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NTSB REPORTS--The War Over Admissibility--A Strict Reading of 49 U.S.C. app. § 1441(e) Prohibits Admission of NTSB Accident Reports in Multidistrict Litigation Arising out of a Civilian Air Crash. *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989, 780 F. Supp. 1207 (N.D. Ill. 1991).*

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NTSB REPORTS—THE WAR OVER ADMISSIBILITY—A strict reading of 49 U.S.C. app. § 1441(e) prohibits admission of NTSB accident reports in multidistrict litigation arising out of a civilian air crash. *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, 780 F. Supp. 1207 (N.D. Ill. 1991).

On July 19, 1989, a United Airlines DC-10 pilot lost all ability to manipulate flight controls when an engine explosion severed hydraulic fuel lines. Flight 232, enroute from Denver to Chicago, attempted a crash landing at Sioux City, Iowa. Of the 296 passengers and crew on board, 112 died in the crash.

The National Transportation Safety Board (NTSB) is charged with the responsibility of investigating aviation accidents to determine the circumstances, conditions, and ultimately the probable cause of the accident.[1] Pursuant to these duties, the NTSB began an immediate investigation of the Sioux City crash and published its findings on November 1, 1990, in a final Aircraft Accident Report.[2]

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[1] 49 U.S.C. app. § 1441(a) (1988). The controlling statute states that the NTSB shall:

> (1) Make rules and regulations governing notification and report of accidents involving civil aircraft;
> (2) Investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;
> (3) Make such recommendations to the Secretary of Transportation as, in its opinion, will tend to prevent similar accidents in the future;
> (4) Make such reports public in such form and manner as may be deemed by it to be in the public interest; and
> (5) Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by conducting special studies and investigations on matters pertaining to safety in air navigation and the prevention of accidents.

Id.

[2] *In re* Air Crash Disaster at Sioux City, Iowa, on July 19, 1989, 780 F. Supp. 1207, 1208 (N.D. Ill. 1991).

The report compiled and analyzed the factual information about the crash and contained numerous factual conclusions of alternative probable causes of the crash.[3]

In a consolidated multidistrict action filed in the Northern District of Illinois, plaintiffs intended to offer the NTSB report as evidence in support of personal injury, survival, and punitive damages claims. Defendants, United Airlines, Inc., UAL Corporation, and General Electric Company, moved in limine to exclude all or part of the report, citing 49 U.S.C. app. § 1441(e) and 49 U.S.C. app. § 1903(c) as statutory bars to the evidence.[4] The court's ruling is the subject of analysis of this casenote.

In examining whether NTSB reports may be used as evidence in trial, Part I of this casenote will recount the history of the NTSB and related statutory authority concerning NTSB reports. Part II will examine early case law concerning the admissibility of NTSB investigator testimony and NTSB reports, and Part III will address recent cases leading to the *Sioux City* decision. Part IV will explore the *Sioux City* court's reasoning in light of preceding case law. Part V will conclude with the current status of the war over admissibility.

I. HISTORY OF THE NTSB

Congress first regulated aviation with the Air Commerce Act of 1926.[5] This Act provided that the Secretary of Air Commerce, under the Department of Commerce should "investigate, record and make public the cause of accidents in civil air navigation."[6]

By 1937, the number of deaths in aviation accidents had risen over fifty-six percent from the time of the Air Com-

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[3] *Id.*

[4] 49 U.S.C. app. §§ 1441(e), 1903(c) (1988). Sections 1441(e) and 1903(c) contain identical proscriptions. *Id.*

[5] Pub. L. No. 69-254, 44 Stat. 568 (1926) (repealed 1958).

[6] *Id.* § 172(e), 44 Stat. at 569.

merce Act.[7] Public awareness of the dangers of air travel were heightened by the deaths of Knute Rockne in 1931 and Will Rogers in 1935 and the Hindenbuerg crash of 1937.[8] As a result, Congress amended the Air Commerce Act in 1934, and again in 1937, to promote safety by strengthening the investigation process.[9] These amendments mandated that the Secretary of Air Commerce hold hearings and report the causes of aviation accidents and prohibited the use of the Secretary's report in any action arising from the accident.[10] The Secretary then promulgated regulations for accident investigation procedures and established a five-member investigation board consisting of three Department of Commerce employees and two outside advisors.[11]

In 1938, Congress again took action to make aviation safer by enacting the Civil Aeronautics Act of 1938, which established and incorporated all aviation functions into the Civil Aeronautics Authority.[12] The Authority was short-lived due to organizational problems that led to a complete reorganization in 1940.[13] The reorganization created two separate agencies, the Civil Aeronautics Board (CAB) and the Civil Aeronautics Administration (CAA), both under the control of the Department of Commerce.[14] This approach continued until 1958, when Congress passed the Federal Aviation Act.[15]

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[7] C.O. Miller, *Aviation Accident Investigation: Functional and Legal Perspectives*, 46 J. AIR L. & COM. 237, 238-39 (1981). Miller notes that in 1926 five persons were killed in air carrier accidents and 146 persons were killed in general aviation accidents. In 1937, 52 persons were killed in air carrier accidents and 184 in general aviation accidents. *Id.*

[8] *Id.* at 239.

