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JUDICIAL AND REGULATORY DECISIONS

EVIDENTIARY IMMUNITY OF CAB ACCIDENT RECORDS AND REPORTS

BECAUSE of the vital status which aviation occupies in today's society, an ever-present necessity exists to promote maximum safety standards for air travel. To a great extent, these standards are formulated by the Civil Aeronautics Board,¹ which determines accident causes and promulgates rules designed to prevent similar occurrences in the future.² To determine the cause of an accident, the Board must carry on extensive investigations to ascertain the facts and circumstances surrounding each mishap. Because private litigants, in suits arising from aerial accidents, have scant opportunity to perform their own investigations, this Board-secured information may be extremely useful to such parties.³ The task of sifting the bits of wreckage and charred structure remaining after a crash requires the highly technical skills and perceptive powers of trained investigators.⁴ Moreover, the investigators immediately isolate the scene of the wreckage and only the investigators are allowed to go near the remains of the plane.⁵ Thus, private individuals are prevented from making their own investigations. However, if the Board's entire findings were open to unlimited use in private litigation, airline operators, in fear of subjecting themselves to vast civil liability, would be reluctant to submit to the Board any facts which might suggest operational negligence.⁶ Such an inclination could greatly impede the effectiveness of the Board's investigations. Moreover, the Board's examiners are too few to operate without the assistance of the airlines; and these few examiners cannot spare the time to become involved in private litigation.⁷ In determining the extent to which private parties may use the results of Board investigations, the Board, Congress, and the courts are faced with the problem of balancing the need to formulate an adequate program of safety regulation with the policy of affording individuals the maximum discovery procedures necessary for successful litigation.

The problem of balancing these interests was recognized by Congress in the enactment of Section 701(e) of the Civil Aeronautics Act.⁸ This section provides that the accident investigation reports of the Board shall not be admitted as "evidence" in any suit for damages arising from matters mentioned in the report. On the surface, this section appears to have granted an extensive privilege to all information gathered by the Board during the course of the accident investigation, as well as any conclusions regarding causation reached by the Board. Believing that anything less than a strict interpretation of the section will lead to confusion, the Board has interpreted Section 701(e) in this way.⁹ Thus, the Board will not release either its preliminary records and reports or the final Board report to private parties as a matter of right.¹⁰ Consequently, the Board has realized the possible inequities involved in a strict interpretation of Section 701(e). Thus, a private party may not be able to sustain his claim for relief without the Board's information,¹¹ or at best avoid a directed verdict against him.¹² In an attempt to balance these interests, the Board has adopted rules of procedure which allow a controlled use of Board information after a request has been submitted to the General Counsel of the Board.¹³ He has full power to approve or deny the request depending upon the requisite showing of necessity by the applicant.¹⁴ However, this exemption is explicitly limited to the material facts,¹⁵ and subsequent Board rules absolutely prohibit testimony by Board employees as expert witnesses.¹⁶ This includes testimony as

Note: Footnotes follow this article (page 237).

to facts and opinions incorporated in Board reports, as well as facts and opinions garnered by Board employees while working in their official capacity.

The Board believes that these rules do not extend the privilege of Section 701(e), but only uphold its spirit.¹⁷ It is thus contended that if a report is privileged, everything leading up to the report should be privileged,¹⁸ and this must include all matters which have been ascertained by an individual while employed in an official capacity.¹⁹ Thus, the Board concludes that Section 701(e) can be enforced only by denying private parties the opportunity to procure the privileged material through the testimony of agency employees regarding the contents of withheld reports.²⁰ However, in the event that these Board rules do, in fact, extend the privilege of Section 701(e), the Board apparently believes that the rules should have the force of law.²¹ This belief is based on the constitutional separation of powers between the different branches of the government,²² and also on the statutory power which has been granted the Board by the Act (to make and amend such rules of procedure as are necessary for its operation).²³ The Board sets forth several considerations of necessity which support its rules as needed for proper Board operation. The foremost of these considerations are the need for full and frank reports²⁴ and the convenience of the agency.²⁵ Also, the disclosure of Board reports may subject the individual members to political pressures in reaching their decisions.²⁶ Therefore, the Board feels that such a necessity gives it the right to use the general rule-making power of the Act. To a great extent, this right has been supported by Congress²⁷ and by the courts.²⁸ Thus, the Board has taken the position that, in any event, its rules are proper and that the only solution to the problem of Section 701(e) is compliance with the discretion of the Board.

