1976

National Transportation Safety Board - A Critical Review of Information Availability

Robert K. Pezold

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

Recommended Citation


https://scholar.smu.edu/jalc/vol42/iss2/4

This Article 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.
SINCE its inception in 1966, the National Transportation Safety Board has had primary responsibility for the investigation of all aircraft accidents occurring within the territorial limits of the United States. To the litigants in a civil tort litigation arising from an accident, one of the most crucial functions of the NTSB is the investigation and determination of the "probable cause" of each accident at a public hearing, since this greatly simplifies their discovery procedures. Because of restrictions placed on the availability of information concerning an accident, and the failure to make provision for participation by possible future plaintiffs in any phase of the investigation, however, the course and conduct of the public hearing assume an importance to the future litigants which is neither recognized nor provided for by NTSB. It is the purpose of this article to review the effects of the restrictions on access to information, the continued viability of the policy justifications for the limited participation of some parties, and to propose

* Mr. Pezold received his J.D. degree from the University of Tulsa Law School in 1974. He is presently Trial and Defense Counsel, JAGC, USN.


3 49 C.F.R. § 400.45 (1967) "Probable cause" in the sense used herein is meant to mean the "probable cause in fact" of the accident, as distinguished from the probable cause in the sense used in the criminal law.

4 Investigation of non-fatal accidents involving non-air carrier aircraft weighing less than 12,500 lbs. gross weight have been delegated to the Federal Aviation Administration.


6 Id. § 431.6.
alternative courses which may better fulfill the unique requirements of all concerned.

HISTORY

What has become the NTSB had its inception in the Civil Aeronautics Act of 1938, which, among other things, created the Air Safety Board, the predecessor of NTSB. The Air Safety Board was a subordinate branch of the Civil Aeronautics Authority (CAA), with the functional responsibility of air accident investigation. The Air Safety Board had the power to investigate accidents, but no power to institute remedial measures. It could only make recommendations to the five-member Authority (CAA)....

The subordinate nature of the Air Safety Board vis-a-vis the CAA, when considered in light of the independence most commentators assumed necessary for a satisfactory air accident investigation program, created a conflict of interest which was early recognized by the Congress. The response was the Reorganization Plan of 1940, which transferred the investigative, economic regulatory, and rulemaking functions to the newly created Civil Aeronautics Board. The core "conflict of interest," however, remained, because the investigatory function was not yet independent.

The phenomenal growth of civil aviation in the decade following the Second World War made it evident to the Congress that new legislation was required to deal with problems then facing the industry. Congress responded with the Federal Aviation Act of 1958. The primary purpose of the Act was to create an independent agency called the Federal Aviation Administration which

---

8 Hearings on S. 3010 Before the Subcommittee of the Senate Committee on Government Operations, 89th Cong., 2d Sess. at 197 (1966) [hereinafter Senate Hearings].
9 Id. at 198.
11 As a result of this reorganization, a Cabinet-level division of the Department of Commerce, the Civil Aeronautics Authority, was to administer civil aviation.
13 Hereinafter FAA.
would assume several of the CAB's responsibilities. The CAB, however, was to continue as an independent agency, with responsibility for economic regulation of the industry as well as aviation safety. The air safety function was expanded by the Act to include exclusive authority to investigate aviation accidents and to determine the probable cause. It should further be noted that this responsibility now lay with the Board itself, rather than the Bureau of Safety within the CAB.

With few exceptions the separation of functions between the FAA and the CAB proved to be quite successful. So successful, in fact, that the decision of the Administration, in the Department of Transportation Act, to spin off the safety function of the CAB and attach it functionally to the Secretary of Transportation, received much criticism within the industry. This criticism, however, was countered by the assertions that an independent safety investigation arm could function well in either environment and provide a substantial benefit since the techniques utilized in air accident investigation would be readily applicable to investigation of accidents occurring in other modes of transportation. As a

---

14 Comment, 28 U. KAN. CITY L. REV. 35 (1960) states that the FAA was to have the following authority:

(1) establish, maintain and operate air navigation facilities, and provide for the consolidation of research and development of such facilities,
(2) develop and operate a common system of air traffic control and navigation for the safe and efficient use of the airspace by both civil and military aircraft,
(3) promulgate, administer and enforce safety regulations for the manufacture, operation and flight of aircraft, and
(4) provide for the promotion, encouragement, and development of civil aeronautics both in the United States and abroad.