[9] *Id.* (citing Air Commerce Act of 1926, *as amended by* Pub. L. No. 73-418, 48 Stat. 1113 (1934)).

[10] *Id.* (citing § 2(e) of the Air Commerce Act).

[11] Miller, *supra* note 7, at 239 (citing Civil Air Regulations, 15 C.F.R. §§ 91.0-.37 (1939)).

[12] Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938) (repealed 1958).

[13] *See* Miller, *supra* note 7, at 240-41.

[14] *Id.* at 241.

[15] *Id.* at 242-43 (citing 49 U.S.C. §§ 1301-1542 (1976)). This reorganization

The 1958 Act delegated the accident investigation responsibility to the CAB, providing that the CAB should determine the probable cause of accidents and make recommendations to the FAA that could prevent future accidents.[16] Section 701(e) of the 1958 Act also prohibited the use of accident reports in litigation by providing that "no part of any report or reports of the Board of 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."[17]

With the passage of the Department of Transportation Act of 1966, the NTSB was born.[18] Accident investigation under the NTSB continued much as it had under the CAB until the Board became an independent agency in 1974.[19] Section 701(e) was succeeded by 49 U.S.C. app. § 1441(e), which continued the prohibition of using the NTSB (Board) report as follows: "No part of any report or reports of the [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."[20] Section 1441(e) purports to create an express privilege, which would completely bar the use of Board reports; however, not all courts interpreted the statute in that way.[21]

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was brought on by the advent of the supersonic jet, which drew public attention to safety matters. *Id.* at 243.

[16] Federal Aviation Act of 1958, Pub. L. No. 85-726, § 701, 72 Stat 31 (1958) (codified as amended at 49 U.S.C. app. § 1441 (1988)).

[17] *Id.* § 701(e) (current version codified at 49 U.S.C. app. § 1441(e) (1988)).

[18] Department of Transportation Act of 1966, Pub. L. No. 89-670, § 5, 80 Stat. 931, 935 (1966) (repealed 1975).

[19] *See* Miller, *supra* note 7, at 246. The NTSB became an independent agency as part of the Independent Safety Board Act of 1974, §§ 301-09, 49 U.S.C. app. §§ 1901-1907 (1988). For a discussion of the conflict of interest concerns leading to this Act, see Miller, *supra* note 7, at 247-48.

[20] 49 U.S.C. app. § 1441(e) (1988). *See also* Roy T. Atwood, *Admissibility of National Transportation Safety Board Reports in Civil Air Crash Litigation*, 53 J. AIR L. & COM. 469, 470-74 (1987) (briefly discussing the statutory change).

[21] *See* 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2019 (1970).

II. EARLY CASE LAW ON NTSB REPORT ADMISSIBILITY

A. *UNIVERSAL AIRLINES V. EASTERN AIRLINES*

The congressional mandate of section 701(e), predecessor of current § 1441(e), seemed clear until interpreted by an early court decision. In *Universal Airline v. Eastern Airlines*,[22] the court dealt with the issue of whether section 701(e) acted as an absolute bar to discovery, thereby precluding testimony of Board employees.

The Board interpreted section 701(e) to mean that testimony of its investigators could not be used as evidence in a cause of action seeking damages. In *Universal*, the Board filed an amicus curie brief setting forth five reasons for this position: (1) Congress instructed the Board to investigate accidents solely to gain information in order to prevent future accidents, not to provide evidence or witnesses for litigation, (2) the disclosure of the information would discourage frank disclosure by the investigators, (3) a particular investigator's conclusions may differ from the ultimate cause of determination by the Board, (4) the conclusions of the investigator would tend to influence jury findings of civil liability, and (5) the time required for investigators to testify at trials would be burdensome to the Board.

The Court of Appeals for the District of Columbia noted that although the Board's reasons for proscribing the testimony as evidence were useful to further Board goals, section 701(e) must be construed "with reference to the governmental function of administering justice, the judicial power, and the established practice and precedents of our system of jurisprudence."[23] The court further noted that the authority to compel witness attendance was an essential part of the administration of justice.[24] Even the Board[25] admitted in its brief that in

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[22] 188 F.2d 993 (D.C. Cir. 1951).

[23] *Id.* at 998.