Although the Board has sought a compromise solution to the Section 701(e) problem, the fact remains that any restriction placed on the Board's information will have an adverse effect upon the private litigants involved.²⁹ It is not surprising, therefore, that the courts have confined the interpretation of Section 701(e) and the Board's rules concerning it. The problem of the extent to which Board information is privileged under the interpretation of Section 701(e) was considered in the case of *Ritts v. American Overseas Airlines*.³⁰ In that case, the court held that a witness was not precluded by Section 701(e) from being examined on matters about which he had testified at the Board's investigation. The court adopted a narrow interpretation of the language of Section 701(e) so that only the final Board report was excluded, and not the preliminary information gathered during the investigation.³¹ Shortly thereafter, several cases followed the *Ritts* case and allowed the claimant to inspect routine accident reports of the airline which were submitted to the CAB,³² to use the Board report for purposes of refreshing a witness' memory, or to impeach his veracity,³³ and to introduce as evidence the report of a Board investigator pertaining to his examination of the airplane wreckage.³⁴ Thus, with respect to documents, Section 701(e) excludes only the use of the final Board report.³⁵ In *Universal Airlines v. Eastern Airlines*, recognition of the Board's rules concerning Section 701(e) was directly presented.³⁶ Assuming the reasoning of the *Ritts* case as its major premise, the court held that a Board investigator could be subpoenaed by the court and made to testify to his observations of both the facts and his opinions regarding the crash.³⁷ However, the court stated it would be error to compel an agent of the Board to produce any of the Board's reports, orders, or private files which are privileged, or to testify as to the contents of any privileged papers.³⁸ Although the court endorsed the policy underlying the Board's regulations, it stated that the policy must be considered in the light of judicial power and the function of the courts to administer justice. The function of a subpoena is to compel attendance of all witnesses (of facts and opinions) so that the courts may have all available information. There-

fore, even though the Board rules are sound, they cannot supersede the judicial power of the courts.³⁹ It appears, therefore, that Section 701(e) allows the use of opinion testimony given by Board employees, so long as the opinion is not contained within the privileged final Board report.⁴⁰ Moreover, irrespective of statutory construction, the rules of evidence will generally protect the litigants against any inadmissible or prejudicial evidence.⁴¹

CONCLUSION

By confining the apparently broad exclusionary privilege of the statute, the courts have taken a realistic, but equitable approach to this problem. Whereas the Board's concern with safety necessitates frank disclosures of all facts in accident reports, the Board does not want to be involved in private litigation. Conversely, so that the private litigant may obtain the fairest adjudication of his cause of action, he desires access to the Board's accident reports. In balancing these conflicting interests, the courts will disrupt the Board's regulations only in cases of necessity.

In light of the protection afforded to litigants by the rules of evidence, and because the Board regulations are protected to as great a degree as possible by the courts, no statutory changes appear necessary in the present provisions of Section 701(e), and none are foreseen in the near future.

FOOTNOTES

¹ Civil Aeronautics Act Sec. 701(a), 52 Stat. 1012 (1938) as amended, 49 U.S.C. Sec. 581 (1952). Hereinafter referred to as the "Board."

² Civil Aeronautics Act Sec. 702(a), 52 Stat. 1013 (1938), as amended, 49 U.S.C. Sec. 582 (1952).

³ Other avenues available to private parties attempting to secure the facts involved in the air crash are depositions (Fed. R. Civ. P. 26, 27, 28, 29, 30, 31 and 32) and the discovery procedures, which are written interrogatories directed to a party opponent (Fed. R. Civ. P. 33), examination, copying and photographing of documents and property in the possession of opposing parties (Fed. R. Civ. P. 34), physical and mental examinations of persons (Fed. R. Civ. P. 35), and admissions of facts and the genuineness of documents from the other party (Fed. R. Civ. P. 36). However, it must be recognized that these procedures can never completely replace a first-hand investigation of the air crash.

