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John W. Simpson

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USE OF AIRCRAFT ACCIDENT INVESTIGATION INFORMATION IN ACTIONS FOR DAMAGES

By JOHN W. SIMPSON *

University of Rochester, B.A., 1943; Harvard Law School, LL.B., 1948; Fighter Pilot with 8th Air Force in England, World War II; Attorney, Bureau of Law, Civil Aeronautics Board.

INTRODUCTION

THE Civil Aeronautics Board (hereinafter referred to as the "Board") investigates aircraft accidents to determine their probable cause in order to prevent the occurrence of similar accidents in the future. The question then arises as to whether the information gathered in such investigations may be used in subsequent actions for damages growing out of the accident. Section 701 (e) of the Civil Aeronautics Act of 1938, as amended [1] (hereinafter referred to as "the Act"), provides as follows:

> "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." [2]

It has been contended by various persons that this section extends a privilege not only to the accident reports of the Board itself, but also prohibits the testimony of Board employees in civil suits for damages and precludes the use in such suits of reports by Board employees to the Board, the transcript of the testimony and the documents used in Board accident inquiries, and copies of records and reports which have been introduced into Board accident inquiries by air carriers, aircraft manufacturers, and other persons. The exact scope and purpose of Sec. 701 (e) are at the present time the subject of great uncertainty for there is

* The views expressed in this article are the personal views of the author only and do not necessarily represent the views of the Civil Aeronautics Board.

[1] 52 Stat. 1013 (1938), 49 U.S.C. §581 (1946).

[2] The Civil Aeronautics Board now has all the powers and duties granted by Title VII of the Act to the Civil Aeronautics Authority and to the Air Safety Board. Therefore, Sec. 701(e) applies to reports of the Civil Aeronautics Board. Reorganization Plan No. IV, 3 Code Fed. Regs. p. 332 (Supp. 1940), effective June 30, 1940.

almost no valuable legislative history to aid in its interpretation [3] and, prior to the recent decision on a motion in *Tansey* v. *TWA*,[4] there was no complete, written court decision on the question. The purpose of this article is to bring together all of the scattered aids to interpretation and to answer, insofar as it is possible at the present time, the legal questions involved in Sec. 701 (e). It should be noted that this article deals only with the scope of the privilege granted by this section and does not consider whether accident information would otherwise be admissible under the rules of evidence.

Records and Testimony in Board Inquiries

The most difficult question is whether the language of Sec. 701 (e) extends a privilege to testimony taken at a Board accident inquiry and to the numerous documents and records used in a Board investigation, so that such evidence cannot be used in a subsequent suit or action for damages growing out of any matter mentioned in a Board report.[5] The first line of Sec. 701 (e) makes a clear distinction between the "records" and the "reports" of the Board and the second half of the section provides that only the "report or reports" of the Board shall be inadmissible in evidence. This distinction was pointed out as a basis for a ruling that Sec. 701 (e) applied to the Board report only and did not preclude the use of testimony from a Board inquiry to impeach a witness during the taking of a deposition for use in an action for damages. *Ritts v. American Overseas Airlines.*[6]

Two other court decisions are in accord with this ruling. In ruling on objections to interrogatories in the case of *Kendall and Sebo v.*

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[3] The only legislative history on this section is a statement by Mr. Henry Allen Johnston of the Committee on Aeronautics, Association of the Bar, New York, N. Y., to the effect that accident investigation records could not be used for any purpose in any litigation (Senate hearings on S. 3659, 75th Cong., 3rd Sess., April 6, 1938, p. 18). Since there is no evidence that Congress, or even the Subcommittee, did or did not agree with his statement, it would seem to have little or no probative value in determining the intent of Congress. Furthermore, S. 3659 did not become law and S. 3845, which eventually became the Civil Aeronautics Act, contained additional language making a clear distinction between the "records" and the "reports" of the Board. See, however, RHYNE, THE CIVIL AERONAUTICS ACT ANNOTATED (1939), p. 157.