[24] *Id.*

many cases their investigators were the only people knowledgeable of certain facts and information following aircraft accidents.[26] The Board's regulations further provided rules for deposing investigators. For these reasons, the court held it was not error to admit the investigator's testimony.[27]

The *Universal* court did not address whether the investigator could testify about personal opinions based upon the investigation, since the testimony in question was factual. The court did note that the investigator would not be allowed to testify about issues that directly or indirectly reflected the ultimate findings of the Board.[28] Such testimony would be inadmissible and "tend to usurp the function of the jury" by allowing Board determinations of probable cause to influence jury determinations of cause.[29]

Further, the *Universal* court determined that sound authority prevented courts from compelling the Board to produce its report, noting the statutory proscription of section 701(e).[30] The court added that Board reports often contained statements of "hearsay based upon hearsay," which are inadmissible.[31] While the Board's report was deemed inadmissible, by allowing courts to compel investigation testimony, the *Universal* court opened the door for future interpretation of section 701(e).

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[25] *Id.* at 1000.

[26] *Id.* at 999.

[27] *Id.* The court noted that "the trial court should ordinarily receive the deposition of the CAB investigator, rather than order his personal attendance." *Id.* The *Universal* decision preceded the Board regulations stating that "[t]estimony of Board employees may be made available for use in actions or suits for damages arising out of accidents through depositions or written interrogatories. Board employees are not permitted to appear and testify in court in such actions." 49 C.F.R. § 835.5(a) (1991).

[28] *Universal*, 188 F.2d at 1000.

[29] *Id.*

[30] *Id.*; *see also id.* at 998 n.2 (quoting § 701(e)).

[31] *Id.* at 1000. "Hearsay based upon hearsay" refers to the statements contained in the Board's report taken from witnesses at the scene of the accident and from recordings of the hearings held by the Board. *See id.*

B. *LOBEL V. AMERICAN AIRLINES*

Less than one year after the *Universal* opinion, the Court of Appeals for the Second Circuit decided *Lobel v. American Airlines*.[32] *Lobel* involved an action for personal injuries sustained in the crash of an American Airlines flight. At trial, the court admitted into evidence a Board investigator's report despite the prohibition contained in section 701(e).[33] The jury found for the plaintiff.[34] American Airlines appealed, claiming that the district court judge clearly erred by admitting the report into evidence.[35]

The court of appeals held that the admission of the report was not error, applying their interpretation of the rationale in *Universal*.[36] The court determined that the report contained only the investigator's personal observations without opinions or conclusions regarding probable cause and did not include statements of "hearsay based upon hearsay."[37] Furthermore, the content of the report was within the scope of questions that could have been asked at the investigator's deposition.[38]

The *Lobel* court apparently read the *Universal* decision to prevent only the admission of evidence of the Board's findings of probable cause. Since the report did not contain such findings of probable cause and because it did not violate the *Universal* evidentiary prohibition of containing "hearsay based upon hearsay,"[39] the court admitted the report into evidence.[40] The *Lobel* court failed to take into account that the *Universal* decision excluded the report because it violated rules of evidence precluding hearsay. Further, ignoring the evidentiary preclusion circumvented the interpretation of section 701(e) in

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[32] 192 F.2d 217 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952).
[33] *Id.* at 220.
[34] *Id.* at 219.
[35] *Id.* at 220.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Lobel*, 192 F.2d at 220.

Universal.[41]

In *Lobel*, the Second Circuit simply ignored the clear language of section 701(e) and allowed the report into evidence by looking to the limited legislative history of the section.[42] The court interpreted section 701(e) in light of this history to preclude evidence from reports only when such evidence contained findings and opinions that would invade upon the function of the jury.[43]

C. *BERGUIDO V. EASTERN AIR LINES*

The Third Circuit declined to apply the *Lobel* interpretation of section 701(e) to the successor § 1441(e)[44] in *Berguido v. Eastern Air Lines, Inc.*[45] *Berguido* concerned a wrongful death action resulting from the crash of an Eastern Air Lines plane. At trial, the district court judge allowed deposition testimony of the Board's investigators into evidence. The deposition testimony consisted of mathematical computations based upon factual observations of the crash scene.

Appealing from the jury verdict, Eastern contended that the district court erred in admitting the deposition testimony under the *Lobel* court's rationale that § 1441(e) allowed investigator deposition testimony only of personal observations of the scene of the crash and condition of the plane. Eastern contended that since the computations were not performed by the investigator testifying, they were not personal observations and therefore not admissible. The Third Circuit held the admission of the tes-

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[41] *See* Walter A.T. Welch, Jr. & John E. Faulk, *The Use of Aviation Accident Reports by Civil Litigants: The Historical Development of 49 U.S.C. Section 1441(e)*, 9 PEPP. L. REV. 583, 588 (1982).

[42] *Lobel*, 192 F.2d at 220. The scant legislative history showed that Congress intended § 701(3) to prevent the use of Board reports that showed the Board's opinion of causation, which tended to usurp the function of the jury. 2 LEE E. KRIENDLER, AVIATION ACCIDENT LAW § 18.01(2) (1991).

[43] *Lobel*, 192 F.2d at 220.

[44] *See supra* note 4 and accompanying text. The prohibition of using Board reports is the same under both sections.

