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Opinion, Probable Cause, Factual Investigation: The Admissibility of NTSB Reports and Investigator's Opinions in Aviation Accident Litigation

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OPINION, PROBABLE CAUSE, FACTUAL INVESTIGATION: THE ADMISSIBILITY OF NTSB REPORTS AND INVESTIGATOR'S OPINIONS IN AVIATION ACCIDENT LITIGATION

I. INTRODUCTION

The Federal Aviation Act¹ (the Act) creates a legal minefield for the unwary and uninitiated attorney handling air crash litigation because of its strict wording and bias toward the aviation industry. According to the plain language of the Act and the attendant regulations, no potential civil litigants, their representatives, or any insurance company(ies), shall participate or even observe the National Transportation Safety Board's (the NTSB's) investigation of the crash.² Further, no civil litigant may use the resulting reports and investigator opinions as evidence in a civil trial.³ Considering the NTSB initially and exclusively controls the crash site and wreckage, narrow judicial construction of the Act would work substantial hardship on litigants by preventing both first hand observation of the evidence and making full use of the results of the government's investigation.⁴ A lawyer's awareness of frequent judicial reluctance to inflict such hard-

¹ Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (the Act).

² See 49 C.F.R. § 831.11(a)(1), (3) (1998), which limits the parties to the investigation to "those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident . . ." and provides that "[n]o party to the investigation shall be represented in any aspect of the NTSB investigation by any person who also represents claimants or insurer . . ." *Id.*

³ 49 U.S.C. § 1154(b)(1994). The statute provides: "[n]o part of a report of the [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." *Id.*

⁴ 49 U.S.C. § 1131, 1134 (1997). Section 1131 provides that the NTSB shall "investigate or have investigated" and establish the facts, circumstances, and cause or probable cause of an aircraft accident. *Id.* at § 1131(a)(1). Section 1134 authorizes a NTSB investigator to enter, inspect, and move accident wreckage from an accident site. *Id.* at § 1134(a)(1), (b)(1),(2).

ship on litigants may save time and money and provide evidence that might otherwise be unobtainable.⁵

This article discusses when, notwithstanding the Act's prohibitory language, a court may admit NTSB investigative reports and investigator opinions as evidence in a civil trial. Section I presents a brief overview of the legislative regulation of air transportation while section II analyzes the federal courts' interpretation of the statutory prohibition against admitting NTSB reports and opinions in civil trials through the mid-1980's. Section III addresses the conflict between the Act's prohibition on, and the Federal Rules of Evidence (the Rules) trend toward, admissibility raised by the Supreme Court decision in *Beech Aircraft v. Rainey*⁶ decision. Section IV discusses the admissibility trends of the last decade.

Although not the focus of this article, a nuance about which practitioners must be aware is the NTSB's discretion to delegate its investigatory powers to the Federal Aviation Administration (the FAA).⁷ While major civilian air crash cases involve investigations by the NTSB's own investigators, the NTSB often delegates nonfatal and smaller aircraft accident investigations to local FAA personnel.⁸ Accordingly, although the NTSB is the body predominantly referred

⁵ Interview with Gary M. Arber, Attorney, in Brookline, Mass. (Jan. 21, 1998) (noting NTSB's removal of wreckage from crash site deprives litigants opportunity to view site undisturbed). See also 49 U.S.C. § 1134(a)(1), (b)(2) (authorizing NTSB investigators to move accident wreckage from accident site).

⁶ 488 U.S. 153 (1988).

⁷ See NTSB Accident/Incident Investigation Procedures, 49 C.F.R. § 831.2 (1998) (empowering the Secretary of the Department of Transportation to delegate the investigation to the FAA). The regulation makes clear that the investigation remains a NTSB investigation notwithstanding the delegation to the FAA. *Id.* Further, although the FAA conducts the investigation, the NTSB retains full control and determines the probable cause of the accident. *Id.*

⁸ Interview with Gary M. Arber, *supra* note 5. Local FAA personnel involved in an air crash investigation can be a good source of information because they often have knowledge of the local area, pilots, and airports. *Id.* They also are often aware of prior incidents that, though they did not result in an accident at the time, may be relevant to the accident investigated. *Id.*

to in this article, in a practitioner's particular accident, the FAA may be the investigating body.

II. HISTORY OF AIR TRAVEL REGULATION

In 1926, Congress, seeking to foster growth in the air transport industry by enhancing accident prevention, passed legislation to regulate air travel and investigate aircraft accidents.⁹ Early in the legislative history of air travel regulation, Congress vested the power to investigate all air accidents in the then newly created Secretary of Air Commerce in order to centralize the investigatory process and data compilation.¹⁰ In 1934, Congress empowered the Secretary to hold hearings and subpoena witnesses and documents while at the same time prohibiting the use of the Secretary's report in litigation involving the accident investigated.¹¹ Congress sought to protect the reports because (1) the investigation determines causation, *not* fault, and (2) the presence of litigants might bias the report.¹²

As air travel grew, and accordingly the investigatory burden, the Secretary, pursuant to his regulatory powers, created the Civil Aero-

⁹ See generally C.O. Miller, *Aviation Accident Investigation: Functional and Legal Perspectives*, 46 J. AIR L. & COM. 237 (1981) (providing an in depth history of air accident investigation legislation). The author served as the Director of the Bureau of Aviation Safety of the NTSB. *Id.*

¹⁰ The Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926). Current codification in section 1131 of the Federal Aviation Act provides that the NTSB shall "investigate or have investigated" and establish the facts, circumstances, and cause or probable cause of an aircraft accident pursuant to section 1132; section 1132 grants authority to investigate civil aircraft accidents. 49 U.S.C. § 1132.

¹¹ Pub. L. No. 730418, 48 Stat. 1113 (1934). Originally codified at 49 U.S.C. § 581. Repealed 1958 and superceded by the Federal Aviation Act of 1958. See also Miller, *supra* note 9 at 238.

