

TREND TOWARDS THE INADMISSIBILITY OF NTSB FINAL REPORTS

*By
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The courts have held divergent rulings on the inadmissibility/admissibility of the National Transportation Safety Board (NTSB) final reports of aircraft accidents in their entirety. Recent published and unpublished case decisions, and revisions to clarify and narrow the language of the statutes and regulations regarding this issue, indicate a trend towards the inadmissibility of these reports in their entirety.

As stated in a prior article in this law report, the National Transportation Safety Board (NTSB) is an independent federal agency in charge of investigating, determining and reporting the facts, conditions, circumstances and probable causes of aircraft accidents. Its duty is also to make recommendations for prevention of similar accidents. During the course of its investigation, the NTSB generally issues the following reports regarding the accident: the Preliminary Report, which is released within a few days of an accident; the Factual Report, which is the investigator's report of his investigation of the accident; and the Final Report, which includes the probable causes of the crash and recommendations to prevent similar crashes in the future. The Final Report may also include a summary or listing of the factual information uncovered in the investigation.

NTSB investigations are fact-finding proceedings with no formal issues or adverse parties, and are not conducted for the purpose of determining the rights and liabilities of any person or entity. The investigations are meant to be litigation neutral in order to promote impartiality and foster cooperation so that the NTSB's mission of finding the cause of an accident can be accomplished in order to prevent similar ones from occurring. The NTSB achieves this by not entangling and embroiling itself into litigation regarding the accident it is investigating. Consequently, statutes and regulations were enacted to determine the admissibility, or rather inadmissibility, into evidence of the reports issued by the NTSB in suits or actions relating to the accident.

The prior version of the regulation/statute stated:

[N]o part of [the Board's accident report, which contains the Board's determinations, including the probable cause of an accident] may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports.

Factual accident report means an investigator's report of his investigation of the accident.¹

and:

¹ 49 C.F.R § 835.2 (1998). This regulation was revised in 1999 and is discussed further in this article.

No part of any report or reports of the [NTSB] 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

A literal interpretation of these statutes would appear to indicate that the final report in its entirety could not be admitted into evidence in litigation arising from the accident. However, throughout the years there have been deviating interpretations of the statutes by the courts regarding the admissibility/inadmissibility of factual portions or findings in the final report. Parties to litigation may seek to exclude factual findings in the NTSB final report from being admitted into evidence, as they may contain statements or findings that are prejudicial and would otherwise be inadmissible by local or federal evidentiary rules of law. Despite the regulation/statute, numerous judicial circuits have held that factual portions of the NTSB report were admissible.³

A careful analysis of prior cases regarding this issue revealed that it was unclear which reports (factual or final) or which part of the reports were being excluded or admitted by the courts. In reviewing the split authorities, it was apparent that the NTSB final reports containing probable cause determinations, and at times prefaced by a factual portion, were being referenced by the courts as either NTSB report, accident report or probable cause report. Also, factual reports were termed as aircraft accident report, factual accident report and factual report. The interchanging of closely worded terms could lead the reader to misinterpret which report or part thereof was being excluded or admitted. This is significant in a common law system which relies on application of prior decisions. If the courts were unable to identify which reports were being examined in the cases to their readers, with subsequent cases relying on its ruling, then conflicting case law resulted.

This problem was further hampered by the lack of a standardized format of the NTSB factual and final reports. Currently, factual reports consist of one volume and a multitude of pages discussing the various factual circumstances of the accident. However, if the investigation requires it, the factual report could also be accomplished by several groups each focused in a specific area resulting in group chairman reports which will be compiled together for the factual report.

There are also different formats of the final report, containing the probable cause of the accident and possibly a factual portion. The factual portion usually summarizes fact findings of the investigation consisting of anywhere from two sentences to over a hundred pages in length. Also, it may consist of excerpts carefully selected from the factual reports in order to substantiate its conclusions, probable causes and recommendations. Alternately, the final report may not have a factual portion at all and

² 49 U.S.C. § 1441(e). Nearly identical language exists in 49 U.S.C. § 1903(c), except it refers to “report[s] of the Board.” Both were recodified in 49 U.S.C § 1154(b) with minor changes in text.

³ However, the law is well settled, by statute and case law, that conclusions and probable cause determinations in the final reports are inadmissible at trial.

consist only of the probable cause. This complicates an already confused issue if it is not specifically addressed or identified by the courts when rendering their determination of admissibility.

To further complicate matters, different titles of the final reports are also used interchangeably by the NTSB. In the regulation and statute cited, the Board Accident Report has been termed as the final report, aircraft accident report or probable cause report. The various titles were used in final reports that have been issued and in the text of their website.

As the NTSB faced the judiciary's literal distortion of the regulation, the Board amended it to clarify the which reports were admissible and which were not. 49 C.F.R. § 835.2 was amended to read:

[N]o part of [the Board's accident report, which contains the Board's determinations, including the probable cause of an accident] may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports.

Factual accident report means the report containing the results of the investigator's investigation of the accident. The Board does not object to, and there is no statutory bar to, admission in litigation of factual accident reports. In the case of a major investigation, group chairman factual reports are factual accident reports.

Hence, in the revision, the NTSB has defined the factual accident report and group chairman's factual reports as admissible. Unchanged and rendered inadmissible was the board accident report in its entirety, which contains the Board's determinations and probable cause. Literally read, the factual portions/findings of the board accident report (final report) were inadmissible.

This narrow interpretation of the statute was upheld in a recent decision by the U.S. Court of Appeals in the District of Columbia in *Chiron Corp. et al. v. NTSB, et al.*⁴ The NTSB was the defendant in that action, and during oral argument of this issue, counsel for the NTSB made clear that the only admissible reports were the factual reports that the investigators did and what individual investigator's found. The Board's factual or probable cause findings were not admissible at all. The *Chiron* Court agreed and upheld the narrow and literal interpretation of the statute. Consequently, in *Chiron* the Board's actual report was held inadmissible as evidence in a civil suit. Recent unpublished decisions have also favored exclusion into evidence of the NTSB final report in its entirety.

⁴ 198 F.3d 935 (DC Cir. 1999)

Chiron and the revised statutes supported the holding in *In re Air Crash Disaster at Sioux City*,⁵ in which the court determined that the final aircraft accident report was entirely inadmissible. The final report contained a lengthy compilation of factual information and conclusion, as well as a probable cause determination and a dissent to the probable cause determination. The court held that the language of the statute on its face absolutely barred the use of the NTSB reports in the action.⁶ In its reasoning, the Court stated that Congress chose to prevent NTSB data from usurping the function of the jury and sought to preserve the court and jury roles being uninfluenced by the findings of the Board or investigators.

The trend towards the inadmissibility of the final reports in their entirety promotes the purpose of the regulations. This will ensure that the Board is not embroiled in controversial issues unrelated to its duties. It will also preserve the impartiality of the Board as a neutral investigator, foster cooperation focused on prevention and not liability, and prevent its internal processes from controversy.

⁵ 780 F.Supp. 1207 (N.D.I.L. 1991)

⁶ The *Sioux City* Court was interpreting 49 U.S.C. § 1441(e) and 49 U.S.C. § 1903.