[45] 317 F.2d 628 (3d Cir.), *cert. denied*, 375 U.S. 895 (1963).

timony was not statutorily prohibited, noting that the fundamental policy of § 1441(e) seemed to be

> a compromise between the interests of those who would adopt a policy of absolute privilege in order to secure full and frank disclosure as to the probable cause and thus help prevent future accidents and the countervailing policy of making available all accident information to litigants in a civil suit.[46]

Since § 1441(e) would exclude reports that expressed Board opinions of probable cause, the court held it would also exclude testimony expressing the Board's opinion of probable cause.[47] Because the testimony in this case did not reflect the Board's findings of probable cause in any way, the testimony was not prohibited by § 1441(e).[48] The court, however, ultimately found the testimony inadmissible on hearsay grounds.[49]

Although the admission of the actual report was not at issue, the *Berguido* analysis of § 1441(e) implied that a report could be admitted so long as it complied with the rules of evidence and did not contain Board findings of probable cause. Later cases cite *Berguido* as support for admission of Board reports, without distinguishing between testimony and reports.[50]

D. *AMERICAN AIRLINES V. UNITED STATES*

By 1969, the prevailing interpretation of § 1441(e) seemed to be that Board reports would be barred as evidence.[51] In *American Airlines v. United States*[52] the Fifth Cir-

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[46] *Id.* at 631-32. There is little evidence that Congress intended a balancing of competing interests, except that it allowed the testimony of investigators through deposition. *See* Atwood, *supra* note 20, at 480-81.

[47] *Berguido*, 317 F.2d at 632.

[48] *Id.*

[49] *Id.* The changes in the Federal Rules of Evidence would alter this aspect of the opinion today. *See* Atwood, *supra* note 20, at 489-91.

[50] *See, e.g.*, Fidelity & Casualty Co. v. Frank, 227 F. Supp. 948, 949 (D. Conn. 1964); Wenninger v. U.S., 234 F. Supp. 499, 519 (D. Del. 1964), *aff'd*, 352 F.2d 523 (3d Cir. 1965).

[51] Welch & Faulk, *supra* note 41, at 590. Excluding the report was considered

cuit took exception to this interpretation and declined to follow other circuits.

The *American* suit was an appeal from a jury verdict awarding damages for the crash of an American Boeing 727. American Airlines contended that the district court erred by allowing into evidence exhibits from part of the Board's report. The exhibits consisted of a graph showing the altitude of the 727 and an explanation of the flight recorder read-out, which American contended showed the opinions of the investigators that prepared the report.

The Fifth Circuit noted that the exhibits were properly admitted without objection because they did not reflect the Board's finding of probable cause.[53] By relying on *Berguido*, the court stated that the "qualified testimony going beyond merely personal observations is admissible provided such testimony does not presume to be official agency opinion."[54] The *American* opinion did not set forth any basis for applying the rule used for testimony to the Board's report under § 1441(e). Further, the *American* court did not draw a distinction between admitting investigator testimony and admitting Board reports. The court stated that the evidence would be excluded "only when it embraces the probable cause of the accident or the negligence of the defendant."[55] Thus, the Fifth Circuit extended the *Berguido* test concerning deposition testimony to include parts of a Board report, without a rational basis for the extension.

E. *FALK V. UNITED STATES*

Three years later, *Falk v. United States*[56] decided the issue of whether the plaintiff could compel the Board's chief investigator to give his opinion of the probable

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the "only practical way to give adequate effect to and to fulfill the purpose" of § 1441(e). *Id.* (quoting *Fidelity*, 227 F. Supp. at 949).

[52] 418 F.2d 180 (5th Cir. 1969).

[53] *Id.* at 196.

[54] *Id.*

[55] *Id.*

[56] 53 F.R.D. 113 (D. Conn. 1971).

cause of the accident at deposition. In holding that the plaintiff could compel the opinion at deposition, the court drew support from 49 U.S.C. § 1654(e), which requires the Board to make its opinions available to the public.[57] The court presumed that § 1654(e), in making the reports available to the public, also made the opinions available to litigants.[58] However, the court stated that the defendant could object and obtain a ruling on admissibility if the plaintiff attempted to admit the testimony at trial.[59]

F. *KLINE V. MARTIN*

In 1972, the District Court for the Eastern District of Virginia addressed a situation similar to *Falk* in *Kline v. Martin*.[60] In *Kline*, the plaintiffs moved for an order compelling Board investigators to answer deposition questions about the investigators' opinions. The *Kline* court applied the *American Airlines* rule, which prohibited testimony regarding the probable cause of the crash.[61] This rule seemed consistent with the purpose of § 1441(e), namely to prevent the introduction into evidence of Board reports expressing matters that tend to usurp the function of the jury.[62]

The court further noted that the only proscription of § 1441(e) was against the use of the Board's report. The statute did not go so far as to prohibit testimony of the investigator's opinion, at most it could only proscribe testimony of the investigator's opinion of the probable cause of the accident.[63] The court balanced the reasons for excluding opinion testimony with the need to make information available to litigants, finding that "the interest of discovering the truth and insuring a just result in civil liti-

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[57] *Id.* at 114-15.