¹² See Miller, *supra* note 9, at 275 (discussing distinction of probable cause in investigatory setting versus litigation, noting greater in-depth investigation in litigation setting). *Id.* at 266-67. Cause, in the context of a NTSB investigation, is not a search for current liability but rather a search for prevention in the future. *Id.* at 267.

navitics Board (the CAB) to investigate and report on aircraft accidents.¹³ The scope of the CAB's investigators' testimony likewise falls under statutory control, limiting it to their factual observations and prohibiting their expression of opinion.¹⁴ The regulations further limit litigant access to NTSB investigators by restricting their testimony to one appearance through interrogatories or deposition¹⁵ with testimony at the actual trial requiring permission from General Counsel.¹⁶ Part 835 of the Code of Federal Regulations explains that the reasons for restricting the scope and availability of investigator testimony include limiting the burden extensive testifying would place on the NTSB and preventing undue influence on litigation.¹⁷ As aviation regulation evolved to the current day codification of the Federal Aviation Act,¹⁸ Congress has maintained these prohibitions under a belief that doing so protects the investigatory process and prevents NTSB opinions from supplanting the role of the civil factfinder.¹⁹

¹³ See, Miller, *supra* note 9, at 239 (noting creation of new board did not change civil admissibility prohibition already established).

¹⁴ 49 C.F.R. § 835.3 (1998). Sec. 835.3(b) provides in pertinent part: [NTSB] employees may only testify as to the factual information obtained during the course of an investigation, including factual evaluations embodied in their factual accident reports. However, they shall decline to testify regarding matters beyond the scope of their investigation and they shall not give any expert or opinion testimony.

49 C.F.R. § 835.3(b).

¹⁵ 49 C.F.R. § 835.5(a), (c) (1998).

¹⁶ 49 C.F.R. § 835.6(a) (1998). It is important to note that section 835.6(c) prohibits litigants from serving a subpoena upon a NTSB employee in connection with taking of depositions. § 835.6(c). See also *Universal Airline, Inc. v. Eastern Airlines, Inc.*, 188 F.2d 993, 999-1000 (D.C. Cir. 1951) (observing courts typically defer to NTSB except where original deposition testimony was inadequate or investigator was particularly uncooperative).

¹⁷ 49 C.F.R. § 835.3

¹⁸ Federal Aviation Act of 1958 Pub. L. No. 85-726, 72 Stat. 731 (1958).

¹⁹ 49 U.S.C. § 1154(b)(1994). The statute provides: "[n]o part of a report of the [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a

These prohibitions combined with the exclusion of potential litigants and insurers work a substantial hardship on litigants because the NTSB has statutory right to the initial exclusive use of the accident wreckage for investigative purposes, often removing the wreckage from the crash site.²⁰ Further, federal regulations restrict the status of "party to the field investigation" to those persons representing the government and companies or associations whose products or services were involved in the accident, resulting in limited access of outside parties.²¹ The underlying policy recognizes the unique expertise of these designated parties as well their interest in future accident prevention. An obvious contradiction exists in the regulations because the manufacturer or association may well become a party to a civil suit for which they have unique preparation as an investigative party.²² Further, their participation in the investigation could potentially bias the final report in their own favor therefore benefiting them at any subsequent trial.²³

III. JUDICIAL INTERPRETATION OF LEGISLATIVE INTENT

Careful investigation into aviation accident case law reveals that, notwithstanding the plain language of the statute, certain types of reports generated for use by the NTSB as well as some opinion testimony of the investigators will often be allowed at trial.²⁴ Judges

matter mentioned in the report." *Id.* See also Miller, *supra* note 9, for an in-depth discussion of the legislative history of the regulation of aircraft safety and the responsibilities of each governing body.

²⁰ See 49 C.F.R. § 831.11 (excluding litigants and insurers from status of party to investigation); 49 U.S.C. § 1134 (a), (b) (authorizing NTSB investigators to enter, inspect, and move accident wreckage from accident site).

²¹ 49 C.F.R. § 831.11(a)(1) (1998).

²² 3 Lee S. Kreindler, *Aviation Accident Law*, § 22, 22-18 (1991).

²³ *Id.*

²⁴ See, e.g., *Berguido v. Eastern Airlines*, 317 F.2d 628, 632 (3d Cir. 1963) (holding that calculations made by third party and included in the CAB report admissible under § 1441(e)); *In re Air Crash at Charlotte, N.C.*, No. MDL 1041, 1996 WL 926575, at *8 (D.C.S.) Dec. 27, 1996 (holding investigator's summary admissible under statute but barred because of trustworthiness issues caused by third-party edits); *Kline v. Martin*, 345 F. Supp. 31, 33 (E.D. Va. 1972)

frequently rely on the policy underlying the prohibition -- that the NTSB's own determination of the cause of the accident not supplant the jury's function -- to allow NTSB reports and NTSB investigator testimony into evidence as long as they do not disclose the NTSB's probable cause determination.²⁵ This position developed over time and ultimately resulted in the NTSB itself incorporating these decisions into its policies.²⁶

A. Admissibility of Factual Testimony and Reports

Early in aviation accident litigation, most courts declined to construe the statutory prohibition of the Act narrowly. Courts reasoned that the purpose of the prohibition was to prevent the NTSB's probable cause from reaching the jury, but that the intent was not to prevent the jury from hearing factual and expert testimony in general.²⁷ By 1951 the underlying policy of the prohibition, as articulated in *Universal Airline, Inc. v. Eastern Air Lines, Inc.*,²⁸ emerged as the focal point for decisions. The United States Court of Appeals for the District of Columbia Circuit concluded, pursuant to section

(allowing employee testimony which does not address ultimate issue or probable cause). *But see In re Air Crash Disaster at Sioux City, Iowa*, 780 F. Supp. 1207, 1212, (N.D. Ill. 1991) (denying admissibility of any part of NTSB report).