16 See generally, Analysis.
18 Hearings on H.R. 13200 Before the Subcommittee of the House Committee on Government Operations, 89th Cong., 2d Sess. at 213 et seq. [hereinafter Hearings].
19 Statement of William F. McKee, then Administrator of the FAA:
As we understand it, regardless of where the [aircraft accident investigation function] was in the Department of Commerce, it will be done separately and independently from the FAA and we subscribe to that principle.
Hearings 138.
20 Senate Hearings at 184, 741.
consequence, the air accident investigative function came to reside where it remains today, in the NTSB, an independent repository specifically designed to contain that function.

**FUNCTIONING OF THE NTSB**

The functions of the NTSB germane to this article are: to promote safety in transportation; to determine the probable cause of transportation accidents; to report the facts, conditions and circumstances relating to such accidents; to make regulations concerning the prevention of such accidents; to make recommendations concerning rules, regulations and procedures for the conduct of such investigations; to make “such (accident) reports public as may be deemed by it to be in the public interest...” To carry out its function of determining probable cause, the NTSB has been granted statutory powers of an unusual scope. These powers include, but are not limited to: examining and testing of entire aircraft as well as their component systems; having sole access to the remains of aircraft accidents; holding of hearings on accidents and other topics; and issuance of subpoenas.

To afford the reader a more complete overview of the interactions of the functions of the NTSB with regard to an air carrier accident, the following scenario is offered. On a clear, cold January evening a Boeing 747 vanishes from the radar scope of the Washington Air Traffic Control Center during an en route descent to Dulles International Airport. Radio contact is lost simultaneously. Within an hour the Virginia State Highway Patrol confirms reports that an explosion on a farm near Manassas was caused by the 747. In addition to the crew of the aircraft, 273 passengers are dead.

Within an hour the NTSB, which will control the accident in-

---

21 *Id.* at 270.
23 49 C.F.R. § 400.3 (1967); Department of Transportation Act, § 5, 80 Stat. 935, 936, 49 U.S.C. § 1654.
25 An enroute descent is one made largely at the pilot's discretion, after receiving ATC approval, and usually made along the normal route of the flight. It is a much-used procedure that simplifies handling and reduces time delays incident to terminal arrival.
through its Bureau of Aviation Safety, has been in-
formed of the accident, and has commenced the “investigative”
phase. This first part of a three-phase process will be followed by
the “public hearing” phase and the “analysis” phase, which will be
dealt with in order. A team consisting of a member of the Board,
the investigator in charge, technical specialists, NTSB accident
investigators, and a public affairs officer is dispatched to the scene
of the accident. Upon arrival, their first task is to isolate the
wreckage of the aircraft.” As soon thereafter as time allows the
investigator-in-charge will form committees and designate parties
to the investigation.” Other than the FAA, whose presence is
mandatory, the parties to a field investigation normally include
the Airline Pilots Association, the airline, the manufacturer, and
agencies “who can provide suitably qualified personnel who will
actively assist in the field investigation.” Conspicuous by their
absence from the group of “interested parties” to the field investiga-
tion are any representatives of the passengers of that aircraft be-
cause of the operation of section 431.6(A) of Title 14 of the Code
of Federal Regulations, which states in pertinent part: “No party
to the field investigation . . . shall be represented by any person
who also represents claimants or insurers.” One might logically
inquire at this juncture about the policy reasons by which the
representatives of a possibly negligent manufacturer, or pilot, or
air controller are made parties to an investigation, and thereby
granted a clear and rather obvious opportunity to further and pro-
tect their own interests, while those seeking to protect the inter-
ests of the most seriously wronged are explicitly excluded.

By far the largest part of the actual investigative work is per-
formed by the various committees consisting of an NTSB specialist,
as chairman, and representatives of the particular party in interest.
The function of each committee is to determine the “facts, condi-
tions and circumstances” relating to its area of investigation which
may have a bearing on the probable cause of the accident. In the

---

56 49 C.F.R. § 400.25 (1967).
57 Id. § 430.10.
59 Id. § 431.13.
60 Id. § 431.6(b).
61 Id. § 431.13(a).
62 Id. § 431.5.
absence of specific information pointing at the outset to some particular cause of the accident, the following committees may be established:

1. Debriefing of Witnesses—This committee has the responsibility for locating, debriefing and obtaining statements from any individuals having witnessed personally the accident or any of its surrounding circumstances. If available, particularly if from knowledgeable sources such as other pilots, this information is quite valuable: firstly, because it may significantly narrow the scope of the investigation; and secondly, because the external frame of reference may provide information not available even to surviving occupants of the aircraft. In the more probable event that the available witnesses are "technologically unsophisticated," special attention and care should be given to the formation of the questions put to these witnesses to insure that no preconception or bias is introduced.