[58] Welch & Faulk, *supra* note 41, at 591 (citing Berguido v. Eastern Air Lines, 317 F.2d 628, 632 (3d Cir.), *cert. denied*, 375 U.S. 895 (1963)).

[59] *Falk*, 53 F.R.D. at 115.

[60] 345 F. Supp. 31 (E.D. Va. 1972).

[61] *Id.* at 32.

[62] *Id.* (referring to 49 U.S.C. app. § 1441(e) (1988)).

[63] *Id.* at 32.

gation" was paramount.[64] The court concluded that the witnesses should be allowed to give opinions so long as the opinions were not of the ultimate cause of the accident.[65]

After *Kline*, opinion testimony by the Board's investigators was not precluded under § 1441(e) unless the opinions were about the probable cause of the accident. The *American Airlines* rule of the Fifth Circuit was gaining acceptance and the liberal interpretation of § 1441(e) continued.

III. RECENT CASE LAW ON NTSB REPORT ADMISSIBILITY

On July 17, 1975, the rules pertaining to civil accident investigation were altered to modify the scope of permissible testimony by investigators.[66] The notification of the new rule in the Federal Register stated:

> The only opinions of investigators proscribed now are those which reflect the ultimate determination of cause or probable cause determined by the Board and expressed in the Board's reports. The Board considers its revised policy to be consistent with the existing law, relying in particular on *Kline v. Martin* . . . . The Board continues its prohibition against the requirement that investigators should testify on matters beyond the scope of their investigation.[67]

After the change in Board regulations, courts had to reconsider their positions in light of the new rules.

A. *KEEN V. DETROIT DIESEL ALLISON*

In 1978, the Court of Appeals for the Tenth Circuit adopted the *American Airlines* and *Kline* rationale in *Keen v.*

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[64] *Id.*

[65] *Id.* at 33.

[66] 49 C.F.R. §§ 800-850.35 (1991). For a discussion of NTSB regulations, see Miller, *supra* note 7, at 254-66.

[67] 40 Fed. Reg. 30,231, 30,232 (1975).

Detroit Diesel Allison.[68] In *Keen*, the plaintiff claimed the district court erred by admitting a Board investigator's testimony regarding the probable cause of the crash. The testimony at issue included the investigator's conclusion that the aircraft was functioning normally at high power when it crashed.

The plaintiff contended that the testimony was inadmissible under both § 1441(e) and under 49 C.F.R. § 835.3(b),[69] since it was a matter beyond the scope of the witness' investigation. The Tenth Circuit did not address the changes in Board regulations but based its opinion solely on the interpretation of § 1441(e) in *American Airlines* and *Kline*.[70] The court held that the investigator did not testify as to the proximate cause of the crash; therefore, the trial court did not err in admitting the testimony.[71] Thus, the change in Board regulations had virtually no effect on the court's ruling.

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[68] 569 F.2d 547 (10th Cir. 1978).

[69] Section 835.3 reads:

> (a) Section 701(e) of the [1958] Act . . . preclude[s] the use or admission into evidence of [NTSB] accident reports in any suit or action for damages arising from accidents . . . . The purposes of these sections would be defeated if expert opinion testimony of [NTSB] employees, which may be reflected in the views of the [NTSB] expressed in its reports, were admitted in evidence or used in litigation arising out of an accident. The [NTSB] relies heavily upon its investigators' opinions in its deliberations. Furthermore, the use of [NTSB] employees as experts to give opinion testimony would impose a significant administrative burden on the [NTSB's] investigative staff. Litigants must obtain their expert witnesses from other sources.
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> (b) For the reasons stated in paragraph (a) of this section and section 835.1, [NTSB] employees may only testify as to the factual information they obtained during the course of an investigation, including factual evaluations embodied in their factual accident reports. However, they shall decline to testify regarding matters beyond the scope of their investigation, and they shall not give any expert or opinion testimony.

49 C.F.R. § 835.3 (1991).

[70] *Keen*, 569 F.2d at 551.

[71] *Id.*

B. *BENNA V. REEDER FLYING SERVICE*

In *Benna v. Reeder Flying Service*[72] the Ninth Circuit turned its attention from investigator testimony to the actual Board report, which is expressly inadmissible under § 1441(e).[73] The issue in *Benna* was whether it was error for the jury to view an accident report prepared by a Board investigator, which had been advertently left on the judge's bench and read by the jury.

The Ninth Circuit Court of Appeals held that the jury's viewing of the report was harmless error.[74] Of importance was the fact that the report did not contain a finding of probable cause, but was merely cumulative of other evidence presented by testimony and cross-examination during the trial.[75] Had the jury seen a finding of probable cause, the court stated it would have had "no trouble granting a new trial since this report would have definitely prejudiced the jury by unfairly placing a government stamp of officiality on the probable cause of the accident" and accordingly the report would tend to usurp the function of the jury.[76]

The Ninth Circuit did not appear to view the statutory prohibition of § 1441(e) as requiring a new trial in *Benna*, so long as the purpose of the prohibition was intact. Since the jury did not view the Board's determination of probable cause (the purpose of § 1441(e) according to the *American Airlines* and *Kline* rules), the error was harmless. The stage was set for the battle over admission of the report into evidence in direct contravention of § 1441(e).