²⁵ See, e.g., *Berguido*, 317 F.2d. at 632 (noting policy conflict between absolute privilege and full availability results in exclusion of reports expressing probable cause); *In re Air Crash at Charlotte, N.C.*, No. MDL 1041, 1996 WL 926575, at *8 (D.C.S. Dec. 27, 1996 (observing history of court interpretation in favor statutory admissibility of factual portions of NTSB reports); *Kline*, 345 F. Supp. at 33 (finding limits on investigator testimony which did not address ultimate NTSB finding of cause unnecessarily cut off primary avenue to truth). *But see In re Air Crash Disaster at Sioux City, Iowa*, 780 F. Supp. 1207, 1212, (N.D. Ill. 1991) (denying admissibility of any part of NTSB report because of absolute statutory bar).

²⁶ See *Miller*, *supra* note 9, at 260-61 (discussing NTSB notices and elaboration in Federal Register regarding its regulations and interpretations resulting from evolution in judicial decisions).

²⁷ See, e.g. *Universal Airline, Inc. v. Eastern Air Lines, Inc.*, 188 F.2d 993, 1000 (1951).

²⁸ 188 F.2d 993 (1951).

701(e) of the Act, that while an NTSB employee's factual testimony was admissible, testimony reflecting the opinion or probable cause of the accident was inadmissible because it would usurp the role of the fact finder.²⁹

Later in the same year, *Lobel v. American Airlines, Inc.*³⁰ expanded the holding of *Universal* by applying the admissibility of factual testimony to an equally factual investigative report.³¹ The NTSB report contained no opinions and was entered into evidence as past recollection recorded through the author who was available for cross-examination.³² The United States Court of Appeals for the Second Circuit distinguished between NTSB reports containing opinions as to cause and negligence from those containing an "investigator's personal observations about the condition of the plane after the accident," the latter admitted through past recollection recorded.³³ The appellate court concluded that § 701(e) of the Civil Aeronautics Act³⁴ would not be offended by the admissibility of the

²⁹ *Id.* at 1000.

³⁰ 192 F.2d 217 (2d Cir. 1951).

³¹ *See Lobel*, 192 F.2d at 220 (determining investigator's factual report did not offend purpose of statutory prohibition).

³² *Id.* The report contained

no findings based on interviews or anything but personal observations. Nothing in the report offends either the opinion or the hearsay rule. Sec. 701(e) was designed to guard against the introduction of C.A.B. reports expressing the agency views about matters which are within the functions of the courts and juries to decide.

Id. (quoting *Universal Airline v. Eastern Airline*, 188 F.2d 993, 1000 (D.C. Cir. 1951))

³³ *See Lobel*, 192 F.2d at 220. (observing report contained same information as investigator's CAB authorized deposition and properly admitted at trial). The author of the report testified in a deposition as to substance of report. *Id.*

³⁴ Civil Aeronautics Act 49 U.S.C.A. § 581, providing in pertinent part:

no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in

report because the report would not interfere with the fact-finding role of the jury.³⁵ Further, the hearsay rule would not be violated because the author of the report testified as to its contents and such testimony was open to cross-examination by defense counsel.³⁶ The appellate court concluded that the goal of the statutory prohibition was not to prevent use of the report per se, but rather to prevent the NTSB from being, in effect, the final arbiter of the civil case by virtue of its probable cause determinations.³⁷ What began as a rule on the scope of admissible investigator testimony grew into a seemingly contrary interpretation of apparently clear statutory language prohibiting admission of investigative reports.

B. The Struggle Over Opinion and Probable Cause

In 1963, the United States Court of Appeals for the Third Circuit ruled, in *Berguido v. Eastern Airlines, Inc.*,³⁸ that calculations, necessarily requiring assumptions and inferences regarding the evidence, were inadmissible not because of the prohibition against opinion testimony, but because they were hearsay that could not be cross-examined.³⁹ Noting that the policy underlying the prohibition

any suit or action for damages growing out of any matter mentioned in such report or reports.

Id.

³⁵ See *Lobel*, 192 F.2d at 220. The investigator's report consisted of his personal observations about the condition of the plane. *Id.* Section 701(e) of the Civil Aeronautics Act as codified at 49 U.S.C.A. § 581 provides in pertinent part: no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

Id.

³⁶ *Lobel*, 192 F.2d at 220.

³⁷ See *id.* (describing policy underlying statutory prohibition as guarding against expressing agency views about issues fact-finder should decide).

³⁸ 317 F.2d 628 (3d Cir. 1963).

³⁹ *Berguido*, 317 F.2d at 632. Plaintiffs sought admissibility of mathematical calculations performed by a third person not present at trial to support testimony of CAB employee. *Id.* at 630-31. The court found this

worked a compromise between an absolute privilege to facilitate full and frank CAB investigations and absolute disclosure of evidence to litigants, the appellate court seemed amenable to at least some opinion testimony.⁴⁰ The court distinguished between general opinion testimony of a CAB investigator and her opinion testimony that reflects the CAB's probable cause findings.⁴¹ Such opinion now differentiated, only probable cause opinion, which violated the underlying purpose and policy of the prohibition, was inadmissible.⁴²

As the courts struggled to discern between opinion, opinion that specifically goes to probable cause, factual inferences, and fact, they became more frustrated with the rules they had created.⁴³ In response, the courts moved toward admitting investigators' opinions providing they did not encompass or directly indicate the probable cause of the accident.⁴⁴

testimony admissible under § 1441 (e) because the testimony did not express the agency views of probable cause. *Id.* at 631-32. However, the court held that defendant's inability to cross-examine the mathematician as to assumptions made for purposes of his calculations performed resulted in inadmissible hearsay and therefore rendered the testimony inadmissible. *Id.* at 632. *See also* FED. R. EVID. 801 (c) (defining hearsay as out of court statement by one other than testifying witness and offered for truth of matter asserted).

⁴⁰ *Berguido*, 317 F.2d at 631.

⁴¹ *Id.* at 632.

