

## TRANSPORTATION

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### IN THIS ISSUE

*In transportation cases, including aviation accident cases, the National Transportation Safety Board (“NTSB”) often is required to investigate and prepare a report. These reports generally include factual information obtained through interviewing witnesses, pilots or other individuals involved in the accident, manufacturers, and other experts, as well as the NTSB’s own observations of the aircraft and accident scene. The NTSB report may also include the NTSB’s “probable cause” determination. Naturally, the information found in the NTSB report may become a focal point in the litigation, but not all the information in the report may actually be admissible in court. This article explains what parts of the NTSB report may be potentially excluded as inadmissible evidence to assist counsel in determining a strategy for use (or non-use) of the NTSB report in their cases.*

## What Information from an NTSB Report is Admissible Evidence in Court?

### ABOUT THE AUTHORS



**Mica Worthy** serves as legal counsel to clients in the aviation and global supply chain industries, representing airports, general aviation companies, FBOs, and manufacturing, technology, and service companies. She has experience providing analysis of issues involving aviation expert witness challenges, aircraft valuation and damages, and contract dispute resolution. Mica assists clients through pre-suit negotiations, mediation, arbitration and litigation in State and Federal Courts. She serves on the CSH Law COVID-19 Response Team. Mica is a founding Board Member of the Charlotte International Arbitration Society (“CIAS”), and currently serves as the Chair of the CIAS. She has also served as Chair of the N.C. Bar Association’s International Law & Practice Section. She is also currently a member of the Carolinas World Trade Association. Mica has been a member of the International Association of Defense Counsel (IADC) since 2018. She can be reached at [mworthy@cshlaw.com](mailto:mworthy@cshlaw.com).



**Susan Hofer** serves as the Chair of the firm’s Aviation Litigation Practice Group. Susan has been litigating since 1988 and is licensed to practice law in North Carolina. She has also been admitted to practice Pro Hac Vice in many other jurisdictions. She joined the Cranfill Sumner & Hartzog LLP (CSH Law) team in 2014 and serves on the CSH Law COVID-19 Response Team. In addition to her extensive litigation experience, Susan is an FAA certificated pilot, holding commercial and certified flight instructor, small unmanned aircraft system, remote pilot, instrument airplane, and glider certificates. This combined expertise, along with a technical background from extensive patent research experience, enables her to effectively and successfully analyze and litigate aviation, products liability, and other technically-based cases.. She can be reached at [shofer@cshlaw.com](mailto:shofer@cshlaw.com).

### ABOUT THE COMMITTEE

This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

In many of our aviation accident cases, one of the first tasks for investigation is reviewing the report from the National Transportation Safety Board (“NTSB”). The “preliminary” report is generally available within a few days of an accident or incident, and then once further factual information has been obtained and the investigation is deemed complete, the NTSB prepares a “final” version of the report with both a detailed description of the facts obtained and the NTSB’s “probable cause” determination.<sup>1</sup>

We sometimes see the NTSB reports referenced or relied upon in litigation and occasionally must argue our position that certain parts of the report are inadmissible as evidence at trial. There are generally two parts in the NTSB reports that are subject to challenge: (1) the “probable cause” and opinions; and (2) inadmissible hearsay statements from witnesses.

### 1. The NTSB’s Probable Cause Opinions are Inadmissible in Court

Under the Federal Aviation Act (“FAA”) as well as case law around the country, at most, only the factual portions of these reports are admissible as evidence in civil litigation.

Federal Aviation Act of 1958, § 701(e), 49 U.S.C. § 1154(b)<sup>2</sup>.

In North Carolina, the Courts have cited the FAA statute and held that “no part of any report 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.”<sup>3</sup> The Court in *Bolick v. Sunbird Airlines, Inc.* even went on to explain that our courts have excluded the portions of such reports expressing agency views and opinions, but agreed that factual information was admissible.<sup>4</sup>

To compare, in the case *In re Paulsboro Derailment Cases*<sup>5</sup>, the New Jersey court held that the entire NTSB report was to be excluded from evidence based on the language of 49 U.S.C. §1154(b) that specifically uses the phrase “no part” of the accident report may be admitted into evidence.