[4] U.S. Dt. Ct. for the District of Columbia, Civil Action No. 5151-47, Feb. 3, 1950.

[5] Sec. 701(e) by its own terms does not apply to a proceeding before the Board for the revocation of a safety certificate or to any criminal prosecution. See, however, Sec. 1004(i) of the Act (54 Stat. 1022 (1938), 49 U.S.C. §644 (1946). It was probably not designed to apply to an action by the Administrator for a civil penalty, even though civil penalties are based on the theory that the government is being reimbursed for damages to it.

[6] Unreported opinion in a letter of Sept. 26, 1947 from Judge Leibell to the counsel in the case. (S. D. N. Y., Civil Action No. 40-730.) During the taking of a deposition on October 6, 1947, Judge Leibell qualified his opinion by stating that a judge ruling upon questions put to a witness upon the taking of a deposition takes a broad, liberal view, and if there is any likelihood that the testimony would be admissible at the trial, he overrules the objection to that question, leaving to the trial judge the final determination of the question of admissibility.

United Air Lines,[7] the judge held that testimony taken in a Board inquiry could be used to check the veracity of a witness in answering the interrogatories. In *Tansey v. TWA,* the defendant interjected Sec. 701 (e) as the basis for refusing to produce for the plaintiff's inspection certain documents (including both routine records and a special report prepared by TWA employees as to the cause of the accident) because they had been submitted to the Board for use in an accident investigation. The court rejected this argument and held that the records had to be produced for inspection.

The theory used to support the contention that Sec. 701 (e) prevents the use of all testimony and documents considered by the Board, whether in the hands of the Board or of a private person, is that this section was enacted for the purpose of encouraging full and frank disclosure by witnesses who might otherwise withhold evidence if they knew that it could be used against them in suits for damages. Several court decisions have held that this was the purpose of a similar statute as to railroad accident reports.[8] In the *Gourley* case, the court used this theory as the basis for a refusal to admit testimony previously taken at an Interstate Commerce Commission invetigation.[9] In *Tansey v. TWA,* the judge stated that the reasoning of these cases was not without persuasion but added that "nothing has been found by way of legislative history, or by way of language of either the Act of Congress relating to the reports of the Interstate Commerce Commission or the Act of Congress here under consideration, to compel this view as to the purpose of the statutes."

But even assuming that the railroad reports statute was designed to encourage full and frank disclosure, it is quite possible that Sec. 701 (e)

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[7] Unreported memorandum opinion. (S. D. N. Y., Civil Actions No. 47-501 and No. 48-185, Oct. 21, 1949.) The entire portion dealing with this question is as follows, "The objections to interrogatories based on 49 U.S.C.A. Section 581 cannot be sustained because it does not appear that the content of any report of the Civil Aeronautics Board relating to any accident or the investigation thereof is sought by those interrogatories. It does not even appear that the Board has made any report whatsoever."

[8] Louisville and N. R. R. v. Grant, 234 Ky. 276, 27 S. W. (2d) 980, 984 (1930); Gourley v. Chicago and E. I. Ry., 295 Ill. App. 160, 14 N. E. (2d) 842 (1938).

Sec. 701(e) is apparently based on similar sections in two earlier statutes: 36 Stat. 351 (1910), 45 U.S.C. §41 (1946) (railroad accident reports) and 36 Stat. 916 (1911) as amended, 45 U.S.C. §33 (1946) (railroad boiler accident reports). See also 54 Stat. 927 (1940), 49 U.S.C. §320 (1946) (motor carrier accident reports). The legislative history of the railroad reports statute supports the theory that it was designed to encourage full and frank disclosure. See the statements of Rep. Mann in introducing H.R. 3649 in the House of Representatives. Cong. Rec. 61st Cong., 2d Sess. 155 (1909). See also H.R. Rep. No. 36, 61st Cong., 2d Sess. (1909) and Sen. Rep. No. 240, 61st Cong., 2d Sess. (1910) which state that the I.C.C. was given authority to investigate accidents because the reports of the carriers as to the causes of accidents had been vague and unsatisfactory.