⁴ See, Section 701(e) of the Act, 52 Stat. 1012 (1938), as amended, 49 U.S.C. Sec. 581 (1952), whereby the Board is authorized to employ temporary personnel and to request the services of other government experts in connection with accident investigations. These temporary experts are generally sought from the individual air carriers and aircraft manufacturers involved because of their specific knowledge concerning the craft.

⁵ Brief for the CAB as *Amicus Curiae*, P. 3, *Universal Airlines v. Eastern Airlines*, 188 F. 2d 993 (D.C. Cir. 1951).

⁶ The airlines are required to notify and report any aircraft accidents or overdue aircraft, 14 C.F.R. Secs. 62.1-62.45 (1956). (Secs. 62.1 to 62.45 were issued under Sec. 205, 52 Stat. 984, as amended; 49 U.S.C. 425. The regulations interpret and apply Secs. 601, 702, 52 Stat. 1007, as amended, 1013, as amended; 49 U.S.C. 551, 582.)

⁷ The statistics available show that in the fiscal year 1949 more than 7,500 accidents involving aircraft were reported to the Board, whereas the Board had, and still has, less than thirty investigators to make field investigations.

⁸ 52 Stat. 1013 (1938), as amended, 49 U.S.C. Sec. 581 (1952),

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, except that any publication thereof shall be styled "Air Safety Board of the Civil Aeronautics Authority," and that no part of any report or 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 for damages growing out of any matter mentioned in such report or reports.

⁹ 15 Fed. Reg. 6442 (1950).

¹⁰ Note 9, *supra*.

¹¹ Obviously, knowledge and understanding of the facts involved are necessary to the private party so that he can deliver the proper arguments to the court and to the jury. Otherwise, the private party will always be subject to the possibility

of a directed verdict against him. Furthermore, it must be noted that the personal injury plaintiff does not have the benefit of the *res ipsa loquitur* doctrine in the majority of states. *Lobel v. American Airlines, Inc.*, 192 F. 2d 217 (2d Cir. 1951); *Goodheart v. American Airlines, Inc.*, 252 App. Div. 660, 1 N.Y.S. 2d 288 (2nd Dept. 1937).

¹² The airlines and the aircraft manufacturers (the usual civil defendants in these cases) are customarily asked to assist the Board's team of investigators in its investigation, because the technical skills and first-hand knowledge of the builder and the operator involved are generally very helpful. Thus it is apparent that in the usual civil action arising from an airplane accident (passenger v. airline or manufacturer), the passenger may be at a disadvantage. Contrary to the plaintiff's position, the airline and the manufacturer will have an understanding of the facts involved as well as the persuasive testimony of their own expert witnesses.

¹³ See, 14 C.F.R. Sec. 311 (1956) for the complete text of the Board rules.

¹⁴ The effect of these rules gives the Board's General Counsel an arbitrary power to grant or deny the requests submitted by the interested private litigants.

¹⁵ It must be recognized, however, that the material facts on the surface may not always be helpful to private parties. In this technical field, the untrained mind of a private party will not always be able to reach the proper conclusions from the material facts. Furthermore, the only testimony which will be of real value to a jury of laymen will be the testimony of expert witnesses interpreting the available facts.

¹⁶ Note 13, *supra*.

¹⁷ See, *Boske v. Comingore*, 177 U.S. 459 (1900); *Ex Parte Sackett*, 74 F. 2d 922 (9th Cir. 1935); *Harris v. Walsh*, 277 F. 569 (D.C. Cir. 1922).

¹⁸ The courts have upheld regulations forbidding executive employees from testifying in private litigation concerning contents of secret, official files, or to facts ascertained by them in the course of official business. See, *Stegall v. Thurman*, 175 F. 813 (N.D. Ga. 1910); *In Re Lamberton*, 124 F. 446 (S.D. Ark. 1903). (A contrary rule with respect to production of documents prevails when the government is a party.) See e.g., *United States v. Andolschek*, 142 F. 2d 503 (2nd Cir. 1944), a criminal case.