⁴² *Id.*

⁴³ *See e.g.* *American Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969)(finding the rule sorting fact from opinion developed in *Fidelity and Casualty Co. v. Frank*, 227 F. Supp. 948 (D. Conn. 1964), should yield to rule excluding only opinion testimony regarding probable cause of accident).

⁴⁴ *Id.*; *see also* *Kline v. Martin*, 345 F. Supp. 31, 33 (E.D. Va. 1972) (asserting statutory bar only proscribes admissibility of ultimate issue or probable cause); *but see* *Fidelity and Cas. Co. v. Frank*, 227 F. Supp. 948 (D. Conn. 1964) (articulating rule that all statements of opinion must be redacted from otherwise factual and admissible CAB subcommittee reports).

C. A Legislative Response to Judicial Interpretation of the Act

The Independent Safety Board Act,⁴⁵ enacted in 1974 (the "1974 Act"), retained the prohibition of NTSB employee opinion testimony,⁴⁶ but the 1975 revision of the regulations governing NTSB employee testimony, Part 835.3(b), contained a concession to the courts found in the Federal Register.⁴⁷ The Federal Register stated:

The only opinions of investigators proscribed now are those which reflect the ultimate determination of cause or probable cause determined by the board and expressed in the Board's reports. The Board considers its revised policy to be consistent with the existing law, relying in particular on *Kline v. Martin*,⁴⁸ . . . the Board continues its prohibition against the requirement that investigators should testify on matters beyond the scope of their investigation.⁴⁹

⁴⁵ The Independent Safety Board Act, Pub. L. No. 93-633, 89 Stat. 2156 (1975). This act separated the NTSB from the FAA in an attempt to remedy the incestuous nature of their relationship and eliminate constraints to thorough and effective accident investigation. See also Roy Tress Atwood, Comment, *Admissibility of National Transportation Safety Board Reports in Civil Air Crash Litigation*, 53 J. AIR L. & COM. 469, 485 (1987) (noting NTSB, brought into existence by Department of Transportation Act of 1966, often investigated its sister agency FAA).

⁴⁶ The original prohibition codified at 49 U.S.C. § 1441(e) as represented in the Independent Safety Board Act of 1974, § 304(c) was codified as 49 U.S.C.A. § 1903(c) the text of which remained largely unchanged: "No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." *Id.*

⁴⁷ National Transportation Safety Board Redesignation and Revision of Regulations, 40 Fed. Reg. 30232 (1974)(to be codified at 49 C.F.R. pt. 835).

⁴⁸ 345 F. Supp. 31 (E.D. Va 1972)

⁴⁹ National Transportation Safety Board Redesignation and Revision of Regulations, 40 Fed. Reg. 30232. The NTSB refers to the decision in *Kline v. Martin*, 345 F. Supp. 31, which abandoned the complete exclusion of all opinion

Also worth noting, because of the consistency with this concession, is that a careful reading of Part 835.3(b) permits NTSB employee factual testimony to "[include] factual evaluations embodied in their factual accident report."⁵⁰ The only prohibitions concern testimony on matters "beyond the scope of their investigation" or "opinion or expert testimony" concerning the cause of the accident.⁵¹ The plain language of the regulation implies that opinions are permissible as long as they stop short of speculating on the cause of the accident.⁵²

The NTSB set forth a compromise but still insisted that the NTSB's report remain out of litigant's reach.⁵³ The complexity and scope of accident investigation grew over time, necessitating the production of two distinctly different reports: the Factual Aircraft Accident Report⁵⁴ and the NTSB's probable cause report also known as the 'blue cover' report.⁵⁵ As of the 1975 regulation change, while the proscription against using the probable cause report remained, it no longer included the use of the investigator's factual report, therefore opening wide the door to their use in civil suits.⁵⁶ The use of

testimony as unworkable and concurred with rule espoused in *American Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1964) which stated, "it would be better to exclude opinion testimony *only* when it embraces the probable cause of the accident or the negligence of the defendant." *Id.* (emphasis added).

⁵⁰ 49 C.F.R. § 835.3(b) (1998).

⁵¹ *Id.* (emphasis added); see also National Transportation Safety Board Redesignation and Revision of Regulations, 40 Fed. Reg. 30232 (relaxing proscription of opinion to include *only* opinions reflecting ultimate determination of probable cause)(emphasis added). The NTSB, acknowledging the changing interpretation of its prohibition of employee opinion testimony, modified the proscription so as to reflect recent court decisions. *Id.*

⁵² National Transportation Safety Board Redesignation and Revision of Regulations, 40 Fed. Reg. 30232.

⁵³ 49 C.F.R. § 835.3(b) (1998).

⁵⁴ See generally 3 KREINDLER AVIATION ACCIDENT LAW § 28 (1991) (providing illustrations of various NTSB accident report forms).

⁵⁵ See *Miller*, *supra* note 9, at 261-62 (discussing splitting apart original NTSB Accident Report into different sub-reports isolating probable cause into "blue cover" report). See generally KREINDLER, *supra* note 22, ch. 22.

⁵⁶ *Miller*, *supra* note 9, at 261-62.

two different reports allowed the NTSB to keep its final probable cause determinations out of the courtroom more easily because the permissible factual portions of the investigation were contained in detail in a separate report.

While courts continued to struggle with the issue of the admissibility of NTSB reports, the *Kline v. Martin* rule took hold.⁵⁷ The United States Court of Appeals began by affirming the admissibility of NTSB employee opinion testimony as long as that opinion did not speculate on the proximate cause of the accident.⁵⁸ Then, in 1986, A question arose in the Tenth Circuit in *Mullan v. Quickie Aircraft Corp.*⁵⁹ concerning the admissibility of expert testimony based on the factual findings in the NTSB's reports.⁶⁰ Quickie contended that Mullan's expert impermissibly relied on the NTSB report when giving his opinion on the cause of the accident, which, as Quickie noted, was the same as the NTSB's determination.⁶¹ The Tenth Circuit reasoned that current judicial construction of the statutory prohibition excludes only portions of reports containing the NTSB's probable cause findings and accordingly an expert may rely on factual por-

⁵⁷ See *Protectus Alpha Navigation v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1986) (holding § 1441(e) complete bar to admissibility of NTSB reports notwithstanding judicial gloss admitting factual statements); *Chevron, USA v. Sikorsky Aircraft*, 779 F.2d 272, 274 (5th Cir. 1985) (finding statutory prohibition allows factual statements but forbids use of conclusory statements in NTSB reports); *Travelers Ins. Co. v. Riggs*, 671 F.2d 810, 816 (4th Cir. 1982) (holding district court properly excluded conclusory statements addressing the issue of pilot's negligence as probable cause of accident).