[9] The legislative history of the railroad reports statute is conflicting as to whether it precludes the use in a civil suit of testimony given before the Commission. Rep. Mann thought that it could not be used. Cong. Rec., 61st Cong., 2d Sess. 159 (1909). Rep. Olmsted, another staunch supporter of the bill, stated that such testimony would not be excluded unless it was made a part of the I.C.C. report. P. 156. See also the amendments made by the Senate, Cong. Rec., 61st Cong., 2d Sess. 3459, 5302, 5449, 5514 (1910).

was not enacted for the same purpose. The railroad reports statute requires the railroads to file monthly accident reports with the I.C.C.[10] and provides that such reports, as well as the I.C.C. reports, shall be inadmissible in evidence. Even though the Civil Aeronautics Act authorizes the Board to require the filing of accident reports,[11] it does not specifically provide that such reports shall be inadmissible in actions for damages. If Congress had intended to encourage the disclosure of information by making such reports privileged, it would have been a simple matter to refer to them specifically as it did in the railroad reports statute and the motor carriers reports statute.[12]

There are several reasons why Congress might have wanted to preclude the use of Board reports in actions for damages which would not also require that the privilege be extended to the evidence on which such reports were based. If the findings of the Board as to the probable cause of an accident were admitted in evidence they would probably be conclusive in the minds of most jurors, for the average juror would recognize that the Board is an impartial body which has a great deal of technical knowledge and experience as to aircraft accidents. This would be prejudicial to parties who had not taken part in the Board accident inquiry.[13] It would also be prejudicial to the rights of the litigants since Board accident inquiries follow administrative fact finding procedures which are not designed to provide the safeguards guaranteed by judicial procedures and the formal rules of evidence.[14] Therefore, Congress may have made Board reports inadmissible in evidence so that the Board would not usurp the function of judge and jury to decide civil liabilities.[15]

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[10] 36 Stat. 351 (1910), 45 U.S.C. §38 (1946).

[11] Sec. 702(a)(1), 52 Stat. 1013 (1938), 49 U.S.C. §582 (1946). See Civil Air Regulations, Part 62, 14 Fed. Reg. 4319 (1949).

[12] Congress was quite explicit in providing a privilege in the case of self-incriminating testimony. Sec. 1004(i), 52 Stat. 1022 (1938), 49 U.S.C. §644 (1946). See also Sec. 1104, 52 Stat. 1026 (1938), 49 U.S.C. §674 (1946).

In the *Tansey* case it was argued that Sec. 701(e) did contain explicit language making such evidence privileged because it should be read as "no part of any report of the Board relating to any accident, or no part of the investigation thereof," etc., rather than as "no part of any report of the Board relating to any accident, or *any report of the Board relating to* the investigation thereof." The judge rejected this argument stating, "It is true mention is made in the statute of investigations by the Board, but the language readily may be construed to make privileged only reports of the investigations, not information received in the course of the investigation."

[13] Ritts v. American Overseas Airlines, Inc., *supra* note 6; Tensey v. TWA, *supra* note 4.

[14] Accident inquiries are at all times controlled and conducted by the Board of Inquiry and private attorneys are not allowed to present or cross-examine witnesses (however, the Board of Inquiry will ask any pertinent questions submitted in writing by private persons). The Board does not follow the formal rules of evidence, but frequently admits hearsay and opinion evidence for what they are worth. Such procedures are perfectly fair if the sole purpose of the Board report is to make recommendations for the prevention of similar accidents in the future, but it might be considered unfair to allow a report, based on evidence collected by such procedures, to influence the determination of the civil liabilities of private parties.

[15] During the debates on the railroad reports statute, Rep. Olmsted objected to the use of I.C.C. accident reports in civil suits because "that would substitute the finding of the Interstate Commerce Commission—its declaration of responsibility—for the finding of a court and jury in a damage case." Cong. Rec., 61st Cong., 2d Sess. 156 (1909).

