the prohibition in respect to the use of "reports" of the Board most likely is based on the fact that the report would contain findings and conclusions, the receipt of which at a trial might be prejudicial to a party who had no part in the investigation of the Board and no opportunity to be heard by the Board.<sup>37</sup>

---

<sup>27</sup> *Id.* § 701(e).

<sup>28</sup> *Id.*

<sup>29</sup> See Simpson, *Use of Aircraft Accident Investigation Information In Actions for Damages*, 17 J. AIR L. & COM. 283 (1950).

<sup>30</sup> CAA § 701(e).

<sup>31</sup> *Id.*

<sup>32</sup> 97 F. Supp. 457 (S.D.N.Y. 1947).

<sup>33</sup> *Id.* at 458.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

In the context of *Ritts*, the court believed that the policy behind section 701(e) would not be defeated where a witness could be confronted in open court by representatives of both sides of the lawsuit.<sup>38</sup> The court, therefore, strictly construed section 701(e) as a ban only on the use of the actual Board accident report.<sup>39</sup>

The strict construction of *Ritts* was subsequently adopted by another federal district court in *Tansey v. Transcontinental & Western Air*.<sup>40</sup> Here the defendant airline refused production in discovery<sup>41</sup> of an accident report which it was required to file with the Board.<sup>42</sup> The airline contended that the report was privileged under section 701(e).<sup>43</sup> After reviewing with approval the *Ritts* opinion, the court discussed the conflicting policies behind section 701(e) and the Federal Rules of Civil Procedure.<sup>44</sup> The court noted that justice is promoted by full disclosure of the facts available to both parties.<sup>45</sup> As such, an exception to the disclosure requirements of the rules of civil procedure would not be found unless supported by a clear expression in the statutory language.<sup>46</sup> The court held the report admissible by strictly construing section 701(e) noting that the section exempts from use only the "reports" of the Board and not those reports filed by the airline to the Board.<sup>47</sup>

---

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 97 F. Supp. 458 (D.C.C. 1949).

<sup>41</sup> Rule 34 of the Federal Rules of Civil Procedure provides that one party to an action may serve upon another party a request to produce for inspection or duplication documents in the control of the other party. FED. R. CIV. P. 34.

<sup>42</sup> *Tansey*, 97 F. Supp. at 460. Section 702 of the CAA provides that "it shall be the duty of the Board to make rules and regulations, governing notification and report of accidents involving aircraft." CAA § 702. Pursuant to this duty the Board passed a regulation which required a written report to be made of every accident involving a certified aircraft. *Tansey*, 97 F. Supp. at 460. The *Tansey* court noted that "the form provided requires a 'detailed account of flight and accident, including nature of difficulty, speed, altitude, maneuvers, etc.'" *Id.*

<sup>43</sup> *Tansey*, 97 F. Supp. at 460.

<sup>44</sup> *Id.* at 461.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

In addition to adopting the reasoning of *Ritts*, the court, in *Tansey*, relied on a wholly separate line of reasoning to support its conclusion. Railroad companies are required by law to submit accident reports similar to those at issue in *Tansey*.<sup>48</sup> These reports are specifically exempted from use in related actions for damages.<sup>49</sup> The court believed that the policy underlying this exemption was to encourage full and frank disclosure and investigation of accidents.<sup>50</sup> The court, however, believed that Congress did not choose to grant such a broad exemption within the CAA.<sup>51</sup> The court stated that "nothing has been found by way of legislative history or by way of language of . . . [the CAA] to compel this view as to the purpose of the statutes."<sup>52</sup> The court found, therefore, that the scope of section 701(e) is more limited than that of the railway statutes, for if Congress had intended to encourage the disclosure of information by making such reports privileged, it would have been a simple matter to refer to them specifically as it did in the railroad reports statute.<sup>53</sup> Indeed, the court notes that Congress was quite explicit in providing other privileges within the CAA such as in the case of self-incrimination.<sup>54</sup> Congress' silence coupled with the explicit provisions for evidence privileges within

---

<sup>48</sup> *Id.* Federal law required that railroads make monthly reports of all accidents resulting in death or injury to any person. 45 U.S.C. § 38 (1983). The Secretary of Transportation has the authority to investigate all collisions, derailments or other accidents resulting in serious injury to a person or to the property of a railroad. 45 U.S.C. § 40. Compare this with the requirement of the CAA set out in note 43 *supra*.

<sup>49</sup> The statute reads: "Neither the report nor . . . any report of the investigation . . . nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation." 45 U.S.C. § 41 (1985). Note here how remarkably similar the language of section 41 is to that of section 701(e) of the CAA. See *supra* notes 28-29 and accompanying text for a discussion of the language of section 701(e).