⁵⁸ See *Keen v. Detroit Diesel Allison*, 569 F.2d 547, 551 (10th Cir. 1978) (finding no error in admitting NTSB investigator testimony, noting testimonial bar detrimental to private citizens and contrary to Part 835.3(b)).

⁵⁹ 797 F.2d 845 (10th Cir. 1986).

⁶⁰ *Mullan*, 797 F.2d at 848.

⁶¹ *Id.* Quickie tried to equate the prohibition on admissibility of NTSB reports to their use by Mullen's outside expert witness. *Id.* The court rejected the argument pointing to precedent allowing admission of factual portions of the reports and accordingly approved report use as the factual basis upon which the expert testified. *Id.*

tions of the reports.⁶² The court found that the expert permissibly relied on the factual portions of the report and therefore ruled the testimony admissible.⁶³ In so doing the court admonished, "[t]o hold, as Quickie's argument suggests, that [the expert] impermissibly relied on the NTSB report because his conclusions were the same as or similar to those of the NTSB investigators, is an inference which we shall not make."⁶⁴ The court made clear that rulings on admissibility are based on the law and not speculation of impropriety.⁶⁵

Likewise, NTSB reports were finding their way into evidence. In *Travelers Insurance Co. v. Riggs*,⁶⁶ the appellate court sustained the trial courts admission of factual portions of the NTSB reports.⁶⁷ The court declined to examine the appropriateness of the district court's ruling, noting that the 1974 Act forbade the use of conclusory sections of the NTSB report, which the district court then properly excluded.⁶⁸

D. The Ninth Circuit Hard Line Stance Against Admissibility of NTSB Reports

As the majority of courts across circuits at both the district and appellate level favored admissibility of NTSB reports at least in part, a 1986 decision from the United States Court of Appeals for the Ninth Circuit took a different stand.⁶⁹ In *Prospectus Alpha Naviga-*

⁶² *Mullan*, 797 F.2d at 848.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Mullan*, 797 F.2d at 848.

⁶⁶ 671 F.2d 810 (4th Cir. 1981).

⁶⁷ *See Travelers*, 671 F.2d at 817.

⁶⁸ *See id.* *See also* *Curry v. Chevron, USA*, 779 F.2d 272, 274 (5th Cir. 1985) (acknowledging "judicial gloss" allowing NTSB reports into evidence without opinions on probable cause). The court, resting on the 1974 Act's prohibition of the use of NTSB probable cause report in civil trials, declined to allow the plaintiff's expert to testify that he relied on the probable cause conclusions in the NTSB's report. *See also* FED. R. EVID. 703 (providing data underlying expert's testimony need not be separately admissible as evidence).

⁶⁹ *See Prospectus Alpha Navigation v. North Pacific Grain Growers, Inc.*, 767 F.2d at 1385 (holding NTSB reports inadmissible in civil trials).

tion v. North Pacific Grain Growers, Inc.,⁷⁰ the court narrowly construed the statutory provision prohibiting the use of NTSB reports as evidence in civil trials reasoning that the plain language of the statute was unambiguous.⁷¹ The appellate court, although noting the more permissive stance other courts were taking on admissibility of NTSB Reports, ruled such reports, to the extent they express the probable cause of the accident, excludable in their entirety.⁷² Citing no supporting authority and in the face of ample authority to the contrary, the Ninth Circuit then upheld the exclusion of the NTSB report in its entirety, calling it "another trier of fact's conclusion as to what happened"⁷³ The Ninth Circuit was virtually alone in its holding.

IV. BEECH AIRCRAFT V. RAINEY DECISION AND ITS EFFECTS ON THE ADMISSIBILITY OF NTSB REPORTS

One year after enactment of the 1974 Act, the new Federal Rules of Evidence⁷⁴ (the Rules) took effect presenting a potentially new challenge to the NTSB's ability to prohibit the admission of the probable cause report.⁷⁵ Exceptions to expert and opinion testimony were introduced which challenged the remaining restrictions to investigators testifying as to their opinion based on evidence other than

⁷⁰ *Id.*

⁷¹ *See id.* at 1385 (finding NTSB report "merely another trier of fact's conclusion as to what transpired on that fatal evening").

⁷² *Id.* The court cited various cases illustrating prior admissibility of NTSB investigative reports including *Keen v. Detroit Diesel Allison*, 569 F.2d 547, 549-51 (10th Cir. 1978), *American Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir.1969), and *Berguido v. Eastern Airlines, Inc.*, 317 F.2d 628, 631-32 (3rd Cir. 1963). *Id.*

⁷³ *See Prospectus Alpha Navigation*, 767 F.2d at 1385. "The district court had before it all seven volumes of the transcript of the Coast Guard hearing on which the report in question was based, and the excluded report was merely another trier of fact's conclusion as to what transpired on that fatal evening." *Id.*

⁷⁴ Pub. L. No. 93-595, 88 Stat. 1926 (1975).