Congress may well have thought that it would be in the interests of aviation safety to have the Board make findings, for the purpose of preventing accidents in the future, based on a lesser amount of evidence than would be necessary to support findings for the purpose of assessing liability for the damages resulting from the accident.[16] Therefore, Congress may have enacted Sec. 701 (e) to give the Board complete freedom to determine the probable cause of an accident without having to consider the huge civil liabilities which might flow from its findings if they were admissible in suits for damages.

If Sec. 701 (e) was enacted so that the Board would not usurp the function of the court and jury, or to guarantee that the Board should be free to determine the probable cause of an accident without considering civil liabilities, the function of the section could be carried out by merely forbidding the use of the Board report in civil suits and it would not be necessary to forbid the use of the evidence on which the Board report was based. However, this raises the puzzling question of why it was deemed necessary to make Board reports inadmissible in evidence when they would seldom, if ever, be admissible anyway under the technical rules of evidence. It can be argued with considerable merit that Sec. 701 (e) is useless if it does not apply to the evidence on which a Board report is based, for the report of the Board itself would be inadmissible anyway.

It is possible that Congress was acting upon the assumption that accident reports would be admissible under the normal rules of evidence.[17] It is also possible that the reports were specifically made inadmissible to make it unmistakably clear that the first part of Sec. 701 (e), which makes accident reports subject to the same provisions for publication as other Board records, was not intended to make accident reports admissible in evidence nor to provide that the findings of fact in such reports should be conclusive if supported by substantial evidence.[18]

Testimony of Board Employees

There seems to be little doubt that the Civil Aeronautics Board can issue regulations forbidding its employees from disclosing aircraft acci-

[16] It is probably more than mere verbiage that Sec. 702(a)(2) of the Act (52 Stat. 1013 (1938), 49 U.S.C. §582 (1946)) does not direct the Board to find the "cause" of accidents, but merely directs it to find the "probable cause" of accidents. This language seems to instruct the Board to make what amounts to a "highly informed guess" as to the cause of an accident, so as to take all possible precautions to prevent the recurrence of similar accidents in the future.

[17] There was a rather confusing discussion of this question during the House debates on the railroad reports statute. Cong. Rec., 61st Cong., 2d Sess. (1909). Rep. Graham (p. 157) and Rep. Martin (p. 159) both stated that an I.C.C. accident report would never be admissible under the technical rules of evidence. Rep. Mann insisted that such reports would be admissible unless rendered inadmissible by statute (pp. 157-158).

[18] See Sec. 205(d), 52 Stat. 984 (1938), 49 U.S.C. §425, and Sec. 1006(e), 52 Stat. 1024 (1938), 49 U.S.C. §646 (1946).

dent information either by producing Board records in court [19] or by testifying in court as to such information.[20] The Board has adopted the rule that employees who are permitted to appear as witnesses in court actions may testify only as to facts actually observed by them in the course of accident investigations and may not give opinion evidence as expert witnesses.[21]

This rule conforms to the provisions of Sec. 701 (e) of the Civil Aeronautics Act. Court decisions interpreting similar provisions as to railroad reports have held that they do not prevent an investigator from testifying as to facts actually observed by him in the course of an accident investigation.[22] There are no judicial decisions on the subject, but a good argument may be made that Sec. 701 (e) precludes opinion testimony by Board investigators. Since the Board members must necessarily rely heavily on its staff's reports in the preparation of accident reports, the reports of Board employees may be considered to be parts of and to collectively form the report of the Board and thus cannot be introduced in evidence because of Sec. 701 (e).[23] Opinion testimony by Board investigators would in effect reveal the contents of their reports, and it has been held that a provision which prohibits the introduction in evidence of certain documents also prohibits testimony in court as to the contents of such documents.[24]

