

1954

Use and Abuse of Civil Aeronautics Board Investigation Reports in Civil Actions Arising Out of Aircraft Accidents

Payne Karr

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Payne Karr, *Use and Abuse of Civil Aeronautics Board Investigation Reports in Civil Actions Arising Out of Aircraft Accidents*, 21 J. Air L. & Com. 453 (1954)
<https://scholar.smu.edu/jalc/vol21/iss4/7>

This Comment 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>.

provided mail subsidy for some domestic trunk air carriers, in one form or another, for twenty-five years. That segment of the industry has now reached a potential economic status which will permit it hereafter to operate without that support, provided that the routes and services are merged into logical operating units, and provided there is sound regulation of the merged operation. That is a desirable objective in the national interest, and it can and should be made effective.

In the overseas field there has been wasteful duplication of services on some of the international air routes, with consequent increased and unnecessary cost to the national government. A different policy will provide an adequate service with a substantial reduction in cost to the taxpayer. There should be a different policy and the details of it should be explored and recommended. In the field of local air service, methods must be found for the reduction in the cost of this service to the government. These objectives are, in my opinion worthy ones. They can and should be accomplished. Chairman Robert B. Murray, Jr., and his associates on the Air Coordinating Committee have done a constructive service to aviation and to their country. They deserve our congratulations, our good wishes and our support.

USE AND ABUSE OF CIVIL AERONAUTICS BOARD INVESTIGATION REPORTS IN CIVIL ACTIONS ARISING OUT OF AIRCRAFT ACCIDENTS

BY PAYNE KARR

Member of the Bar of the State of Washington.

NO OCCASION has ever arisen for me to "use" a Civil Aeronautics Board report in civil litigation, but as one who has been the victim of "abuse" by opening counsel in my adversary's use of such a report which was adverse to the airline I represented, perhaps I am qualified to discuss this subject.¹

Before we review the judicial decisions which interpret the statute prohibiting the use of such reports in civil litigation, a brief background of federal regulation of aircraft operation, and governmental investigation of airplane accidents, may be helpful.

Like Jack Webb of radio and television fame, the Bureau of Safety Investigation of the Civil Aeronautics Board is one federal agency dedicated to the purpose of getting "all the facts, just the facts" whenever an aircraft accident occurs. It was established under the authority of the Air Commerce Act of 1926 (49 U.S. Code 171) and the Civil Aeronautics Act of 1938 (49 U.S. Code 401) as amended. Some change in organization resulted from the Reorganization Plans III and IV (1940).

The Civil Aeronautics Board is responsible for economic regulation of air carriers, the adoption of Civil Air Regulations and the operation of the Bureau of Safety Investigation. Through the C.A.B. and the Administrator of Civil Aeronautics is exercised federal control over domestic air carriers which was described as "intensive and exclusive" by the United States Supreme Court in *Northwest Airlines vs. Minnesota*, 322 U.S. 292. The function of investigating aircraft accidents is that of the Bureau of Safety

¹ *Editor's Note:* For an earlier discussion of this subject in the JOURNAL see Simpson, "Use of Aircraft Accident Investigation Information in Actions for Damages," 17 JRL. OF AIR LAW 283 (1950).

Investigation. Full authority to conduct such investigation, hold hearings, issue safety regulations, and punish violations thereof is granted to the C.A.B. This authority includes the right to exercise the full subpoena power in the conduct of investigations and hearings.

It is clear that the function of the C.A.B. in investigating accidents is not to fix legal liability therefor. This is apparent from the statement of purpose of the legislation. Instead its purpose is to ascertain all of the facts involved in an accident (1) to determine whether safety regulations of the C.A.B. have been violated and (2) to avoid similar future accidents by the improvement of such regulations.

The Bureau of Safety Investigation carries out its purpose with devotion. No other investigative procedure with which I am acquainted approaches its thoroughness and efficiency. Generally, within hours after an airplane accident of any consequence, a representative of the C.A.B. is at the scene. The law provides that all parts of the damaged aircraft must be preserved unremoved except under authority of the Board (Sec. 702 (d), Civil Aeronautics Act). This requirement is steadfastly enforced and for good cause. What to an untrained layman may look like meaningless, twisted rubbish often provides the key to the cause of an accident when examined by a technical aviation expert.

To conduct such studies, the C.A.B. in important cases will organize committees or teams, each assigned to study a different feature of the aircraft involved. The responsibility of the different teams will probably include power plant, propellers, aircraft structure, and the like. Each team will include a C.A.B. representative as chairman and one or more of the following where appropriate: A representative of the carrier whose plane is involved, a representative of the aircraft manufacturer, a representative of the engine or propeller manufacturer, a representative of the pilots union, and the like. All are urged to participate actively and contribute their knowledge and experience to the team reports. Fault for the accident under consideration is strictly secondary. How to prevent further accidents is everyone's primary concern.