<sup>50</sup> *Tansey*, 97 F. Supp. at 461.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* See Simpson, *supra* note 29, at 286 for a discussion of the relationship between the ICC statute and the CAA statute.

<sup>54</sup> See CAA, § 1004(i).

the CAA led the *Tansey* court to conclude that the scope of section 701(e) was much narrower than any similar exclusion in other transportation legislation.<sup>55</sup> Accordingly, the airline's report to the Board was held admissible.<sup>56</sup>

In *Universal Airline v. Eastern Air Lines*<sup>57</sup> a court was presented, for the first time, with the question of admissibility of testimony by Board employees. In *Universal* two airplanes collided in mid-air.<sup>58</sup> Among the issues before the court of appeals<sup>59</sup> was the admissibility of testimony of Mr. Berman, a Civil Aeronautics Board employee.<sup>60</sup> The court held that section 701(e) excluded opinion and not factual testimony.<sup>61</sup>

On appeal, the Civil Aeronautics Board filed an *amicus curiae* brief on the issue of Mr. Berman's testimony.<sup>62</sup> The Board forwarded five policy reasons for support of the exclusion of Mr. Berman's testimony:<sup>63</sup> (1) The Board exists solely for the purpose of gaining the information necessary to prevent similar accidents in the future; (2) Testimony in court discourages full and frank disclosure of facts; (3) Conflicts between the investigators' findings and the Board reports should not be revealed; (4) The Board reports would usurp the functions of judge and jury by taking from them the question to be litigated; and (5) The Board could not support the administrative burden of providing expert testimony for all air crashes investi-

---

<sup>55</sup> *Tansey*, 97 F. Supp. at 461.

<sup>56</sup> *Id.*

<sup>57</sup> 188 F. 2d 993 (D.C. Cir. 1951).

<sup>58</sup> *Id.* at 996. The mid-air collision was caused when two aircraft were flying on the same general course. *Id.* The second plane was flying so fast that it eventually overtook and collided with the first plane. *Id.* Under the rules of flight the second plane must yield right of way to the first plane. *Id.*

<sup>59</sup> Other issues before the court included a tort action based on malicious interference with business which was dismissed because the statute of limitations had expired. *Id.*

<sup>60</sup> *Id.* at 997.

<sup>61</sup> *Id.*, at 1000.

<sup>62</sup> *Id.* at 995. The Federal Rules of Appellate Procedure allow a party to appear *amicus curiae* if that party can show that he has an interest in the outcome of the litigation. FED. R. APP. P. 29.

<sup>63</sup> *Universal*, 188 F.2d at 998.



gated.<sup>64</sup> The District of Columbia Circuit Court of Appeals held that while all of these policy reasons were sound, the exclusion of evidence must be considered with regard to the ends of justice.<sup>65</sup>

The court of appeals noted that administrative agencies have long been able to make reasonable regulations regarding their records,<sup>66</sup> and that courts have upheld administrative regulations forbidding agency employees from testifying in suits between private parties.<sup>67</sup> Therefore the court asserted that it was well within the power of the Board to limit its employees' ability to give live testimony at trial.<sup>68</sup>

The court of appeals, however, was unwilling to find that section 701(e) granted a total exclusion.<sup>69</sup> Balancing the Board's interest in excluding testimony with the interest of the courts in a full and fair adjudication, the court of appeals distinguished the factual testimony of Mr. Berman from his testimony relating to the Board's opinions and conclusions.<sup>70</sup> The court held that the factual testimony could be admitted, but excluded opinion and conclusion evidence on the basis of the enumerated policy reasons.<sup>71</sup>

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 999. The court cites *Boske v. Comingore*, 177 U.S. 459 (1899), where the Supreme Court of the United States held that an agency may properly make regulations concerning its records. Rules concerning the conduct of business and the custody use and preservation of records are plainly valid as a means plainly adapted to the end of the successful administration of an agency. This proposition was so clear in the eyes of the Court that the Court declared it to be manifestly true. *Boske*, 177 U.S. at 469.

<sup>67</sup> *Universal*, 188 F.2d at 999. The court cites for support three cases upholding a limitation on testimony by employees of the Internal Revenue Service. *Id.* See: *In re Lamberton*, 124 F. 446 (W.D. Ark. 1903); *Stegall v. Thurman*, 175 F. 813 (N.D. Ga. 1910); *United States v. Owlett*, 15 F. Supp. 736 (M.D. Penn. 1936).