The same reasons which led Congress to prohibit the use of Board reports in actions for damages would lead it to preclude opinion testimony by Board employees. Opinion testimony by a Board employee would be almost as conclusive in the minds of the jury, and therefore almost as likely to usurp the function of the court and jury, as the introduction in evidence of a Board report. Board employees would not be free to determine the probable cause of an accident without considering civil liabilities if they knew that they would later have to testify as to their conclusions in actions for damages. Therefore, it may be argued that the statutory policy set forth in Sec. 701 (e) which precludes the use of a Board report in an action for damages also precludes opinion

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[19] Boske v. Commingore, 177 U.S. 459, 20 Sup. Ct. 701 (1900); Ex parte Sackett, 74 F. (2d) 922 (9th Cir., 1935).

[20] In re Huttman, 70 Fed. 699 (Kans. 1893); In re Lamberton, 124 Fed. 446 (Ark. 1903); In re Weeks, 82 Fed. 729 (Vt. 1897); First National Bank v. Williams, 142 Ore. 648, 20 P. (2d) 222 (1933); Harewood v. McCurty, 22 F. Supp. 572 (Ky. 1938).

[21] The Board has also ruled that its employees may not serve as witnesses for the purpose of testifying to facts observed by them in the course of accident investigations except in those cases in which the Government's investigators are the only source of information available to the party seeking the evidence. This appears to be a reasonable provision since Board investigators are hired for the purpose of investigating accidents and not to testify in private actions. It also appears to be reasonable because the Board makes available to the public all the information in its accident investigation files, except for the opinions of its investigators.

[22] Gerow v. Seaboard Air Line Ry., 188 N. C. 76, 123 S. E. 473 (1924); *cf.* Hines v. Kelley, 252 S. W. 1033 (Tex. Com. App. 1923).

[23] *Cf.* Palmer v. Hoffman, 318 U.S. 109, 115, 63 Sup. Ct. 477 (1942) where the Supreme Court used language which can be interpreted as indicating that a statute prohibiting the use in court of accident reports from a railroad to the I.C.C. also prohibited the use of reports to the railroad from its employees.

[24] In re Huttman, *supra* note 20; In re Lamberton, *supra* note 20.

testimony by Board employees in such actions. However, since there are no judicial decisions it is impossible to make any definite statement as to the applicability of Sec. 701 (e) to the testimony of Board employees. It may never be necessary for a court to decide this question because, as stated before, the Board clearly has the power to regulate testimony by its employees.

Policy Considerations

No analysis of Sec. 701 (e) would be complete without a discussion of the policy considerations, both because it might be considered necessary to enact legislation changing the provisions of the section,[25] and because a court might be influenced by strong policy considerations. The basic consideration is that justice requires all accident information to be available to both the plaintiff and the defendant in a civil suit, unless there is some compelling reason for withholding such information. It is often argued that it is far more important to discover the cause of an accident in order to prevent future accidents than to compensate the victims of past accidents, and that in order to encourage all witnesses to make a full and frank disclosure it is necessary to provide that such information cannot be used in suits for damages. There is considerable merit to this argument, but it must be tempered with other considerations.

In order to guarantee complete disclosure it would probably be necessary to adopt a policy of absolute privilege and complete secrecy as to accident information, for it would often be a comparatively simple matter for a person who had access to the Board's information to subpoena the same records from the defendant or to ask witnesses the same questions in a subsequent suit. Such a degree of secrecy would come close to rendering defendants immune from suit. This would not only be grossly unfair to the victims of aircraft accidents, but would remove one of the strongest incentives to prevent future accidents, *i.e.*, the fear of civil liability as the result of an accident.