⁷⁵ *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 166-67 (1988) (discussing admissibility of Navy investigative reports under Federal Rules of Evidence).

their own observations.⁷⁶ Further, an exception to the hearsay rule allowed the admission of public records and reports.⁷⁷

A. Beech Aircraft Sustains Broad Admissibility for Evaluative Reports

In 1986, the same year as the *Prospectus* decision, the Supreme Court in *Beech Aircraft Corp. v. Rainey* heard arguments on the question of whether the public records hearsay exception of the Rules,⁷⁸ providing for the admissibility of investigatory reports containing "factual findings", extended to conclusions and opinions contained within the reports.⁷⁹ The Court, acknowledging the dichotomy of opinions at the appellate level as well as in the congressional subcommittees that debated the Rules, reasoned that the Advisory Committee intended that courts generally admit the reports.⁸⁰ In fact, the rule was drafted and adopted in the face of split court decisions and statutorily mandated hearsay exceptions.⁸¹ The Senate Ad-

⁷⁶ See e.g., FED. R. EVID. 703 (allowing expert testimony based on information of type reasonably relied upon by experts in field, regardless of separate admissibility); FED. R. EVID. 704 (providing for testimony on ultimate issue of case); FED. R. EVID. 705 (permitting opinion testimony without testifying as to underlying facts unless asked on cross-examination or required by court).

⁷⁷ FED. R. EVID. 803(8)(C). The rule provides an exception to the hearsay rule for "reports . . . of public offices or agencies . . . setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law . . . unless the sources of information or other circumstances indicate lack of trustworthiness." *Id.*

⁷⁸ FED. R. EVID. 803(8)(C). Rule 803(8)(C) provides admissibility for "[r]ecords, reports, statements, or data compilations . . . setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness" regardless of the availability of the declarant as a witness. *Id.*

⁷⁹ *Beech Aircraft Corp.*, 488 U.S. at 156.

⁸⁰ *Id.* at 166-67. See also S. Rep., 93-1277 at 13 (1974) (rejecting narrow construction of House Committee and opting instead for Advisory Committee's assumption of admissibility balanced by trustworthiness test).

⁸¹ See *Beech Aircraft Corp.*, 488 U.S. at 166 (discussing diverging appeals court decisions and statutory exceptions to hearsay rule). See also FED. R. EVID.

visory Committee responded to the dichotomy by drafting a rule, ultimately accepted by Congress, that assumes the general admissibility of "evaluative" reports subject to a test of trustworthiness.⁸² A further safeguard exists within the rule requiring that the reports set forth "factual findings resulting from investigation," therefore excluding statements not based on factual investigation.⁸³ Notwithstanding the safeguards built into the rule, other rules of evidence involving relevance and prejudice provide further screening of the admissibility of these reports.⁸⁴

The Court further found this interpretation consistent with the broader approach the Rules take in allowing expert opinion testi-

803(8)(C) advisory committee's note (discussing controversial nature of "evaluative" reports and dichotomy of decisions involving their admissibility).

⁸² See *Beech Aircraft Corp.*, 488 U.S. at 167 (noting the escape provision in final clause of rule excluded reports if sources of the information lacked trustworthiness"); see also FED. R. EVID. 803(8)(C) advisory committee's note (favoring general admissibility of reports subject to consideration of presence of negative factors). The Advisory Committee Note concluded in favor of the general admissibility of reports but provided "ample provision for escape if sufficient negative factors are present." *Id.* The Advisory Committee proposed four factors that might be considered when passing on the trustworthiness of the report: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)). *Id.*

⁸³ See *Beech Aircraft Corp.*, 488 U.S. at 164 (proposing the proper reading of rule as not "factual findings" are admissible but that *reports*, setting forth factual findings, are admissible). See also S. Rep., 93-1277 at 13 (1974) (taking exception to the House Judiciary Committee's limit of admissibility to "factual findings" noting guidance of many statutes allowing admissibility of particular evaluative reports).

⁸⁴ See *Beech Aircraft Corp.*, 488 U.S. at 168. (discussing discretion judge maintains in admitting such reports); see also FED. R. EVID. 401-403 (permitting admission of evidence tending to make material fact more, or less, probable except where probative value outweighed by unfair prejudice).

mony even when the opinion is on the ultimate issue in the case.⁸⁵ The court reasoned that because facts were really just a more specific and detailed statement of opinion, the reports should be treated no differently than expert opinion testimony.⁸⁶ Though experts on the stand are subject to cross-examination, Rule 803 generally provides for admissibility of public records and reports notwithstanding the availability of the witness.⁸⁷ Accordingly, when viewed with the safeguards present in the rule itself, the broader view in favor of admissibility is more in keeping with the general thrust of the Federal Rules because it promotes full disclosure of all relevant information to the jury.⁸⁸ The Court unanimously held that 803(8)(C) does not exclude factually based conclusions or opinions contained in the reports.⁸⁹ Accordingly, rather than an arbitrary distinction between opinion and fact, courts should rely on the concepts of trustworthiness, relevance, prejudice, and the right of opposing parties to present contradictory evidence in determining admissibility of an evaluative report.⁹⁰

⁸⁵ *Beech Aircraft Corp.*, 488 U.S. at 169. See also FED. R. EVID. 701-705 (allowing expert witness opinion testimony on ultimate issue and lay witness opinion testimony drawn from own observations when testimony helpful to trier of fact).

⁸⁶ See *Beech Aircraft Corp.*, 488 U.S. at 168-69 (articulating the analytic difficulty in draw a distinction between fact and opinion). The court opined that the "factual finding" statement in the JAG report that "at the time of impact, the engine of 3E955 was operating but was operating at reduced power" was a deduction from smaller observed clues of the investigator who did not actually observe the engine running at the time of impact. *Id.* at 169. Labeling this a fact rather than an opinion called for an arbitrary line drawing exercise to distinguish between shades of grey. *Id.*

⁸⁷ *Beech Aircraft Corp.*, 488 U.S. at 160. See also FED. R. EVID. 803 (providing admissibility for public records and reports under section 8(C) regardless of declarant availability).

⁸⁸ See *Beech Aircraft Corp.*, 488 U.S. at 169 (finding no reason to interpret Rule 803(8)(C) contrary to liberal thrust of the Federal Rules).

⁸⁹ *Id.* at 170.