2. Examination of Flight Recorder Data—Many aircraft presently carry a flight recorder, which makes a chronological record of the readings of certain "essential" instruments, such as altimeter, air speed indicator, vertical acceleration, and heading. This committee is responsible for reconstructing the flight from this information and for analysing the information contained in the recorder. Though research is being conducted to further insure the survivability of this important data, particularly violent accidents or resulting fires frequently destroy the instrument or render it useless for later evaluation.

3. Cockpit Voice Recorder—This device is operationally similar to the flight recorder, with the obvious distinction that the information recorded is the totality of the communications taking place among crewmembers and between crewmembers and ground personnel. This committee has the responsibility for preparing a transcript of this tape and an analysis of its contents. It should be pointed out that this device is subject to the same survivability problems encountered in the use of the flight recorder.

4. Air Traffic Control Records—All air carrier flights must be made on an IFR flight plan. One of the prerequisites for this type

---

23 Id. § 121.343(a)(1).
24 Instruments Flight Rules.
of flight is the capability for continuous two-way radio communications between the aircraft and Air Traffic Control personnel on the ground, who continuously monitor the progress of the flight by radar and provide instructions for the proper conduct of the flight. Just as the cockpit voice recorder records conversations in the aircraft, a similar recorder on the ground chronologically records all communications between the aircraft and Air Traffic Control personnel. It is the function of this committee to provide transcripts and analysis of relevant communications, to analyze both the activities and the procedures used by Air Traffic Control personnel involved, and to determine the adequacy of all navigational and radar facilities involved.

5. Meteorological Records—This committee is responsible for reviewing the general meteorological environment of the entire route of flight, whether the information made available to the aircrew was factually correct, and whether, in analyzing synoptic conditions, the forecaster provided the aircrew with reasonably accurate information.

6. Human Factors—Because of the complexity of modern aviation equipment, the speeds at which it operates, and the fact that a deteriorating situation cannot be remedied simply by stopping, there exists a reasonable probability that some human failure occurred at some point in the chain of events leading to an accident. This is not to infer that these "human failures," if they in fact occurred, were the primary cause of the accident. Today's flight crews are far too competent for any failure on their behalf to be automatically assumed. Rather, because of the stress that a situation will generate, procedurally perfect responses by all individuals involved cannot be realistically expected. This committee has the responsibility for determining whether any such errors did occur, and if so, whether they contributed to the accident. In making this determination, attention must be given to the medical background and psychological data available on all personnel, aircrew or otherwise, who were involved with the accident. This committee may also be asked to evaluate the accident concerning possibilities for rescue, evacuation, and survival.

7. Operations—This committee is responsible for analyzing the operational conduct of the flight, which is primarily an analysis
of the preflight planning done by the aircrew. Also included are aircrew scheduling by the carrier and equipment performance data.

8. Maintenance History and Records—The function of this committee is to review the maintenance history of the aircraft both as a whole and as compared with that of the same type aircraft. Maintenance information must be kept on all aircraft, and the specific requirements for carrier aircraft are particularly stringent and complex. This investigation may, and frequently does, go back as far as the manufacturer's developmental history of the aircraft in a search for recurrent problems or trends, either with that type aircraft or with this particular aircraft.

9. Structures—This committee is responsible for an analysis of the structural breakdown of the aircraft, and, from an investigation of as much of the structure as is available, it is to ascertain whether structural failure was a possible contributing factor. Models of the aircraft can be utilized in addition to tests performed on the same type aircraft. An attempt is made to provide an accurate break-up pattern through an analysis of wreckage distribution.

10. Aircraft Systems—The function of this committee is to analyze the evidence relating to each aircraft subsystem, with the exception of structures and powerplants. This area of responsibility is quite broad, covering all the communications and navigation systems, life support systems, flight control systems, and hydraulic and pneumatic systems.

11. Powerplants—The engines of an aircraft, while actually a subsystem within the same broad category as those in section 10 above, are so inherently important to the safe operation of any aircraft that they receive special treatment. This committee is to analyze the remains to determine whether the engine(s) were operating normally at the time of the accident. This committee may also be called upon, at the instance of one or more of the other committees, to determine at what power setting the engines were operating at the time of the accident.5

Upon conclusion of the investigation, a preliminary report is written. These preliminary reports are then made available to each

5 For a complete discussion of these committees, see generally Levy, The Role of Federal Investigation in an Aircraft Accident Case, 18 PRAC. LAW. 65 (March 1972) [hereinafter Levy].
committee member for comments, additions, and corrections. Each committee then submits a final written report to the investigator-in-charge. 30

Following the field investigation phase of the accident, a public hearing "may" be held by the Board. This determination is entirely within the discretion of the Board, limited only by what the Board "deem(s) necessary in the public interest." 31 The purpose of the public hearing, if held, is "[to create] a public record of the facts, conditions, and circumstances relating to the accident." 32 The hearing was conceived to be primarily a "factfinding proceeding," non-adjudicatory in nature, and thus not an adversary proceeding in the generally accepted sense of the term.