<sup>68</sup> *Universal*, 188 F. 2d at 999.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* This interpretation was subsequently adopted by the Second Circuit Court of Appeals in *Lobel v. American Airlines*, 192 F.2d 217 (2d Cir. 1951). In *Lobel*, an airliner crashed when its engines stopped. The *Lobel* court admitted a Board investigator's report. The court noted that the report consisted wholly of the investigator's personal observations about the condition of the plane after the

While the court of appeals found statutory support for its conclusion, it asserted an independent justification based upon the rules of hearsay evidence.<sup>72</sup> The court noted that "the ultimate views or findings of the agency or board are generally held inadmissible because they would tend to usurp the functions of the jury."<sup>73</sup> By this the court of appeals meant that some testimony by Board employees would violate the rules of evidence relating to hearsay and opinion testimony. As the court of appeals stated, "[s]uch reports, or testimony concerning such reports, would be hearsay based upon hearsay," and therefore inadmissible.<sup>74</sup> Accordingly, the testimony of Board employees may be inadmissible regardless of the statutory provision of section 701(e).

#### B. *The Federal Aviation Act of 1958*

In 1958 Congress passed the Federal Aviation Act (FAA).<sup>75</sup> The provision regarding the admissibility of Board accident reports (section 1441(e))<sup>76</sup> is identical to section 701(e) of the 1938 CAA.<sup>77</sup>

In *Berguido v. Eastern Air Lines*,<sup>78</sup> the Third Circuit Court of Appeals adopted the policy justifications for section 1441(e) given section 701(e)<sup>79</sup> in *Universal*. In *Berguido*, an airliner crashed when the pilot attempted a "sneak-in" landing where he deliberately flew below his authorized

---

accident. Furthermore, the report did not contain opinions or conclusions about possible causes of the accident or defendant's negligence. *Id.* at 220.

<sup>72</sup> *Universal*, 188 F.2d at 1000.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1552 (1982).

<sup>76</sup> 49 U.S.C. § 1441(e) (1982). Section 1441(e) reads: "No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." *Id.*

<sup>77</sup> *Id.* For discussion of § 701(e) of the CAA see *supra* notes 21-31 and accompanying text.

<sup>78</sup> 317 F.2d 628 (3d Cir. 1963).

<sup>79</sup> *Id.* at 631-62.

glide slope.<sup>80</sup> A Board employee was called as a witness to testify regarding the glide scope of the airplane.<sup>81</sup> The court held his testimony inadmissible stating that the policy beneath section 1441(e) involves a balancing of interests.<sup>82</sup> On the one side there is the Board's interest in full disclosure of the facts of the accident to prevent its recurrence.<sup>83</sup> Secondly, there is a conflicting policy calling for full disclosure of all the relevant facts to the litigants in a lawsuit.<sup>84</sup> From these conflicting policies the court concluded that 1441(e) excludes not only agency conclusions but also opinion testimony of Board employees which reflects upon the Board's finding of probable cause of the accident.<sup>85</sup>

*Berguido*, therefore, stands for a much more limited privilege than that given by *Universal*. Under *Universal* all opinion testimony by Board employees is excluded.<sup>86</sup> In *Berguido* only opinions relating to the Board's findings of probable cause by the Board are excluded.<sup>87</sup> But as in *Universal*, separate support for the court's holding was found in the rules of evidence regarding hearsay testimony.<sup>88</sup> The court noted that the vice of hearsay is especially apparent in the use of Board reports as evidence because the defendant has no opportunity to cross-examine the employee and therefore determine the basis for his conclusions.<sup>89</sup>

---

<sup>80</sup> *Id.* at 630-31.

<sup>81</sup> *Id.* at 630.

<sup>82</sup> *Id.* at 632.

<sup>83</sup> *Id.* at 631.

<sup>84</sup> *Id.* at 631-32.

<sup>85</sup> *Id.* at 632.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* In general, the rules of hearsay restrict the ability of a witness to testify as to statements made by others out of court. See FED. R. EVID. 801-806.