⁹⁰ See *id.* at 167-68 (relying on safeguards built into FED. R. EVID. 803(8)(C) and other attendant rules to dictate admissibility).

*B. A Battle of the Acts: Federal Rules of Evidence
Versus the 1974 Act*

A conflict arises between the statutory prohibition of the use of NTSB accident reports of various types and the Rules that would admit them in their entirety.⁹¹ This conflict arises because of the different goals and purposes underlying each one. This battle of the Acts played out in both federal district and appeals courts with the same conclusion: a federal statute that restricts admissibility shall preempt the Rules because the statutes are designed to deal with very specific subject matter while the Rules give more general guidance.⁹² Consequently, while factual portions of NTSB reports continued to be admissible, the *Beech Aircraft* decision did not destroy the statutory prohibition forbidding probable cause conclusion and opinion testimony.⁹³ We are reminded by *Beech Aircraft*, though, that other

⁹¹ FED. R. EVID. 803(8)(C). The rule provides admissibility subject only to trustworthiness and a requirement that they set forth "factual findings resulting from investigation." *Id.*

⁹² Interview with Hon. William G. Young, United States District Court for the District of Massachusetts, in Boston, Mass. (Mar. 9, 1998). The canons of statutory construction hold that a federal statute dealing with a specific subject matter preempts a general federal statute. *Id.* Therefore, the specific prohibition of NTSB reports use in civil litigation preempts the general admissibility of FED. R. EVID. 803(8)(c). *Id.* Even when the prohibition is set out by regulation, though subordinate to the Federal Rules of Evidence, courts tend to give deference to the regulation and their underlying policy(s). *Id.* *Accord In re Nautilus Motor Tanker Co.*, 85 F.3d 105, 111-12 (3d Cir. 1996) (finding report filed pursuant to federal regulation admissible because Federal Rules of Evidence control except as provided in U.S. Constitution, Act of Congress, or rules prescribed by Supreme Court pursuant to statutory authority); *In re Cleveland Tankers, Inc.*, 821 F. Supp. 463, 465 (E.D. Mich., S.D. 1992) (finding *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) not controlling because JAG report filed pursuant to regulation not statutory authority).

⁹³ *See Cleveland Tankers*, 821 F. Supp. at 465 (holding no error in admitting factual portions of NTSB report but excluding opinions and legal conclusions).

evidentiary considerations may effect the admissibility of even factual portions of the reports.⁹⁴

V. THE CURRENT TREND TOWARD ADMISSIBILITY

During the last decade, the general trend toward admissibility broadened across the circuits at the district court level except, most notably, the Ninth Circuit where case law has been scant, and the Northern District of Illinois where the courts have followed the Ninth Circuit *Prospectus* decision.⁹⁵ Since 1991, three decisions in the United States District Court for the Northern District of Illinois have barred the use of the reports.⁹⁶ The district court judge, in *In re Air Crash Disaster at Sioux City, Iowa*,⁹⁷ after lengthy discussion and acknowledgement of the broad line of decisions to the contrary, denied admissibility of any portion of the NTSB's final "Aircraft Accident Report" sought to be entered.⁹⁸ The judge gave three reasons for denial: (1) many of the cases relied upon by plaintiffs were inapposite because they only pertained to witness testimony;⁹⁹ (2) a decision by the United States Court of Appeals for the Tenth Circuit stated that NTSB reports are barred as evidence in court;¹⁰⁰ and (3)

⁹⁴ See *Beech Aircraft Corp.*, 488 U.S. at 169 (noting rules on expert and lay witness testimony as well as the rule of completeness affect admissibility).

⁹⁵ Compare *In re Air Crash at Stapleton Int'l Airport, Denver, Colo.*, 720 F.Supp. 1493, 1496 (D. Colo. 1989) (holding NTSB reports admissible with court approved redaction of opinion and probable cause findings), with *In re Air Crash Disaster at Sioux City, Iowa*, 780 F. Supp. 1207, 1212 (N.D. Ill., 1991) (holding NTSB report not admissible).

⁹⁶ See *In re Air Crash Disaster at Sioux City*, 780 F. Supp. at 1212 (holding NTSB reports not admissible). Accord *J. Van Houten-Maynard v. ANR Pipeline Co.*, No. 89-C-0377, 1995 WL 317072, at *3 (N.D.Ill. May 23, 1995); *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, No. 92-C-1658, 1995 WL 59235, at *6 (N.D. Ill. Feb. 10, 1995).

⁹⁷ 780 F. Supp. at 1212.

⁹⁸ 780 F. Supp. at 1209-10 (relying heavily on "unambiguous prohibitory language" of statute barring admissibility of NTSB reports at trial).

⁹⁹ *Id.*

¹⁰⁰ 780 F. Supp. at 1210-11. The court, quoting dicta from *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 639 (10th Cir. 1990) where the Tenth Circuit

the cases that do stand for admissibility of NTSB reports rely on FRE 803(8)(C) for admissibility, an argument that creates a "slippery slope" leading to admission of NTSB opinions just short of the probable cause finding.¹⁰¹ Interestingly, not one case mentions the NTSB's 1975 regulation revision interpreting Part 835 as no longer excluding the investigator's factual accident report, making the Tenth Circuit's holding wrong, as a matter of law.¹⁰²

Notwithstanding the decisions in the Northern District of Illinois, factual portions of NTSB accident reports are now usually admitted into evidence at trial with one of the most permissive decisions coming from South Carolina in *In re Air Crash at Charlotte, North Carolina*.¹⁰³ The court admitted nine NTSB Group Chairman's Factual Reports during one motion in limine hearing, subject to the defendant's opportunity to point out opinions or conclusions that might be redacted.¹⁰⁴ The court opined that "since 1951, Circuit

reversed a district court ruling allowing the representative of a victim of a plane crash to observe an NTSB investigation. 780 F. Supp. at 1211.