The Board of Inquiry, which conducts the public hearing, consists of a member of the NTSB as Chairman, the Hearing Officer, the Director of the Bureau of Aviation Safety and the General Counsel or their designees. It is the stated purpose of this Board, in conducting the hearings, to determine all the facts bearing on probable cause of the accident and from which future corrective action may be formulated. 33 The powers of the Board of Inquiry which are important for the purposes of this article are to designate parties to the hearing, to terminate the hearing apparently at will, to pass on the admissability of evidence, to determine generally what course the hearing will take, 34 to issue subpoenas, and to designate members of the technical panel. Here again, only those designated as parties to the hearing may participate in the questioning of witnesses. The parties selected need not necessarily be those same parties who participated in the field investigation. The only criteria stated for selection as a party are:

[T]hose persons, Government agencies, companies and associations who participated in the field investigation or whose special knowledge and aeronautical skills will contribute to the development of pertinent evidence. 35

30 49 C.F.R. § 431.10 (1971).
31 Id. § 431.20.
32 Id. § 431.21.
33 Id. § 431.20.
34 Id. § 431.22.
35 Id. § 431.23.
36 Id. § 431.27(a).
Conspicuous once more by its absence is any allowance for representation by those individuals injured or killed in the accident.

The power to terminate the hearing at will is important because the objectives of the Board of Inquiry may well differ from the objectives of those injured. The Board of Inquiry is interested in determining the primary cause of the accident and thus may not fully develop the responsibility for that cause. Consequently, the hearing could well be terminated prior to the time when any evidence bearing on liability had been presented and properly made a part of the record.

The power to determine the admissibility of evidence, unhindered by any of the rules of evidence so familiar to an attorney is, simply put, the power to determine not only the outcome of the hearing, but also, to a large extent, the outcome of the entire investigation. A power equally as pervasive as that dealing with evidence is the power to regulate the course of the hearing. More precisely, this is the power to determine not only the particular sub-area upon which witnesses will be allowed to testify, but the scope and depth of that testimony. Thus, testimony concerning an area of potential interest to future litigants may be preemptively foreclosed with neither their knowledge nor consent.

The power to issue subpoenas is vested in the Hearing Officer and extends to subpoenas duces tecum. The power to designate the Technical Panel resides in the Director of the Bureau of Aviation Safety. The Technical Panel is composed primarily of NTSB technical personnel who served as committee chairmen during the field investigation phase. Though not required, the Board ordinarily gives personal notice of the pendency of the hearing to all known interested persons and also publicizes the hearing by a press release to aviation trade journals and to local newspapers near the scene of the accident.

A pre-hearing conference is then held, at which the Board of Inquiry and the parties to the hearing, after having been provided with copies of the proposed exhibits and witnesses, decide upon the witnesses to be heard and the area and scope of the examina-

43 Id. §§ 431.29(b), 431.30.
44 Id. § 431.26.
tion of each. There is no provision making copies of the pro-
posed exhibits available to future litigants. The basic injustice of
this arrangement is very aptly expressed by the following:

The potential defendants are participants, are given free copies
of the exhibits, and help determine the course of the hearing in
advance of the hearing; the passengers and their representatives are
barred from even attending the pre-hearing conference.

Even though ample and concise provision is made whereby parties
are to receive copies of the exhibits prior to the hearing, copies
of these same exhibits are unavailable to the public until concur-
rently introduced at the hearing. Bearing in mind the highly tech-
nical nature of these documents, it is probable that passengers' rep-
resentatives will be unable to comprehend adequately the tes-
timony, thus increasing the difficulties they face in developing
usable and admissible evidence.