<sup>89</sup> 317 F.2d at 632. Unlike *Ritts* (see *supra* notes 32-39 and accompanying text) the issue of hearsay testimony was directly presented. *Id.* The opinions held and many of the facts found by an air crash investigator are based upon the reports of other individuals to the NTSB official who seldom, if ever witnesses the accident. As memorialized in the reports, these statements would be hearsay in that they were made by persons not testifying at trial. See FED. R. EVID. 801(c). There is some question as to whether the report falls within the hearsay exception for pub-

Soon, a conflict developed among the courts in the application of *Berguido*'s interpretation of section 1441(e). In *Fidelity & Casualty Co. v. Frank*<sup>90</sup> the District Court of Connecticut distinguished between factual testimony and testimony based upon opinion and conclusions included in the Air Safety Board's accident report.<sup>91</sup> The court held that section 1441(e) excluded all evaluation, opinion, and conclusion evidence.<sup>92</sup> However, purely factual testimony is admissible.<sup>93</sup> The court justified this rule on the *Berguido* opinion.<sup>94</sup> *Fidelity*, therefore, established a "categorical" approach to the treatment of evidence under section 1441(e). As a question of law the judge must categorize testimony by Board employees as either fact or opinion. Opinion of any kind is excluded and facts are admitted.

A similar question faced the Fifth Circuit Court of Appeals in *American Airlines v. United States*.<sup>95</sup> The appeal in *American Airlines*, as in *Fidelity*, centered around the scope of permissible testimony of Board employees.<sup>96</sup> The court of appeals in *American Airlines*, however, adopted a more narrow privilege by focusing not on the category of the testimony but on its substance.<sup>97</sup> Relying on *Berguido*, the court held certain opinion testimony admissible as long as it does not embrace official agency opinion.<sup>98</sup> The court then noted the difficulty in classifying testimony as fact or opinion under the *Fidelity* approach.<sup>99</sup> The court

---

lic records of FED. R. EVID. 803(8). The question is whether the events described within the report are "matters observed" within the meaning of the exception. Certainly some aspects of the report fall within this exception (for example the points of impact or the distribution of wreckage). Other items within the report are not "matters observed" (for example the pre-crash performance of the aircraft).

<sup>90</sup> 227 F. Supp. 948 (D. Conn. 1964).

<sup>91</sup> *Id.* at 949.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> 418 F.2d 180 (5th Cir. 1969).

<sup>96</sup> *Id.* at 183.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 196.

<sup>99</sup> *Id.* The court notes that it would be easy to classify the information concern-

held that section 1441(e) "exclude[s] opinion testimony only when it embraces the probable cause of the accident or the negligence of the defendant."<sup>100</sup> The court asserted that this "probable cause" test comes closer to the policy behind the exclusion as forwarded in *Berguido*.<sup>101</sup>

Therefore, courts approached section 1441(e) questions from two standpoints. Those following *Fidelity* used the "categorical" approach and admitted only facts. Other courts followed *American Airlines* and admitted all testimony unless it related to the "probable cause" of the accident.

### C. Federal Regulation 835.

In 1975 the National Transportation Safety Board<sup>102</sup> responded to the confusion created by conflicting court decisions by proposing regulations defining the limits of section 1441(e).<sup>103</sup> Regulation 835 states that the Board relies heavily upon the opinions of its investigators.<sup>104</sup> As such, these opinions become "inextricably entwined" in the Board's final determination of probable cause.<sup>105</sup> Also the Board voiced a fear of the tremendous administrative burden which would accompany the demand for

---

ing altitude, speed, and acceleration as being factual in nature under the *Frank* rule. However, these "facts" disguise a very sophisticated mathematical extrapolation from the real facts. The danger here, then, is that these "manufactured facts" with their opinion hidden by statistics will indirectly admit agency opinion. Because of the difficulty in sorting pure fact from pure opinion the court believed that opinion evidence should be excluded only when it embraces the probable cause of the accident or the negligence of the defendant. *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> In 1967 the Federal Aviation Act was amended by the Department of Transportation Act, 49 U.S.C. §§ 1651-1659 (1983). This act brought the Federal Aviation Agency into the Department of Transportation. *Id.* § 1655(c). The new Federal Aviation Administration maintains all of its safety regulations. *Id.* The act also transferred to the Department of Transportation the safety functions of the Civil Aeronautics Board. *Id.* § 1665(d). Within the Department of Transportation the accident investigation function was delegated to the National Transportation Safety Board. *Id.*

<sup>103</sup> 49 C.F.R. § 835 (1975). The proposed regulation appears as Redesignation and Revision of Regulations, 40 Fed. Reg. 30,232 (1975).

<sup>104</sup> 49 C.F.R. § 835.3(a) (1975).