¹⁹ *In Re Hutman*, 70 F. 699 (Kan., 1895).

²⁰ *Contra, Gerow v. Seaboard Airline Ry. Co.*, 188 N.C. 76, 123 S.E. 473 (1924). The state court, however, did not uphold the privilege of exclusion for railroad accident reports.

²¹ *Berger and Krash, Government Immunity From Discovery*, 59 Yale L. J. 1451 (1950); *Sanford, Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 Vand. L. Rev. 73 (1949).

²² This contention is based on the concept of separation of powers inherent in our constitutional organization of government. From its inception, each branch—legislative, executive and judicial—has sought to operate in its own sphere and to refrain from infringing upon the individual provinces of the others. The problem of defining the individual spheres of influence and jurisdiction arose at an early stage of our history when the courts decided that they should not interfere with the discretionary actions of executive officials. *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803). This precedent is still followed. *United States ex rel Touhy v. Ragen*, 340 U.S. 462 (1950). Therefore, because the control of agency records is within the discretionary authority of the agency head, he should have full power to determine whether outsiders may be allowed to use the documents.

²³ Section 205 of the Civil Aeronautics Act (52 Stat. 984 (1938), as amended, 49 U.S.C. 425 (1946)) authorizes and empowers the Board . . . to make and amend such general or special rules, regulations, and procedure pursuant to and consistent with the provisions of the Act, as it shall deem necessary to . . . perform its powers and duties under this Act.

²⁴ Truthful disclosures by those who are in a position to know the facts are important for an accurate investigation by the Board. It must also be recognized, however, that it is poor policy for the law to bribe a man to be truthful. See, *Wigmore*, 19 Ill. L. Rev. 196, 198 (1924).

²⁵ Note 7, *supra*.

²⁶ Brief for the CAB as *Amicus Curiae*, P. 6, *Universal Airlines v. Eastern Air Lines*, 188 F. 2d 993 (D.C. Cir. 1951).

²⁷ Congress has supported this general theory and expressly codified it into the form of a statute in dealing with the internal powers of the departments of the executive branch. 5 U.S.C. Sec. 22 (1948). "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

²⁸ The courts have held that an administrative agency—226 F. 2d 501 (6th Cir. 1955)—or executive department—*Boske v. Comingore*, 177 U.S. 459 (1900),

Ex Parte Sackett, 74 F. 2d 922 (9th Cir. 1935), Harris v. Walsh, 277 F. 569 (D.C. Cir. 1922)—can with impunity, refuse to submit its internal records in response to a court subpoena if it does so pursuant to its own *reasonable* rules of procedure.

²⁹ Often the physical facts of the accident may only be pieced together after much experimentation with the bits of wreckage remaining after a crash. This task is always performed by the Board. Note 5, *supra*.

³⁰ 97 F. Supp. 457 (S.D. N.Y. 1947).

³¹ The court, in the *Ritts* case (note 29, *supra*), distinguished between the words "records and reports" in the first line of Section 701(e) and the reference only to "report or reports" in the exclusionary last line of the section. It was regarded that this distinction evidenced a Congressional intent to exclude only the Board reports containing its conclusions which, if admitted into the court, would prejudice any party who had no part in the investigation. The party would be injured because he would have no chance to be heard or to cross-examine the witnesses before the Board. The court concluded that the use of records of the Board hearings was the same as using any statement taken from a witness to refresh his recollection or to impeach his veracity.

³² In *Tansey v. T.W.A.*, 97 F. Supp. 458 (D.C. 1949), it was held that Section 701(e) did not prevent a person injured in an aircraft accident from inspecting and copying both routine records and special reports as to the cause of the accident prepared by the airline and filed with the Board. This court also distinguished between the final Board report and the records leading up to this report. It was stated expressly that the information received in the course of an investigation was not privileged.