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[72] 578 F.2d 269 (9th Cir. 1978).
[73] 49 U.S.C. app. § 1441(e) (1988).
[74] *Benna*, 578 F.2d at 271-72.
[75] *Id.* at 272.
[76] *Id.*

C. *In re Air Crash Disaster at Stapleton International Airport, Denver, Colorado, On November 15, 1987*[77]

The *Stapleton* case was a multidistrict action involving claims resulting from the crash of a Continental Airlines DC-9.[78] Plaintiffs offered the Board's report as evidence in support of their claims, voluntarily excluding the portions of the report captioned "Executive Summary," "Probable Cause Finding," and "Recommendations."

Defendants objected to admission of the entire report urging the court to apply the Ninth Circuit rule that § 1441(e) acts as a complete bar to the admission of any part of the report. Defendants specifically objected to the admission of an appendix to the report termed "Human Factors report," which implied the co-pilot and crew lacked qualifications needed to fly the DC-9 in weather conditions existing at the time of the crash. The defendants cited *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*[79] for the Ninth Circuit rule. The *Protectus* court held that the district court did not err in relying on the strict application of § 1441(e) to exclude the Board's report.[80] The *Protectus* court mentioned that the strict application of § 1441(e) had been modified to permit some reports into evidence so long as they did not express the probable cause of the crash, citing *American Airlines*, *Keen*, and *Berguido* as examples.[81] The *Protectus* court failed to note, however, that only *American Airlines* allowed part of the Board's report into evidence,[82] while *Keen*[83] and *Berguido*[84] involved only investigator testimony.

Plaintiffs urged the court to adopt the Tenth Circuit rule in *Keen*. The *Stapleton* court stated that the Tenth Cir-

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[77] 720 F. Supp. 1493 (D. Colo. 1989).
[78] *Id.* at 1494.
[79] 767 F.2d 1379 (9th Cir. 1985).
[80] *Id.* at 1385.
[81] *Id.*
[82] *See supra* notes 52-55 and accompanying text.
[83] *See supra* notes 68-71 and accompanying text.
[84] *See supra* notes 44-50 and accompanying text.

cuit interpretation of the purpose of § 1441(e) was "to bar admission of conclusions or opinions more properly left to a jury rather than to establish a privilege encouraging full disclosure to the investigating agency."[85] However, the *Stapleton* court did not consider the fact that the *Keen* interpretation applied only to the admission of testimony into evidence, not to the admission of parts of the Board's report.[86] The *Stapleton* court completely failed to consider the express language of § 1441(e) which states in part: "No part of any report . . . shall be admitted as evidence . . . ."[87] The *Stapleton* court adopted the *Keen* interpretation, denying the defendants' motion to exclude the entire Board report.[88] The court further stated that admitting the report would not usurp the function of the jury, so long as "conclusions regarding the probable cause of an accident presented by the Board" were excluded.[89]

Next, the court addressed whether a part of the Board report entitled "Human Factors report" should be excluded on hearsay grounds.[90] The *Stapleton* court examined the Human Factors report in light of the Supreme Court's interpretation of the public records exception to the hearsay rule[91] in *Beech Aircraft Corp. v. Rainey*.[92] In *Rainey*, the Supreme Court determined that portions of government reports are not inadmissible under Rule

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[85] *Stapleton*, 720 F. Supp. at 1496 (citing *Keen*, 569 F.2d at 549).

[86] *See supra* notes 68-71 and accompanying text.

[87] 49 U.S.C. app. § 1441(e) (1988). *See supra* text accompanying note 22.

[88] *Stapleton*, 720 F. Supp. at 1496.

[89] *Id.*

[90] *Id.* at 1497.

[91] FED. R. EVID. 803(8). This rule states an exception to the hearsay rule for:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (c) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Id.

[92] 488 U.S. 153 (1988). For a discussion of the effect of Rule 803(8), see Atwood, *supra* note 20, at 489-91.