I saw first hand a few years ago the kind of job the Bureau of Safety Investigation does as a result of the last in the series of tragic Martin 202 crashes. In this instance, literally thousands of parts of the aircraft which struck the ground, exploded, and burned were preserved with the greatest care, shipped to the Martin factory in Baltimore under C.A.B. supervision and the plane was reconstructed in impressive fashion from its damaged parts on a frame built for the purpose, all as a part of the Bureau of Safety Investigation study.

This procedure truly approaches the acme of perfection in investigation technique. It reflects television's famous Dagnet approach applied to the investigation of aviation accidents in that they really try to get the facts. The intensity with which the job is done is confirmed by George W. Orr² in which he says: "We attempt to make no technical investigation since we find that the C.A.B. Safety Bureau makes a far more comprehensive investigation than we are able to do."

But what of the use of the results of such investigations in the civil litigation which so frequently follows an aviation accident? Although the official report of a C.A.B. hearing is frequently delayed, facts developed in the investigation are immediately available to interested parties by securing a copy of the record. Copies of exhibits are likewise available.

What is the proper use of such material in civil litigation? Section 701 (e), (49 U.S. Code 581) of the Civil Aeronautics Act of 1938, provides:

² Director of Claims, United States Aircraft Insurance Group, in a recent article in the Insurance Counsel Journal (April, 1954, page 123).

“* * * No part of any report or reports of * * * the Civil Aeronautics 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.”

For years, many people assumed that testimony introduced at accident hearings was privileged. And clearly, under established rules of hearsay, the findings or report of the C.A.B. should be inadmissible in subsequent litigation. But just how far have the courts gone under the above statute in permitting private litigants to make use of the investigation material? Fortunately, or unfortunately, the cases are few. And a familiarity with them for one working in the field of aviation law is important.

An early discussion of the question is found in a reported letter opinion from the District Court for the Southern District of New York in *Ritts vs. American Overseas Airlines, Inc.*, (1947), 97 F. Supp. 457. The issue was whether a C.A.B. investigator could be examined as a witness. Plaintiff's counsel was permitted to question the investigator. Said the court:

“I am satisfied that the second paragraph (of Section 701(e) prohibits the admission in evidence of only the ‘reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof’ and that it does not bar the use of the testimony of a witness examined by the Board in the course of the investigation. . . . 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. That same problem would not be presented where a witness being examined in the trial of the action or before the trial, is confronted with his testimony given at the investigation in order to refresh his recollection or impeach him as a witness.”

Earlier in 1951, the same court had decided *Pekelis vs. Transcontinental & Western Air, Inc.*, 187 F. 2d 122, involving the admissibility of certain investigation reports made by defendant airline's own employees. After considering at length the nature of the reports, whether they were binding on the defendant airline, whether they could be excluded as containing hearsay, the court said:

“We think that the reports were all admissible in toto. Indeed, it would seem to be impossible to disentangle the conclusions from the facts on which they were based. Moreover, out of fairness to both parties, the jury should have been able to consider all the reports as a whole. The fact that they were based on hearsay and expressed opinions would go to their credibility rather than to their admissibility.”

This decision places a critical stumbling block in the way of an airline receiving frank reports from its employees. I have seen many that would be helpful from an administrative standpoint but could be most embarrassing in court.

A related problem was considered in *Universal Airline, Inc. vs. Eastern Airlines, Inc.*, decided by the District of Columbia Court of Appeals (1951), 188 F. 2d 993. The District Court directed a C.A.B. investigator to testify at the trial concerning his opinion as to the cause of an accident. Prior to trial, the C.A.B. had permitted its investigator to testify by deposition at defendant's instance. At the trial, the deposition was excluded on plaintiff's objection that the witness was personally available and, in response to a subpoena *duces tecum*, had with him a copy of his report to the Board on the accident involved.

In its brief as *amicus curiae* opposing the trial court's requirement that the C.A.B. investigator appear at the trial, the Board advanced five reasons for its policy of withholding certain information and refusing to permit its

investigators to appear in person as witnesses. These reasons are summarized in the court's opinion as follows:

- "(1) The obviously correct concept that the Board had been instructed by Congress to investigate aircraft accidents solely for the purpose of gaining the information necessary to prevent the recurrence of similar accidents, and not for the purpose of securing evidence or providing witnesses for the benefit of parties to private litigation,
- "(2) The belief that the refusal to release information encouraged frank disclosure on the part of the persons involved and that such disclosures were in the public interest,
- "(3) The obvious undesirability of releasing a particular investigator's conclusions which might differ from the subsequent final determination by the Board of the cause of the accident.
- "(4) The fact that the conclusions of its investigators often subsequently embodied in the Board's reports would, as a practical matter, influence the determination of the civil liabilities of the parties involved if testified to in damage suits, contrary to the plain purpose and intent if not the letter of Section 701 (e) of the Act, and
- "(5) The number of accidents involving aircraft was such as to require the full time of its experts in investigating them and the public interest dictated the time of these experts not be consumed by appearances in court to give testimony in private damage suits."