³³ *Maxwell v. Fink*, 264 Wis. 106, 58 N.W. 2d 415 (1953). Recognizing the distinction between the words, "records" and "reports," the court allowed a Board expert, testifying as a witness, to refresh his memory from a photostatic copy of his Board report. The witness was testifying to the facts as he found them at the scene of an accident. The court said that this did not permit the report to be "used" in the sense prohibited by Section 701(e) in cases involving records and testimony in Board inquiries. By *dictum*, it stated that this was true whether or not the case involved a deposition, a pre-trial discovery, or the admissibility of evidence at the trial.

³⁴ *Lobel v. American Airlines*, 192 F. 2d 217 (2nd Cir. 1951). Here the report of a Board investigator pertaining to his examination of the airplane wreckage was admitted as evidence. The court, however, indicated that the report contained no opinions or conclusions as to the cause of the accident or of the defendant's negligence. Moreover, the report was based entirely on the investigator's personal observations and was not based on any interviews. Thus, while Section 701(e) was designed to guard against the introduction of Board reports expressing Board views on matters wholly within the functions of courts and juries to decide, the court emphasized that any testimony or evidence not excluded by Section 701(e) still remains subject to the rules regarding hearsay and opinion evidence.

³⁵ See, *Isreal v. United States*, 247 F. 2d 426 (2nd Cir. 1957).

³⁶ 188 F. 2d 993 (D.C. Cir. 1951).

³⁷ However, while this court accepted the general proposition, it excluded the testimony of the questioned witness for other reasons.

³⁸ While this court accepted the rationale of the *Hutman* case (note 19, *supra*); the *Lamberton* case (note 18, *supra*); and the *Stegoll* case (note 18, *supra*), it recognized that if the government official is testifying about facts which are not incorporated into privileged reports, they are not privileged even though they were learned in an official capacity.

³⁹ Implicit recognition was given to the policy considerations favoring a private litigant's effort to secure evidence necessary to his case.

⁴⁰ Recognizing this judicial construction of Section 701(e), a question necessarily presented is whether or not this construction of the section is consistent with its legislative history. However, there is virtually no history of this section which can be used as a guide. The various proposals made in each house from which the present Civil Aeronautics Act evolved were very similar in all respects, and it was agreed to without comment by a joint committee of the House and Senate. 83 Cong. Rec. 8843-8869, 8961-8963 (1938). There was testimony of only one witness relating to this section at the Congressional hearings on the Act. The value of this lone statement is certainly not conclusive as evidencing any legislative intent one way or the other. Therefore, the intent of the Act can only be ascertained by way of inference from similar statutes which preceded it. Section 701(e) of the Civil Aeronautics Act was modeled after the somewhat similar provisions contained in Section 2(e) of the Air Commerce Act of 1926, as amended in 1934. The provisions of this act were in turn derived from the comparable provisions of certain Safety Acts relating to railroads. (36 Stat. 916 (1911), 45 U.S.C. 33 (1940); 36 Stat. 351 (1910), 45 U.S.C. 41 (1940).) The general purpose of all these statutes was to promote and regulate adequate standards of safety for the carriers. Hence, it may be argued

that since the purpose of these prior acts and the Civil Aeronautics Act are the same, the exclusionary privileges in each statute should be construed in the same way regardless of its language. This argument is based on the premise that the ends of safety demand frank disclosures in accident reports by airline operators and that anything less than a complete exclusionary privilege will discourage frank disclosures. Also, safety investigations demand the full time of agency employees and they cannot be bothered with court appearances. As previously noted, this is in accord with the Board's view of the statute. (See, text P. 5, *supra*.) The courts have not accepted this argument and have interpreted the changes in language in the previous statutes and Section 701(e) to show the intent of the legislature to make privileged only the actual Board report and not the records of the Board, or its hearings and investigations, or the expert testimony of its employees. (See, note 29, *supra*, which states the rationale of the *Ritts* case.) The language of Section 701(e) supports this argument. The exclusionary privileges of the three acts are drafted in different language and terms, especially the old Air Commerce Act. Its exclusionary privilege was drawn up in much stronger and broader terms than the similar section in the Civil Aeronautics Act, i.e., Section 701(e). It is consistent with the purpose of the statute and legislative discussion of all three statutes to conclude that Congress has narrowed provisions of Section 701(e).