803(8)(c) of the Federal Rules of Evidence merely because they contain conclusions or opinions.[93] The *Stapleton* court stated that under the *Rainey* decision some conclusions or opinions in Board reports may be admissible when they are: "(1) based on a factual investigation; and (2) trustworthy under the Rules of Evidence."[94] After applying a four-pronged test to determine the trustworthiness,[95] the *Stapleton* Court admitted some parts of the Human Factors report.[96] The court edited out all recommendations based on the Board's probable cause determination, double-hearsay statements not falling within a hearsay exception, and triple-hearsay statements.[97]

The *Stapleton* court ignored the express congressional mandate of § 1441(e)[98] by allowing parts of the NTSB report into evidence. Even though § 1441(e) has been interpreted to allow investigator deposition testimony, its clear language forbids admitting any part of the Board's report into evidence.[99] The District Court for the Northern District of Illinois took exception to the *Stapleton* decision, recognizing the distinction between investigator testimony and Board reports in its recent ruling on *In re Air Crash Disaster at Sioux City, Iowa*.[100]

IV. IN RE AIR CRASH DISASTER AT SIOUX CITY

A. *Sioux City Interpretation of Section 1441(e)*

Whether the NTSB report was admissible evidence at trial was an issue of first impression for the Northern District of Illinois in *Sioux City*.[101] The *Sioux City* court

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[93] *Rainey*, 488 U.S. at 170.

[94] *Stapleton*, 720 F. Supp. at 1497 (citing *Rainey*, 488 U.S. at 169 n.12, 170).

[95] The four factors are: "(1) timeliness of the investigation, (2) special skill or experience of the investigator, (3) whether a hearing was held and the level at which it was conducted, and (4) any possible motivation or bias problems in the preparation of the report." *Id.* at 1498.

[96] *Id.* at 1499.

[97] *Id.*

[98] 49 U.S.C. app. § 1441(e) (1988).

[99] *Id.*

[100] 780 F. Supp. 1207 (N.D. Ill. 1991).

[101] *See supra* notes 1-4 and accompanying text.

granted defendants' motion to exclude the entire Board report,[102] exposed the defects in the *Stapleton* court's rationale, and adopted the Ninth Circuit's interpretation of § 1441(e) as set forth in *Protectus* and *Benna*.[103]

In excluding the report, the *Sioux City* court concluded that the clear language of § 1441(e) left no room for creative interpretation.[104] "The language, on its face, states an absolute bar to the use of NTSB reports in the present action."[105] The court dismissed the interpretation of § 1441(e) advanced by plaintiffs, that the report was admissible so long as Board opinions of probable cause were excluded, as "facially improbable."[106] In adopting the strict interpretation of the statute, the court based its rationale on the flaws in the *Stapleton* court's application of *Keen*.[107]

B. FLAWS IN THE *STAPLETON* APPLICATION OF *KEEN*

The *Stapleton* court failed to draw the distinction between the admissibility of investigator testimony and the admissibility of the report itself.[108] The regulations promulgated by the Board delineate a clear distinction between investigator testimony and evidentiary use of reports. Current regulations expressly prohibit the use of any part of the Board's report as evidence,[109] limit investigator testimony to deposition form,[110] and limit the investigator's use of the report only to "refresh his memory" at deposition.[111] Courts should at least address the lines

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[102] *Sioux City*, 780 F. Supp. at 1212.

[103] *See supra* notes 72-76, 79-84, and accompanying text.

[104] *Sioux City*, 780 F. Supp. at 1208.

[105] *Id.* at 1208-09.

[106] *Id.* at 1209.

[107] *Id.* For the *Stapleton* court's application of *Keen*, see supra notes 89-93 and accompanying text.

[108] *Sioux City*, 780 F. Supp. at 1209.

[109] *Id.* at 1209 (citing 55 Fed. Reg. 41,541 (1990) (codified at 49 C.F.R. § 835.2 (1991)).

[110] *Id.*

[111] *Id.* (citing 55 Fed. Reg. 41,541 (1990) (codified at 49 C.F.R. § 835.4 (1991)). Section 835.4 reads:

(a) [An NTSB] employee may use a copy of his factual accident re-

drawn by the regulations when interpreting § 1441(e).

The *Sioux City* court noted that the purpose of § 1441(e) was "to preserve the functions of court and jury uninfluenced by the findings of the Board or investigators."[112] Even though this purpose will not necessarily be frustrated by allowing parts of the report into evidence, the statutory language shows Congress intended to bar the Board's report entirely.[113]

The *Sioux City* court found an additional basis for rejecting the *Stapleton* rationale in *Thomas Brooks Chartered v. Burnett*,[114] a recent Tenth Circuit case. In *Thomas Brooks* the Tenth Circuit refused to permit the representative of an individual killed in a plane crash to observe the Board's investigation.[115] In doing so, the Tenth Circuit characterized *Keen* as applying only to investigator testimony.[116] This interpretation was a significant indication that the Tenth Circuit would not follow the *Stapleton* rationale.[117]

The *Sioux City* court additionally noted that if the *Stapleton* rationale was adopted, permitting the admission of Board reports, the congressional purpose of § 1441(e) could be compromised by the operation of the Federal Rules of Evidence.[118] For example, any part of a Board's report admitted into evidence would be governed by Federal Rule of Evidence 803(8), which creates an exception to the hearsay rule for certain factual findings of investigations by a public agency.[119] The Supreme Court has broadly construed factual findings under Rule 803(8) to

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port as a testimonial aid, and may refer to that report during his testimony or use it to refresh his memory.