Another reason for not overemphasizing the full and frank disclosure argument is that much information will be received even though no privilege is granted. It is unwarranted to assume that all witnesses will withhold or falsify information even though its disclosure might prevent accidents and save lives. In addition to the moral compulsion to give truthful testimony, persons and companies will often reveal dangerous conditions because of their economic stake in preventing accidents which destroy public confidence in aviation. Moreover, representatives of industry and employee groups often participate in Board investigations and are quite anxious to reveal information which will fix the responsibility on some other person or group. And finally, the Board has wide powers to subpoena witnesses and documents if infor-

[25] See, for example, Sec. 705 of H.R. 5561, 81st Cong., 1st Sess., a bill to recreate an independent Air Safety Board. This bill would extend a privilege to all records and testimony used in an accident investigation.

mation is being withheld.[26] These considerations indicate that the situations in which vital information could and would be withheld are not likely to be as numerous as some people have contended. However, there will still be some situations where a person would disclose more information if he knew that it could not be used against him.

The basic problem is to develop a policy which will achieve a proper balance between securing information and compensating the victims of accidents. The formula for reaching this solution should be based upon two concepts: (1) Aircraft accidents are investigated solely for the purpose of preventing similar accidents in the future and not to help private persons recover damages. (2) Nevertheless, a plaintiff faces almost insuperable obstacles in getting evidence as to an airplane crash, and accident investigation information should not be handled so as to add to these difficulties.

The following recommendations are made on the basis of the above considerations:

(1) The Board should make available to the public all factual information gathered by it in an investigation because its procedures often deprive certain persons of sources of information. The Board often prevents witnesses from gaining information by roping off the scene of an accident and by shipping certain aircraft parts to a laboratory for tests. Furthermore, representatives of industry and employee groups are often permitted to participate in the investigation and thus have access to much information, while the representatives of the victims seldom participate in the investigation. These procedures are absolutely necessary in order to determine the probable cause of an accident, but they would be unfair if the Board did not make available to the public the information gathered in the investigation.

(2) All records and reports submitted to the Board by private persons should be available for use in actions for damages. If a privilege were extended to such documents, it would be virtually impossible for a plaintiff to get access to any documentary evidence concerning an accident. Such documents should be available even from the Board's files, for a rule to the contrary would enable persons to suppress evidence by submitting every document to the Board, where it could not be reached by an opposing party.

(3) Witnesses should be encouraged to disclose information in Board inquiries by providing that their testimony cannot be used in actions for damages.[27] This rule would not impose any additional burden on plaintiffs in civil actions because the testimony obviously would not have been available if it had not been for the Board inquiry. If a witness is completely honest he will tell the truth at both the Board inquiry and the action for damages. If he is not completely honest, there is nothing to be gained by encouraging him to withhold evidence or commit perjury in the Board inquiry as well as in the civil action. However, it

[26] Secs. 702(c), 902(g) and 1004 of the Act; 52 Stat. 1014, 1016, 1021 (1938); 49 U.S.C. §§582, 622, 644 (1946).

[27] This rule should apply only to the use of such testimony in actions for damages. The testimony should be admissible in actions to revoke or suspend a safety certificate because of the great public interest in preventing incompetent or reckless persons from endangering lives and property.

should be noted that even extending a privilege to such testimony may not guarantee a full and frank disclosure, for a witness will probably realize that he may be asked the same questions in an action for damages and that he will be subject to a perjury charge if he does not answer them truthfully.

These recommendations would probably require legislative action, since there appears to be no way that Sec. 701 (e) could be interpreted to extend a privilege to testimony but not to documents.

Conclusions

The few judicial decisions existing to date indicate that Sec. 701 (e) does not exclude from actions for damages the documents and testimony on which the Board's reports are based. This conclusion is amply supported by the language and the probable purposes of Sec. 701 (e).

It might be advisable to amend the section so as to prevent the use of testimony from a Board inquiry in suits for damages. However, the Board should continue to make available to the public all factual information gathered in an accident investigation. All documents used in Board inquiries should be admissible in actions for damages, whether such documents are in the files of the Board or in the hands of private persons.

The Board has the power to issue regulations governing the testimony of its employees in civil actions. The Board has determined that its employees may testify as to facts actually observed by them when such facts cannot be readily obtained elsewhere, but may not give opinion testimony as expert witnesses. A reasonable argument may be made that Sec. 701 (e) precludes opinion testimony by Board employees, but there is no court opinion on the question.