<sup>105</sup> *Id.*

opinion testimony by Board employees.<sup>106</sup> Therefore, the resolution provides that Board employees "may testify as to the factual information they obtained during the course of the accident investigation. . . and they shall decline to testify regarding matters beyond the scope of their investigation, or to give opinion testimony concerning the cause of the accident."<sup>107</sup> Current Board employees may not give live testimony at trial.<sup>108</sup> Testimony of former board employees is subject to the same restriction except that former employees may give live testimony.<sup>109</sup>

When Regulation 835 was proposed, the Board stated that only testimony that expressed the "ultimate determination of cause or probable cause determined by the Board and expressed in the Board's report" should be limited.<sup>110</sup> The Board expressed its opinion that the regulation's "ultimate question" test was consistent with case law to that point.<sup>111</sup> Specifically, the Board adopted the *American Airlines* probable cause test.<sup>112</sup>

---

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* § 835.5.

<sup>109</sup> *Id.* § 835.7.

<sup>110</sup> 40 Fed. Reg. 30,232 (1975).

<sup>111</sup> *Id.*

<sup>112</sup> The Board relied on the case of *Kline v. Martin*, 345 F. Supp. 31 (E.D. Va. 1972) for support. Redesignation and Revision of Regulations 40 Fed. Reg. 30,232 (1975) (codified as 49 C.F.R. Ch. VIII (1984)). *Kline* has summarily adopted the *American Airlines* rationale. *Kline*, 345 F. Supp. at 32. The *Kline* court asserted that the *American Airlines* rule came closer to the policy which prompted section 1441(e), namely, "to guard against the introduction of C.A.B. reports expressing agency views about matters which are within the function of the court." *Id.* (quoting *Lobel v. American Airlines*, 192 F.2d 217, 220 (2d Cir. 1957)) See *supra* notes 96-102 and accompanying text for a discussion of the *American Airlines* rule.

The Board noted, however, that the new regulation may be construed to be inconsistent with the decision of *Faulk v. United States*, 53 F.R.D. 113 (D. Conn. 1971). 40 Fed. Reg. at 30,232. In *Faulk* a board employee was compelled to answer certain questions in deposition regarding his opinion of the cause of an accident. 53 F.R.D. at 114. The court in *Faulk* distinguished between testimony in deposition and testimony in trial. *Id.* Testimony in deposition is not entered into the record and therefore the policy supporting exclusion would not be offended. *Id.* The court, therefore, compelled the Board employee to testify in deposition. *Id.* In the remarks accompanying the proposed regulation the Board asserted its belief that the rationale of *Faulk* was clearly in error. 40 Fed. Reg. at 30,232.

Federal Regulation 835 was first addressed by a court in *Beech Aircraft v. Harvey*.<sup>113</sup> The case arose from the crash on take-off of a small airplane.<sup>114</sup> Litigation centered around the design of the wing.<sup>115</sup> A Board employee was asked at trial to state why the wing had separated from the aircraft.<sup>116</sup> Here, after an extensive analysis of the law,<sup>117</sup> the court noted that section 835 adopted the "ultimate question" test.<sup>118</sup> The Supreme Court of Alaska applied Regulation 835 and held that the cause of the wing's separation was the ultimate question to be decided by the jury and therefore the Board employee's testimony should have been excluded.<sup>119</sup>

In *Murphy v. Colorado Aviation* the Colorado Court of Appeals interpreted section 835 very broadly.<sup>120</sup> In a negligence action a Board employee testified that weather conditions would have required the pilot of the crashed plane to use instruments to navigate.<sup>121</sup> He also testified that the pilot was not instrument certified.<sup>122</sup> The court held that such testimony was not barred by section 835.<sup>123</sup> Even though the testimony strongly implied a conclusion of negligence, the court believed that the testimony "did not state that this accident was caused by the negligence of the pilot."<sup>124</sup> The "ultimate question" to be determined by the jury was narrowly drawn by the court of appeals as the actual negligence of the pilot.<sup>125</sup> The Board employee's testimony did not take this ultimate question

<sup>113</sup> 558 P.2d 879 (Alaska 1976).

<sup>114</sup> *Id.* at 880.

<sup>115</sup> *Id.* at 880-81.

<sup>116</sup> *Id.* at 881.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 882-83. The ultimate question test prohibits a Board employee from testifying as to the ultimate question to be decided by the jury. See *supra* notes 103-110 and accompanying text for a discussion of the ultimate question test.

<sup>119</sup> *Id.* at 882-83.

<sup>120</sup> 588 P.2d 877 (Colo. App. 1978).