The hearing itself is typical of those designed and intended to
gather facts. The witnesses are questioned by the technical panel
before the remaining parties to the hearing have an opportunity
to do so. As a result of the pre-hearing conference, the question-
ning and introduction of exhibits should proceed along a well-prog-
grammed route, in spite of the fact that witnesses may include anyone
even remotely concerned with the accident. The only criterion is
that each witness have information at his disposal bearing on the
probable cause of the accident and not otherwise available to the
Board of Inquiry. The length of the hearing will depend primarily
upon the conclusiveness of the field investigation. If the cause of
the accident was easily determinable and conflicting evidence did
not render the investigation unusually complex and involved, the
hearing itself will be short and uninvolved. If, however, there is
no obvious component failure or other clear cause, the hearing
will undoubtedly be protracted, highly technical and, in view of
its purposes, of questionable usefulness. Its usefulness is suspect
under such circumstances since the same parties who participate
in the public hearing generally were also the major participants in
the field investigation; thus, if conclusive results were available,
they would certainly have been included in the committee's report

43 Id. § 431.28.
44 Levy at 71.
and would not have required development at the public hearing. Finally, a complete transcript of the hearing is available," as are the exhibits, which can be certified as official records for use in any subsequent litigation.

The final phase of an aircraft accident investigation, the "analysis phase," essentially begins at the conclusion of the public hearing. At this point, the Board invites interested persons, non-parties included, to "submit recommendations as to the proper conclusions to be drawn from the testimony and exhibits submitted at the hearing." The Board then considers all the information at its disposal, composes a draft of the final report, and forwards this draft to the Bureau of Aviation Safety for comment and revision, and to the Director for review. Finally, it is submitted to the NTSB Board members for their approval.

The final Board report, like the decision to hold public hearings, is a matter entirely within the discretion of the Board, which "[may] issue a detailed narrative accident report in connection with the inquiry into those aircraft accidents which the Board determines to warrant such a report." (Emphasis added). If a final report is issued, it will include the facts, conditions and circumstances leading up to the accident which bear on the determination of the probable cause of the accident, recommendations for future operational changes, and a determination of the probable cause of the accident.

**THE POLICY QUESTION**

It is axiomatic that the NTSB policy, indeed its reason for existence, is to minimize the occurrence of aircraft accidents. In effectuating this policy, a choice must necessarily be made between the conflicting interests of two groups, those of the flying public-at-large in preventing the occurrence of future accidents, and those of the individuals killed or injured as a result of the accident in having access to information required to fix liability. Implicit throughout the sections of the Code of Federal Regulations dealing with the NTSB are the results of that choice: to protect at

47 49 C.F.R. § 831.32 (1975).
48 Id. § 831.31.
49 Id. § 831.35.
practically all costs the interests of the public-at-large. This is commendable at first glance. Closer examination, however, reveals serious conceptual shortcomings.

Firstly, there is little evidence that the choice was made with the interests of the public-at-large in mind. In fact, aside from their own rhetoric, there is little to indicate that the choice did not fall to the industry. It is certainly not clear what the concern for the public was prior in time to the choice of investigatory method. If the NTSB had indeed given priority to the public interest, then they should have proceeded inductively to arrive at a method of investigation. Rather than following this procedure, it is reasonably clear even to the casual observer that the NTSB is simply justifying a method which has been passed down to it by its predecessors.

Secondly, if this choice of investigative method was in fact made by NTSB, then NTSB appears further to have assumed that the public-at-large would not be served by permitting plaintiff's participation in an investigatory proceeding. This is a highly questionable assumption, particularly because numerous other groups, each with its own interest to protect, play the major roles in accident investigation. These groups include, but are not limited to, pilot's interest groups, equipment manufacturers, and those government agencies servicing the industry. Thus, it further appears that the NTSB has assumed that these interest groups agree that the interest of the public-at-large is paramount, exceeding even their own, and that these groups will actively assist the NTSB in furthering and protecting the interests of the public-at-large. These assumptions are questionable at best. The NTSB, however, goes even further down this questionable path by assuming that it will be in its own best interests to protect these other parties from adverse publicity, because, if so protected, they will be more candid and helpful during the investigatory stage. To implement this assumption, the NTSB attempts to make privileged any testimony these parties may give.

It should now be apparent that the major fault of the present investigatory policy lies not in the policy choice itself, but rather

---

80 See generally, M. Mintz & J. Cohen, America, Inc. (1970); R. Heilbroner, In the Name of Profit (1972).
82 Id. §§ 431.7, 831.15.
in its implementation. To this end, it should properly be asked: is it fair and just that one interested party should be systematically excluded, while all the others are active participants?

Keeping firmly in mind the preferential treatment accorded the industry, which has been outlined above, consideration should be given to two questions: (1) in light of past corporate action adverse to the public interest, is it reasonable to predicate the success of such an important function on what in many instances is essentially corporate goodwill adverse to its own interests?; and (2) even if the corporations or agencies historically involved have proved worthy of this trust, what ensures their future performance?