(b) Consistent with section 701(e) of the [1958] Act . . . a[n NTSB] employee may not use the [NTSB's] accident report for any purpose during his testimony.

49 C.F.R. § 835.4 (1991).

[112] *Sioux City*, 780 F. Supp. at 1210 (citing *Universal*, 188 F.2d at 1000).

[113] *Id.*

[114] 920 F.2d 634 (10th Cir. 1990).

[115] *Id.* at 647.

[116] *See id.*

[117] *See Sioux City*, 780 F. Supp. at 1211 n.40.

[118] *Id.* at 1211-12.

[119] *Id.*

include certain types of conclusions reasonably inferred from the evidence.[120] Accordingly, Board opinions that rarely stop short of stating the probable cause of the crash could be admitted under this construction of Rule 803(8). Board opinions, admitted through the operation of Rule 803(8) would be allowed to influence the jury's determination of probable cause in direct contravention to the stated purpose of § 1441(e).

C. RULING

Based upon a strict interpretation of § 1441(e), the *Sioux City* court granted defendants' motion in limine, ruling that the Board's report was inadmissible at trial.[121] The court rejected the *Stapleton* rationale, since admission of the report would ignore the clear prohibition of the statute and thereby subvert its purpose.

V. CONCLUSION

A. ADMISSIBILITY OF INVESTIGATOR TESTIMONY

The case law regarding the testimony of Board investigators seems well settled. The *American Airlines* rule[122] that "it would be better to exclude opinion testimony only when it embraces the probable cause of the accident or the negligence of the defendant"[123] is widely followed. The *Kline*[124] and *Keen*[125] decisions adopted the Fifth Circuit *American Airlines* rule and established that § 1441(e) does not prohibit opinion testimony of the investigators unless the opinions are about the probable cause of the accident.

Courts following the *American Airlines* rule interpret § 1441(e) to allow some opinion testimony and generally

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[120] *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170 (1988); *see supra* notes 96-104 and accompanying text.

[121] 780 F. Supp. at 1213.

[122] *See supra* note 59 and accompanying text.

[123] American Airlines v. United States, 418 F.2d 180, 196 (5th Cir. 1969).

[124] *See supra* notes 64-69 and accompanying text.

[125] *See supra* notes 72-75 and accompanying text.

construe the purpose of the statute as to prevent the admission of evidence that tends to usurp the function of the jury. Since opinion testimony cannot be admitted about the Board's determination of the ultimate cause of the accident, the testimony does not "place a government stamp of officiality on the probable cause of the accident"[126] and does not contravene the purpose of the statute.

B. Admissibility of NTSB Reports

The admissibility of Board reports into evidence is not as well-settled. The *Stapleton* decision allows the reports into evidence so long as the part of the report admitted does not contain Board findings of probable cause and otherwise comports with the Federal Rules of Evidence.[127] This interpretation of § 1441(e) completely ignores the plain language of the statute and instead relies on the purpose behind the statute.

The better-reasoned approach is set forth in *In re Crash at Sioux City*.[128] The *Sioux City* approach is based on the clear language of the statutory ban of Board reports into evidence. The *Sioux City* opinion points to the flaws of the *Stapleton* rationale by showing that admitting the reports conceivably usurps the function of the jury through the operation of the Federal Rules of Evidence. Had Congress intended portions of such reports to be allowed into evidence, surely they would not have made the explicit statutory ban.

C. Conclusion

Commentators have called for congressional action in interpreting § 1441(e) for some time. If courts follow the *Sioux City* rationale, however, that would not be necessary. NTSB investigators would be allowed to testify about fac-

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[126] Benna v. Reeder Flying Service, 578 F.2d 269, 272 (9th Cir. 1978).

[127] *See supra* notes 81-104 and accompanying text.

[128] *See supra* notes 105-25 and accompanying text.

tual information and opinions (but not probable cause opinions) surrounding the accident. This is desirable since it supports one goal of the judicial system: to allow litigants access to information necessary to their case.

Precluding NTSB investigators from giving their opinion of the probable cause of the accident is also desirable, because it keeps the investigator from directly influencing civil liabilities. The litigants are free to hire their own experts to examine the NTSB reports and make a probable cause determination, and their adversary may cross-examine the expert without appearing to attack the NTSB findings.[129]

The role of the NTSB in civil litigation changed with each court interpretation of § 1441(e). Before the recent *Sioux City* opinion, one commentator proposed that, "[a]s more courts ignore the current prohibition on the use of NTSB findings, plaintiff's attorneys will begin to forum shop as inequities develop between jurisdictions. The time has come, once again, for the Legislature to speak."[130] It would be nice if Congress took action whenever jurisdictions elaborated differing rules. But until Congress does so, courts should adopt the better rule of admissibility of NTSB reports: the *Sioux City* rule.

Leigh Ann White

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[129] *See* Atwood, *supra* note 20, at 502.
[130] *Id.* at 504.