⁴¹ The rules of evidence generally exclude from the court any hearsay statements. 5 Wigmore, Evidence, Sec. 1361, 6 *id.* Sec. 1766 (3d ed. 1940); Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. 1 (1937); for cases discussing and illustrating the nature of hearsay, see Morgan, *Evidence*, 1941-1945, 59 Harv. L. Rev. 481, 541 (1946). In the field of aerial accident investigation, the investigator must rely to a great extent upon statements given by third parties regarding the facts. Thus, he will seldom have first hand information and the evils of hearsay will be implicit in the investigator's personal knowledge of the facts or the records and reports of the Board. Such evidence will generally be excluded from the courtroom. The pitfalls of the hearsay rule may be avoided if the record containing the Board employee's hearsay is used by him as past recollection recorded with his own testimony in court. See 3 Wigmore, Evidence, Secs. 734-757 (3d ed. 1940); *Universal Airline v. Eastern Air Lines*, 188 F. 2d 993 (D.C. Cir. 1951). In this way, the evils are overcome for theasserter is in the court under oath, and he may be cross-examined by the opposing party. The hearsay statements may come within one of the many exceptions to the general rule. See McCormick, Evidence, Secs. 223-299 (1954). The most likely exceptions are admissions by party-opponents. See 4 Wigmore, Evidence, Secs. 1048-1087 (3d ed. 1940); McCormick, Evidence, Secs. 239-252 (1954) or declarations against interest by a person not a party to the suit. See 5 Wigmore, Evidence, Secs. 1455-1477 (3d ed. 1940); Morgan, *Declarations Against Interest*, 5 Vand. L. Rev. 451 (1952). Furthermore, it is possible to use these statements in other ways to by-pass the hearsay rule, such as to impeach a witness. See McCormick, Evidence, Secs. 33-50 (1954); *Maxwell v. Fink*, 264 Wis. 106, 58 N.W. 2d 415 (1953). If the hearsay statement is itself based on other out-of-courtroom assertions of third parties, each statement must satisfy the requirements of some hearsay exception to be admissible into evidence.

Closely aligned to the hearsay provisions is the rule excluding a witness' testimony concerning his opinions. See 2 Wigmore, Evidence, Secs. 650-670 (3d ed. 1940). The general rule demands that a witness testify only to those facts within his knowledge and not to testify to his opinions concerning the issues of the case. See 7 Wigmore, Evidence, Secs. 1917-2028 (3d ed. 1940). Otherwise the witness would usurp the jury's function of determining the liability of the parties based on the facts presented at the trial. *Chicago & Alton R. Co. v. Springfield & N.W. R. Co.*, 67 Ill. 142 (1873). However, in such a technical field, there is a need for expert opinion and the courts usually make an exception to the general rule excluding opinion testimony. To give an opinion, the expert must be qualified and must have first-hand knowledge of the facts involved. See 7 Wigmore, Evidence, Sec. 1923 and Sec. 1925 (3d ed. 1940); *Bratt v. Western Airlines*, 155 F. 2d 850 (10th Cir. 1946). If the expert has no first-hand knowledge, or only a knowledge based on hearsay assertions, he may still give his opinion in answer to a hypothetical question based on stated, assumed facts. There are two basic requirements for a hypothetical question: 1. the facts which the question assumes must be clear to the jury, and 2. the date assumed must not be conflicting. See McCormick, Evidence, Sec. 14 (1954). However, it must be remembered that the evidence or opinion from the Board or its experts will often impress the jury far more than it properly should. See brief for Appellant, pp. 26, 27, *Universal Airline v. Eastern Air Lines*, 188 F. 2d 992 (D.C. Cir. 1951). In this field, the jury must depend to a great extent on expert testimony, and it will surely be impressed by the conclusions of a person who bears the responsibility to determine questions of causation. This may unfairly prejudice one of the parties. Therefore, while the courts cannot determine the weight to be given to admissible evidence, it can be stated surely that the rules of evidence will protect the parties from admission of prejudicial evidence into court.