<sup>121</sup> *Id.* at 881.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 882.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

from the jury.<sup>126</sup> The jury was still free to draw its own conclusion from the evidence.<sup>127</sup>

*Carlson v. Piper Aircraft*<sup>128</sup> presented a section 835 problem in a unique context. *Carlson* was a wrongful death action brought following the mid-air break-up of a small airplane.<sup>129</sup> A Board employee was called as a witness to testify regarding the Board investigation.<sup>130</sup> At trial, however, he was asked certain questions, as an expert, regarding the effects of pilot overcontrol.<sup>131</sup> Carlson, the deceased pilot's spouse, objected and sought reversal on appeal of the trial court's exclusion of the Board employee's testimony.<sup>132</sup> The Oregon Court of Appeals noted that the Board employee was independently qualified as an expert to testify on issues relating to pilot control.<sup>133</sup> In holding the testimony admissible, the court found that the testimony did not touch on the ultimate question (the structural safety of the aircraft) but instead related to his independent area of expertise.<sup>134</sup>

Courts, therefore, have developed a very narrow privilege under regulation 835. As a matter of law, the court must decide if the evidence offered touches on the ultimate question to be litigated. No definition of the "ultimate question" was given within the Regulation. Courts, however, have construed this phrase rather narrowly. Recall *Carlson*, where the trial concerned the issue of pilot negligence. The court of appeals asserted that for section 835 evidence purposes the question was the actual negligence.

---

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 57 Or. App. 695, 646 P.2d 43 (1982).

<sup>129</sup> *Id.* at 44.

<sup>130</sup> *Id.* at 48.

<sup>131</sup> *Id.* at 47-48.

<sup>132</sup> *Id.* at 48.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*



II. *LOFTLEIDIR ICELANDIC AIR v. McDONNELL-DOUGLAS*

At trial Loftleidir sought to introduce the testimony of Charles O. Miller.<sup>135</sup> Mr. Miller was at the time of the accident an employee of the NTSB.<sup>136</sup> However, at the time of trial he was president of System Safety Incorporated, an independent engineering firm.<sup>137</sup> McDonnell-Douglas sought to exclude this testimony based on Regulation 835.<sup>138</sup>

The California Court of Appeals reversed the trial court's ruling on the motion *in limine* which had excluded the testimony of Mr. Miller.<sup>139</sup> The precise reason for granting the motion was unclear in the trial court's record.<sup>140</sup> The California Court of Appeals, however, noted that there are three independent reasons which could have supported the trial court's ruling: (1) Miller was prohibited from testifying under section 835.5 (testimony of Board employees);<sup>141</sup> (2) Miller was prohibited under section 835.3 (testimony of former Board employees);<sup>142</sup> or (3) Miller was prohibited because of alleged inconsistencies between his contemplated testimony and the opinions and conclusions contained in the final NTSB report.<sup>143</sup> The court summarily rejected this third reason.<sup>144</sup> The court then rejected section 835.5 as a basis for exclusion. This section forbids live testimony at trial

---

<sup>135</sup> *Loftleidir*, 158 Cal. App. 3d at 83, 204 Cal Rptr. at 361.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 364-66.

<sup>140</sup> *Id.* at 361.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 364. The court asserts that McDonnell-Douglas cited various passages of the transcript out of context. *Id.* at 361. McDonnell-Douglas asserted that the testimony should be excluded under California Evidence Code § 352 which cloaks the court with discretionary power to exclude testimony if its admission would be time consuming or cause undue prejudice or confusion. CAL. EVID. CODE § 352 (West 1985). The *Loftleidir* court reviewed the entire record and concluded that the sole ground for exclusion was Regulation 835. *Loftleidir*, 204 Cal. Rptr. at 361-64.

by current Board employees.<sup>145</sup> After quoting the provision the court asserted that this section applied only to current Board employees.<sup>146</sup>

The bulk of the court's analysis dealt with section 835.7 and the testimony of former Board employees. Section 835.7 states:

It is not necessary to request Board approval for testimony of a former Board employee. However, the scope of testimony of former Board employees is limited to the matters delineated in section 835.3 [the ultimate question prohibition] and use of reports as prescribed in section 835.4.<sup>147</sup>

Given this regulatory provision, two issues were before the court regarding Mr. Miller's testimony at the trial.<sup>148</sup> First, the court had to decide whether a former employee was allowed to give live testimony at trial<sup>149</sup> (as opposed to deposition testimony and written interrogatories). Second, the court had to decide whether Mr. Miller's testimony at trial (if allowed) would exceed the scope of allowable testimony defined by the regulation.<sup>150</sup>

In regard to the first issue, the ability of former employees to testify, the court notes that the regulation adopts by reference the provisions of section 835.3 (the ultimate question prohibition) and section 835.4 (the use of Board reports)<sup>151</sup> but not the provisions of section 835.5<sup>152</sup> which prohibit live testimony at trial.<sup>153</sup> The court reasoned that section 835.5 was designed to circumvent the tremendous administrative burden accompanying the constant need to have Board employees appear at

---

<sup>145</sup> 49 C.F.R. § 835.5. Section 835.3 further restricts testimony on the ultimate cause of the accident. See *supra* notes 102-109 and accompanying text.