THE CRITIQUE

The failure to implement an investigatory procedure which will protect the vital interests of all parties is due largely to a heretofore unrecognized inconsistency between the procedures of the NTSB and its historical foundation. The history of the NTSB indicates clearly that, if there is one thing generally thought of as essential to the proper functioning of an air accident investigative branch, it is the total independence of that branch. This, in turn, can be achieved only by its divorce from any possible source of coercion. In fact, it was recognized as early as 1938 that it would be unrealistic to expect an agency to indulge in self-criticism and find fault with its own performance during the investigation of an air accident. This position has also been taken in the following pointed statement by Frederick B. Lee of the National Aeronautic Pilots Association:

We do not feel it is proper that any Board, no matter what mechanism was used to insure its 'independence,' could ever be wholly objective in an accident investigation in which their department or agency was involved.

Procedures indicate, however, that the supposed independence of

53 See generally, the sources at note 50 supra.
55 Senate Hearings at 1971.
56 Id. at 211.
the NTSB is in fact an illusion; one which pays only "lip service" to the concept of independence.

Is a higher standard of objectivity to be expected of a manufacturer than of a government agency? Since by the weight of public opinion, an agency could not be trusted to judge itself, it appears incongruous that the NTSB has put manufacturers and other parties in interest in exactly that position. Thus, it is difficult to conceive of a policy more internally inconsistent than this major agency policy, which is specifically grounded on the questionable foundation that the assumed goodwill and fair play of major corporations will allow them to function objectively in areas of obvious self-interest. It is a matter of some concern that an inconsistency which casts such a long shadow over the entire arena of aircraft accident investigation should have gone unrecognized for so long. Why did not the Board itself, when promulgating its regulations, look behind its procedures to see that its actions were accomplishing what was most feared in the Senate hearings: an absolute conflict of interest within the framework of the investigating unit. One commentator early remarked

the fact is that there are adverse interests represented on the investigation committees and participating in the investigation, whose opposing evaluation and conclusions may be sharp in their differences and important, depending upon the circumstances of the accident.57

There is the possibility that this inclusion of adverse parties was not an oversight, but rather was the manifestation of a policy decision that the interests of those killed or injured were so "identical" or closely aligned with those of the corporate/agency parties as to assure adequate protection of their interests during all phases of the investigation. When, however, one considers that the corporate/agency parties are interested in the investigation only to the extent of proving themselves free from liability,58 the trace of logic responsible for the present set of circumstances becomes more remote.

57 Whitehead, Civil Aeronautics Board Accident Investigation Hearings—Boon or Bane, 28 INSURANCE COUNSEL JOURNAL 258 (April 1961).
58 "Despite the Board's instructions that parties are not to divulge information obtained by them during the investigation it is not unusual to see one of the parties issuing public statements in an effort to lessen the public criticism directed at it." Levy at 70.
Additionally, the courts have found the regulations of the NTSB to be unduly restrictive in some instances of disclosure of accident investigation information. Section 435.4 of the Regulations, entitled "Disclosure of Information by Testimony in Suits or Actions for Damages Arising Out of Aircraft Accidents," deals directly with this issue, and states in pertinent part: "Section 701(e) of the Federal Aviation Act (49 U.S.C. 1441[e]) precludes the use of the Board's reports in any suit or action for damages arising out of an accident." (Emphasis added). However, in *Lobel v. American Airlines, Inc.*, the court, in allowing the admission of the report testimony of the manufacturer's investigator, who had been a member of the investigative team, limited the scope and applicability of Section 1441(e) to those reports containing opinions or conclusions about possible causes of the accident. The court further stated that the report in question consisted wholly of the investigator's personal observations. . . . There were in the report no opinions or conclusions about possible causes of the accident or defendant's negligence; there were no findings based on interviews or anything but personal observations.

Effectively, as a consequence of this decision, the only report remaining within the ambit of Section 1441(e) is the final Board report, in which conclusions are drawn and the determination of probable cause made. This interpretation of Section 1441(e) was relied upon and extended somewhat by the court in *Berguido v. Eastern Airlines, Inc.* In *Berguido* the defendant attempted to exclude report testimony on the basis that *Lobel* had established a rule which prohibited an investigator from testifying to anything except his personal observations. The court, in disposing of this argument, stated that "[T]he primary thrust of (section 1441(e))

---

59 49 C.F.R. § 835.3(g) (1975).
60 49 U.S.C. § 1441(e) (1971) states: "No part of any report . . . of the National Transportation Safety Board relating to any accident thereof, shall be admitted as evidence or used in any suit or action for damages growing out of the matter mentioned in such report . . . ."
62 *Id.* at 220.
64 *Berguido v. Eastern Airlines, Inc.*, 317 F.2d 628 (3rd Cir. 1963).
is to exclude CAB reports which express agency views as to the probable cause of the accident. Of further interest in Berguido was the court's analysis of the policy basis for section 1441(e), which the court found to be a compromise between the interests of those who would adopt a policy of absolute privilege (with regard to air accident investigation testimony) in order to insure 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.