In commenting on the Board's contention that it is error to compel an agent of the Board to produce any of the Board's reports, orders or private files or to testify as to the contents of such papers, the court says:

"This contention seems sound and supported by the authorities."

However, the holding is of limited effect since none of the Board reports were involved at the hearing and the report of the investigator had already been made public.

In *Tansey vs. Transcontinental and Western Air, Inc.*, decided by the District Court for the District of Columbia (1950) 97 F. Supp. 458, the court granted plaintiff's motion for inspection and copying of certain papers in defendant's possession, including reports made by defendant's employees as to the accident in question. The court quoted with approval from the *Ritts* case and concluded, ". . . The language (of the prohibition in Section 701 (c)) readily may be construed to make privileged only reports of the investigations, not information received in the course of the investigation. . . . It is quite as probable, as stated (in the *Ritts* case), that Congress intended to withhold from use only the conclusions of the administrative agency charged with investigating the accident."

Again, in 1951, the U. S. Court of Appeals for the Second Circuit authorized cross examination during a civil trial arising from an aircraft accident, such cross examination being based on a transcript of the C.A.B. hearing of the same accident. In *Lobel vs. American Airlines*, 192 F. 2d 217, defendant airline urged error in the reception of a C.A.B. investigator's report of his examination of the plane wreckage. In holding the report properly admitted, the court commented that the investigator's report consisted wholly of his personal observations about the condition of the plane after the accident and included no opinions or conclusions about possible causes of the accident or of the airline's negligence. The court said:

"Nothing in the report offends either the opinion or the hearsay rule. Section 701(e) was designed to guard against the introduction of C.A.B. reports expressing agency views about matters which are within the

functions of courts and juries to decide. . . . The C.A.B. has authorized the disclosures made in this report. The deposition of the investigator was admitted in evidence and contained the same information which the report sets out. There is no question that the deposition was proper evidence. . . . Furthermore, the agent could have been cross examined by opposing counsel on the basis of the report when the deposition was taken since the report was admitted only as past recollection recorded and was entirely auxiliary to the agent's direct testimony in the deposition."

It should be noted that in some of the cases which the C.A.B. investigates, its investigators are the only persons competent to testify as to conditions after the accident. In light of this, the C.A.B. has made changes in its policy and has permitted the release of information and the appearance of its personnel as witnesses in civil cases to testify as to facts observed by them.

The foregoing cases reflect judicial views with reference to the section of the Civil Aeronautics Act in question. Whether this is good or bad, or in the words of the title assigned to me, "a use or an abuse" of the reports, depends upon your point of view.

The standing committee on Aeronautical Law in its 1954 report, posed the question whether or not there should be a change in Section 701 (e) of the Civil Aeronautics Act of 1938 with respect to the use of reports of the C.A.B. upon aircraft accidents but made no recommendation.

George W. Orr, in the article already mentioned, declares that a simple amendment of Section 701 by the change of the words "report or reports" to "records and reports" would avoid any ambiguity. Thus amended the section would read:

"The records and reports of the Board shall be preserved in the custody of the secretary of the authority in the same manner and subject to the same provisions respecting publication as the records and reports of the authority, . . . and that no part of the records and reports of the Board or the authority relating to any accident or the investigation thereof shall be admitted as evidence or used in any suit or action. . . ."

Such a change would afford little excuse for permitting any part of the record of investigations to be used in a lawsuit. Many informed persons support this suggestion.

Senate Bill 2647 which was before the Second Session of the 83rd Congress, introduced by Senator McCarran, provided in Section 706 as follows:

"No part of any record or report 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 record or report."

This is not quite the suggested rewording of Mr. Orr, but it is at least a rewording which incorporates the language of prohibition for both records and reports.³

Until this matter is determined by statutory amendment, or until further judicial decisions consider additional aspects of the subject, those of us engaged in aviation work must follow it closely. Like many legal points, it may be academic until it confronts you but when it applies to your case, it is vital and critical.

³ *Editor's Note:* The Committee received testimony in opposition to this proposed change in Section 706 of the Act from *William C. Gaither*, representing negligence and compensation lawyers of Florida and the National Association of Claimants' Compensation Attorneys and from *William A. Hyman*, Attorney, New York City, representing plaintiffs in airplane accident cases.