<sup>146</sup> *Loftleidir*, 204 Cal. Rptr. at 361.

<sup>147</sup> 49 C.F.R. § 835.7.

<sup>148</sup> *Loftleidir*, 204 Cal. Rptr. at 361.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *supra* notes 111-118 and accompanying text for a discussion of section 835.5.

<sup>153</sup> *Loftleidir*, 204 Cal. Rptr. at 361.

trial.<sup>154</sup> This justification resembles that given by the Board when the regulation was proposed.<sup>155</sup> In the case of former Board employees the court found that there was no such burden.<sup>156</sup> Therefore, a former Board employee could give live testimony at the trial without circumventing the policies of section 835.5.

Having concluded that former Board employees may testify, the court turned to the second issue, the allowable scope of Mr. Miller's testimony.<sup>157</sup> This scope is defined by section 835.3.<sup>158</sup> The court stated that this section is designed primarily to exclude opinions reflecting official Board positions.<sup>159</sup> The court noted that section 835.3 excludes from introduction only opinion testimony relating to the probable cause of the accident.<sup>160</sup> The *Loftleidir* court concludes that courts have consistently held that section 835.3 prohibits only Board employees from rendering opinions concerning the NTSB's finding on the probable cause of an accident.<sup>161</sup>

The California Court of Appeals then noted that Mr. Miller's testimony was not so "inextricably entwined" in the opinions of the NTSB as to require exclusion.<sup>162</sup> The court stated that Mr. Miller's actual involvement in the investigation of this accident was minimal,<sup>163</sup> and that his opinions concerning the human factors aspect of the ground spoiler system were formed only after he left the NTSB and conducted his own private investigation for

---

<sup>154</sup> *Id.* at n. 5.

<sup>155</sup> See *infra* notes 102-112 and accompanying text for a discussion of the regulation's proposal.

<sup>156</sup> *Loftleidir's* attorney suggested that § 835.5 was designed to protect current employees from the constant need to appear at trial. *Loftleidir*, 204 Cal. Rptr. at 361 n.5.

<sup>157</sup> *Id.* at 362.

<sup>158</sup> See *supra* note 103-107 and accompanying text.

<sup>159</sup> *Loftleidir*, 204 Cal. Rptr. at 362.

<sup>160</sup> *Id.* The court cited without discussion the following cases: *Carlson v. Piper Aircraft*, 57 Or. App. 695, 646 P.2d 43 (1982); *Kline v. Martin* 345 F. Supp. 31 (D.C. Va. 1972); *Keen v. Detroit Diesel-Allison*, 569 F.2d 547 (10th Cir. 1978).

<sup>161</sup> *Loftleidir*, 204 Cal. Rptr. at 362.

<sup>162</sup> *Id.* at 363.

<sup>163</sup> *Id.*

Loftleidir.<sup>164</sup> The court, therefore, concluded that section 835.3 provides an inadequate basis for the exclusion of an independent investigator's testimony.<sup>165</sup>

The *Loftleidir* court, however, went one step further. The court noted that Mr. Miller was not being called as an NTSB expert; rather, he was retained as an independent expert to testify regarding the safety of the ground spoiler system from a human factor standpoint.<sup>166</sup> The policy underlying section 835 is to prevent disclosure of the "deliberative process" of an NTSB investigation and thereby not remove from the jury the finding of probable cause.<sup>167</sup> This policy would not be frustrated by a former NTSB employee's testimony regarding an independent investigation involving an independent area of expertise.<sup>168</sup> As such, the *Loftleidir* court found that "Miller's proposed testimony was unrelated to his tenure with the NTSB and was also *outside the purview* of section 835."<sup>169</sup>

### III. CONCLUSION

The *Loftleidir* court did not break with precedent. The decision is notable, however, in several respects. First, the decision reaffirms the overriding importance of the *American Airlines*<sup>170</sup> decision as the basis for interpretation of Regulation 835. The *American Airlines* "probable cause" view was by far the majority position before Regulation 835.<sup>171</sup> And *American Airlines*, remember, served as the primary basis for Regulation 835.<sup>172</sup> *American Airlines* distinguished between testimony relating to agency opinion

---

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 364. This statement is well supported by the policy forwarded by the Board when Section 835 was proposed. See *supra* notes 98-109 and accompanying text.