A more concise statement of the divergent interests with which this single policy must cope would be difficult to construct.

The Regulations also make provision for regulating the oral testimony of both present and former employees as opposed to investigators. Section 435.4 generally prohibits, subject to limited exceptions, the testimony of both employees and former employees relating to information obtained in the course of their official duties. When, however, an appropriate showing has been made that facts cannot otherwise be obtained, employees may testify only as to facts they actually observed in the course of the accident investigation. In addition, employees are allowed to utilize their factual reports, but only to refresh their memories. Testimony by deposition and written interrogatories is permitted. Finally, when an employee has been subpoenaed, the General Counsel, after notification by the Director, will arrange with the court to excuse the employee from testifying.

In Falk v. United States the court held that, contrary to the provisions of 14 C.F.R. section 435.4, noted above, the oral opinion of an investigator could and would be compelled. The court reasoned that "in light of recent federal legislation which provides

---

66 Id. at 632.
67 Id. at 631.
69 Again, the reference is to present and former employees.
70 49 C.F.R. § 835.3(b) (1975).
71 Id. § 835.4(a).
72 Id. § 835.5(a).
73 Id. § 853.8.
that such reports are public documents, and, therefore, are open to inspection by all litigants . . . ,"74 there is no valid reason to hold that such oral opinion, otherwise available, should here be privileged.75 The "recent federal legislation" referred to by the court in *Falk*, is 49 U.S.C. section 1654(e), which provides: "Except as otherwise provided by statute, the Board shall make public all reports, orders, decisions, rules and regulations issued pursuant to subsections (b) (1) and (b) (2) of this section. . . ." Section 1654(b) (1) provides:

There are hereby transferred to, and it shall be the duty of the Board to exercise, the functions, powers and duties transferred to the Secretary by section 1655 of this title and section 8 of this Act with regard to—

(1) determining the cause or probable cause of transportation accidents and reporting the facts, conditions and circumstances relating to such accidents.76

It should be noted that while such legislation renders the desired information more readily available, earlier courts had effected much the same result without the benefit of such legislation. Two such cases are *Ritts v. American Overseas Airlines, Inc.*77 and *Universal Airline, Inc. v. Eastern Air Lines, Inc.*78 In *Ritts*, the court, in construing section 701(e) of the Civil Aeronautics Act,79 stated that the section did not prohibit "the use of the testimony of a witness examined by the Board in the course of the investigation."80 The same result was reached in *Universal Airlines*, primarily

---

74 Id. at 114.
79 Civil Aeronautics Act of 1938, ch. 601, § 701(e), 52 Stat. 973, states, "The records and reports of the (Air Safety) 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."
80 97 F. Supp. at 458.
through a reliance on Ritts. The court stated that:

[We] may add that in any case where the CAB investigator is the sole source of evidence reasonably available to the parties, . . . we deem it incumbent upon the Civil Aeronautics Authority to make his testimony available by deposition or in person; if the deposition is not forthcoming or is insufficient, the Court has the power to order his personal attendance.\(^81\)

The court in *Universal Airlines*, however, did foreclose the question of whether the investigators could be compelled "to produce any of the Board's reports, orders, or private files or to testify as to the contents of such private papers,\(^82\)" in favor of the Board. This decision had the effect of limiting testimony to personal knowledge, recollections, and records. The rule changes somewhat where the government is a party to the resulting litigation. Courts have ruled, in *Evans v. United States*\(^83\) and in *Oresmer v. United States*,\(^84\) that non-privileged records of an investigation; those containing no conclusions as to probable cause or future recommendations, are discoverable as against any party.

The effect of the Freedom of Information Act\(^85\) on the question of information availability from NTSB has yet to be fully comprehended.\(^86\) The Regulations specifically make the FIA applicable to Part 401, dealing with information availability,\(^87\) while at the same time specifically making the FIA inapplicable to the public hearing.\(^88\) This would seem to indicate at least a partial acceptance by the NTSB of prior court decisions limiting the authority of the NTSB to be the final arbiter of when and under what circumstances certain information should be made public. The Board, however, if only by the weight of its own regulations, is still vested with

\(^{81}\) 188 F.2d at 999.