¹⁰¹ 780 F. Supp. at 1211-12. The court pointed to *In re Air Crash at Stapleton Int'l Airport, Denver, Colo.* to support its argument because that court allowed admission of otherwise inadmissible portions of the NTSB report for purposes of impeachment. *Id.*

¹⁰² See National Transportation Safety Board Redesignation and Revision of Regulations, 40 Fed. Reg. 30232 (eliminating investigator's factual accident report from its strictures and allowing employee opinion testimony short of probable cause).

¹⁰³ No. MDL 1041, 1996 WL 926575 (D.S.C. Dec. 27, 1996). *Accord In re Cleveland Tankers, Inc.*, 821 F. Supp. at 464 (admitting factual portions of NTSB report acknowledging "judicial gloss" on statutory prohibition of NTSB report admissibility); *Budden v. United States*, 748 F. Supp. 1374, 1377 (D. Neb. 1990)(finding no opinions as to probable cause and therefore admitting NTSB report to extent not precluded by other reasons such as double hearsay or lack of trustworthiness); *In re Air Crash at Stapleton Int'l Airport*, 720 F. Supp. at 1494 (affirming admission of edited NTSB Human Factors report adopted by the NTSB as final probable cause report).

¹⁰⁴ *In re Air Crash at Charlotte, North Carolina*, 1996 WL 926575, at *3 (admitting the reports subject to requests for redaction from opposing counsel of

Courts have routinely admitted the factual portions of investigative reports generated after an airline disaster" and therefore adequate basis existed for its rulings.¹⁰⁵

Even in less permissive decisions, the emphasis shifted away from statutory construction and towards evidentiary challenges to the otherwise admissible portions of the reports.¹⁰⁶ Trustworthiness now effects more decisions with courts noting that, while FRE 803(8) contains a presumption of trustworthiness in government generated reports, the presumption is rebuttable.¹⁰⁷ Issues of double and triple hearsay also command attention.¹⁰⁸ Additionally, otherwise inadmissible portions of the reports may be admissible for the purposes of

specific portions deemed opinion and the reasons therefor and submitted by a set date).

¹⁰⁵ *Id.* at *4. The court proceeded to give a history of Appellate Court decisions in support of its statement. *Id.* at *4-6. It noted contrary decisions in Illinois but also pointed out they were in the minority. *Id.* at *6. Further, the court found significance in Congress' retention of the identical language of The Federal Aviation Act of 1958 as codified at 49 U.S.C. §§ 1441(e) and 1903(c) in the current codification at § 1154(b), notwithstanding judicial interpretation differing with the plain language. *Id.* at *6.

¹⁰⁶ *See In re Air Crash at Stapleton Int'l Airport*, 720 F. Supp. at 1497-99 (holding NTSB Human Factors Report admissible after lengthy discussion of trustworthiness and double and triple hearsay).

¹⁰⁷ *See In re Air Crash at Charlotte, North Carolina*, 1996 WL 926575, at *8 (finding investigator's summary unreliable and lacking trustworthiness). The investigator's summary, generated from memory and discarded handwritten notes, was further condensed by a third party and contained information that some parties interviewed by the investigator later contested. *Id.* *See also Air Crash at Stapleton Int'l Airport*, 720 F.Supp. at 1499-98 (quoting *Kehm v. Proctor and Gamble Mfg. Co.*, 580 F. Supp. 890 (N.D. Iowa 1982) (noting opponent of admissibility has burden to rebut trustworthiness presumption but partial reliance on unconfirmable hearsay not ipso facto evidence of untrustworthiness).

¹⁰⁸ *See Budden v. United States*, 748 F. Supp. 1374, 1377 (D. Neb. 1990) (excluding portions of coroner's report contained in NTSB report due to insurmountable double hearsay problems).

impeachment.¹⁰⁹ The practitioner, therefore, must pay close attention to other issues that may effect the admissibility of the reports.

VI. CONCLUSION

This body of law, though still unsettled, suggests that the majority of courts will, at the very least, admit factual portions of NTSB reports. Indeed, many decisions revolved not around general admissibility of the submitted report, which neither party contested, but rather the scope of information included. Notwithstanding this trend, a conclusion, as propounded by Roy Atwood in his 1987 *Southern Methodist University Law Review* Comment, that section 1154(b) is some how defunct seems premature.¹¹⁰ Surely the basis for the NTSB's protection of its probable cause findings and the judicial deference to that policy supports maintaining the statutory bar.

The civil litigant must still present her own case and, therefore, may not rely on the NTSB to do it for her by using only NTSB investigative results. The judicial lifting of the restriction on the use of factual reports provides only a starting point for the civil litigant's own base of evidence supporting her case. Ever mindful of the potential for bias in the NTSB investigation and resulting reports, the litigant must still do an exhaustive investigation of her own.

The Rules level the playing field by allowing litigants to present expert witnesses who rely on NTSB materials by denying either party from disclosing this reliance. Allowing expert testimony based on a review of the facts disclosed in the NTSB reports eliminates a litigant's tendency to seek impermissible probable cause testimony from a NTSB employee. While the expert's testimony may comport with the NTSB's own probable cause findings, the jury, denied this fact, evaluates the testimony unbiased by the weight of NTSB authority.

¹⁰⁹ See *In re Air Crash at Charlotte*, 1996 WL 926575, at *8 (allowing excluded report for use by plaintiffs in cross-examination of persons interviewed).

¹¹⁰ See Atwood, *supra* note 45, at 503-04 (advocating Congressional action to remove restrictions on use of NTSB findings).

The civil litigant's need for full disclosure of all admissible relevant evidence for the resolution of civil claims must be balanced against both the judicial premise that the jury's decision must not be supplanted with another body's decision and the NTSB's ability to carry out thorough and unhampered investigations. An appropriate solution would be to change the statutory text to specifically allow the admission of NTSB materials, reports and investigator testimony that fall short of the NTSB's probable cause finding. This would ensure uniformity and fairness of decisions across all circuits as to general admissibility, leaving only the evidentiary issue of screening out NTSB probable cause determinations for judicial review.

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