<sup>168</sup> *Id.*

<sup>169</sup> *Loftleidir*, 204 Cal. Rptr. at 364 (emphasis supplied).

<sup>170</sup> 418 F.2d 180 (5th Cir. 1964).

<sup>171</sup> See *supra* notes 95-101 and accompanying text for a discussion of the *American Airlines* rule.

<sup>172</sup> See *supra* note 113 and accompanying text.

and testimony relating to facts and other opinion.<sup>173</sup> Agency opinion may be admitted as long as it does not touch upon the probable cause of the accident. *Loftleidir* explicitly adopts the *American Airlines* view and is entirely consistent with it. Mr. Miller's testimony does not qualify as agency opinion. Therefore, as independent opinion, his testimony should be admitted.

The *Loftleidir* court broke new ground concerning testimony by former NTSB employees qualified as independent experts. The *Loftleidir* court relied on *Carlson*<sup>174</sup> which allowed an NTSB employee to give opinion testimony regarding his independent area of expertise, pilot overcontrol.<sup>175</sup> In *Loftleidir* the questioned testimony regarded Mr. Miller's independent area of expertise — human factors analysis. Yet, *Loftleidir* justifies introduction of the testimony on entirely different grounds than *Carlson*. *Carlson* used Regulation 835 to justify the testimony.<sup>176</sup> *Loftleidir*, on the other hand, clearly states that testimony based on a former NTSB employee's independent area of expertise is "outside the purview"<sup>177</sup> of section 835. As such, the testimony is limited only by the rules of evidence<sup>178</sup> such as the hearsay exception.

Under *Loftleidir* a court, faced with a section 835 question, first determines if the proposed testimony relates to the "deliberative proceedings" of the NTSB. If not, section 835 does not matter and the testimony is limited only by the rules of evidence.<sup>179</sup> If the proposed testimony did relate to the "deliberative process" of the NTSB, a court would then use the section 835 "ultimate question" test

<sup>173</sup> See *supra* notes 95-101 and accompanying text.

<sup>174</sup> *Carlson*, 57 Or. App. 695, 648 P.2d 43.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Loftleidir*, 104 Cal. Rptr. 358, 364.

<sup>178</sup> See *supra* note 89 for a discussion of the hearsay rule.

<sup>179</sup> The rules of evidence will provide an independent justification for the exclusion of testimony. For example, the fact that the proffered evidence (the Board Report) is admissible under Section 835 has no bearing on the characterization of the report as hearsay.

to determine admissibility of opinion evidence.<sup>180</sup> In addition, the rules of hearsay would be applied to test admissibility.<sup>181</sup> Contrast this approach to that in *Carlson*, where all testimony, whether it relates to the deliberative proceedings of the Board or not, is tested for admissibility under the "ultimate question" test of section 835.

*Loftleidir*, in the final analysis, seems to be entirely consistent with the case law as developed. The *Loftleidir* court continued to limit the privilege granted in the Federal Aviation Act and Regulation 835. Considering the policy beneath the regulation and the position Mr. Miller occupied, the logic of the decision is apparent. First, the testimony of a former employee imposes no administrative burden on the NTSB. Second, Mr. Miller's testimony was wholly unrelated to the NTSB investigation therefore there was little danger that the issue of negligence or design defect would be "taken" from the jury. Third, the probative effect of having a former NTSB employee testify as to matters unrelated to his NTSB activities is slight. There is, in other words, little danger that the jury will be so awed by Mr. Miller's current status as to decide the issue of negligence solely on his testimony.<sup>182</sup> In sum, none of the policies forwarded to exclude NTSB accident reports can be used to support exclusion of a former employee's testimony in an area of independent expertise.

*Barry Douglas Johnson*

---

<sup>180</sup> Factual evidence is still clearly admissible. *Loftleider*, 204 Cal. Rptr. at 364. Recall from *American Airlines* that one of the objections to the *Fidelity* approach of fact versus opinion is the inherent difficulty of classifying a piece of testimony as fact or opinion. *American Airlines*, 418 F.2d 480. Regardless of the test in *American Airlines* or Section 835, the difficulty remains in classifying testimony as fact or agency opinion. This distinction remains unclear.

<sup>181</sup> *Loftleidir*, 204 Cal. Rptr. at 364. See *supra* note 180 for a discussion of the relationship of the hearsay rules to the application of section 835.

<sup>182</sup> This is especially true in light of the fact that *Loftleidir*'s counsel was willing to have Mr. Miller testify without reference to his former affiliation with the NTSB. *Id.*



# **Current Literature**