\(^{82}\) *Id.* at 1000.


\(^{86}\) For a complete discussion of the applicability of the FIA to the records and testimony of NTSB, see generally, Florsheim, *Administrative Law—Aircraft Accident Investigation Records—Freedom of Information Act*, 33 J. AIR L. & COM. 490 (1967) [hereinafter Florsheim].

\(^{87}\) 14 C.F.R. § 401.1(a) (1975).

\(^{88}\) *Id.* § 431.20.
considerable discretion in a section to which the courts have not yet spoken:

Section 1504 of Title 49, United States Code, authorizes the Board to order certain information withheld from public disclosure when in its own judgment a disclosure of such information would adversely affect the interests of a person and is not required in the interest of the public. All information ordered by the Board to be held confidential under this section will not be disclosed to the public; and, in addition, the Board has determined that it will not be in the interest of the public to disclose. . . . (iii) any cockpit voice recorder tape or transcription thereof, in the custody of the Board, except for a transcription of those communications determined by the Board to be pertinent and relevant to the accident, and which will be placed in the Board’s public docket of such accident.80 (Emphasis added).

Numerous other categories of “Information Exempted From Disclosure”80 exist, but none allow for the broad exercise of discretion provided for in section 1504.

Provision is, however, made within the Regulations whereby any decision by the Chairman not to make requested information available “is considered a refusal by the Board for the purposes of Section 3(c) of the Administrative Procedure Act.”81 Section 3(c) of the APA is the FIA, which in turn makes available a more than adequate procedure for judicial review of such a refusal, in that “the disclosure action authorized will take precedence over all other cases on the Court’s docket, unless the Court deems other cases of greater importance.”82 Thus, even though the grant of discretion is broad, perhaps unnecessarily so, there is at least an adequate remedy for the abuse of that discretion.

It further appears that, even though the FIA provides “[e]ach agency . . . shall make available for public inspection and copying (A) final opinions, including concurring and dissenting opinions . . . ,”83 at least the final report of the NTSB will remain privileged. This results because section 4(b)(3)84 of the FIA provides

80 Id. § 401.20(2).
81 Id. Part 401, Subpart D.
82 Id. Part 401, Subpart E. § 401.25(e).
83 Florsheim at 491.
84 FIA § 2(2)(A).
85 Id. § 4(b)(3).
that the FIA is not applicable to records and other information specifically made privileged by other statutes. And, since in Ritts, Universal Airline, Lobel and Berguido the courts have construed section 701(e) to apply to final reports, it is reasonable to assume that any court dealing with precisely this issue would find section 101(e) within the ambit of section 4(b)(3) of the FIA.

As a consequence, the FIA has yet to accomplish substantive changes when applied to the NTSB. Its chief credits to date have been to make many of the investigative records available as a matter of right, and to provide for effective and speedy judicial review of a refusal to honor a request for information. At least as noteworthy are the specific exemptions from disclosure which are made a part of the act. For example, while industry investigative reports are not exempt, reports by government investigators are exempt because they are considered intra-agency communications. Thus, information from what could be considered the only unbiased source taking part in the investigation is exempted. Additionally investigative records and files compiled in connection with agency adjudicative procedures are exempted.

**CONCLUSION**

In a time when air travel has grown to a major industry of worldwide proportions it is too easy to rationalize a decision denying individual rights on the basis of greater public welfare and protection. To maintain adequate individual protections in the face of such pressure, the NTSB should re-examine its posture regarding availability of information, but also more importantly, the designation of parties to the investigation and hearing. Thought should be given to the creation of an in-house technical staff competent to deal with the investigative tasks now performed out of necessity by the manufacturers themselves. At a minimum, the Regulations should be rewritten to allow equal representation to the parties in interest. This solution, however, would be cumbersome within the existing investigative framework.

In the final analysis, perhaps it is in the best interests of all parties concerned to terminate the procedure as it now exists, re-

---

96 Id. § 4(b)(5).
97 Id. § 4(b)(7).
placing it with an independent, adequately-staffed government investigative team whose personnel and findings would be made available to be placed in evidence at a public hearing of an adversary nature before the NTSB. Thus, liability could be fixed with neither party having an unfair advantage. Although this would not necessarily be a perfect system, it would allow the representatives of every person killed on that 747 equal representation and access to information vital to the assertion of their rights. The present procedures do not accomplish this important result.