Indeed, on the NTSB report itself where the “probable cause” is provided, there is even a notice in a box shaded in gray at the end that explicitly informs the public that such

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<sup>1</sup>

[https://www.nts.gov/ layouts/nts.aviation/index.aspx](https://www.nts.gov/layouts/nts.aviation/index.aspx)

<sup>2</sup> *Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 386 S.E.2d 76 (1989), *aff’d*, 327 N.C. 464, 396 S.E.2d 323 (1990); *Davis v. Cessna Aircraft Corp.*, 893 P.2d 26, 35 (Ariz. App. 1995); *Huber v. U.S.A.*, 838 F.2d 398, 403 (9th Cir. 1988).

<sup>3</sup> *Bolick* at 445.

<sup>4</sup> *Bolick* at 443, 386 S.E.2d 76 (1989), *aff’d*, 327 N.C. 464, 396 S.E.2d 323 (1990); See also, *Snider v. Sterling Airways, Inc.*, No. 13-cv-2949, 2017 WL 3873540 (E.D. Pa. Sept. 5, 2017) (excluded the portions of the report and investigation docket that “contained opinions and/or conclusions of the NTSB investigators and/or otherwise inadmissible hearsay.)

<sup>5</sup> *In re Paulsboro Derailment Cases*, 2015 WL 4138950 (July 9, 2015).

admission into evidence in a civil action is precluded<sup>6</sup>:

The National Transportation Safety Board (NTSB), established in 1967, is an independent federal agency mandated by Congress through the Independent Safety Board Act of 1974 to investigate transportation accidents, determine the probable causes of the accidents, issue safety recommendations, study transportation safety issues, and evaluate the safety effectiveness of government agencies involved in transportation. The NTSB makes public its actions and decisions through accident reports, safety studies, special investigation reports, safety recommendations, and statistical reviews.

The Independent Safety Board Act, as codified at 49 U.S.C. Section 1154(b), precludes the admission into evidence or use of any part of an NTSB report related to an incident or accident in a civil action for damages resulting from a matter mentioned in the report. A factual report that may be admissible under 49 U.S.C. § 1154(b) is available [here](#).

In one example, in the *Davis v. Cessna* case, the Court of Appeals in Arizona specifically held that trial court's admission of the NTSB's probable cause conclusion of pilot error was deemed "reversible error." In other words, the verdict was reversed because the jury had improperly been informed that the NTSB decided the issue by finding the pilot was solely responsible for the crash.

However, there are cases where the probable cause from the NTSB report was used in court because no objection was made and 49 U.S.C. § 1154(b) was not brought to the court's attention.<sup>7</sup> These cases are considered anomalies. Thus, upon proper objection by legal counsel, the "probable cause" and opinions in the NTSB report are not admissible in Court.

## 2. Hearsay Statements from Witnesses in the NTSB Report are Inadmissible in Court

Additionally, the portions of the NTSB report that are based on witness (or pilot) statements to the NTSB must be scrutinized under the hearsay rule. In the *Bolick* case, the N.C. Court held that the portions of the NTSB airplane crash investigation report containing hearsay statements by pilots, witnesses and other non-officials who were not present to testify at trial were properly excluded at the negligence trial arising out of an airplane crash.<sup>8</sup>

Likewise, in *John McShain, Inc. v. Cessna Aircraft Co.*<sup>9</sup>, the Pennsylvania court upheld the trial court's exclusion of the NTSB report "to the extent it consisted of statements of pilots or other witnesses because they

<sup>6</sup> The link "here" on the form goes to the "Factual Report" – a separate report the NTSB produces with basic factual information including the date/time of the incident, aircraft information, weather and flight plan information, investigation observations, and pilot information. Even some of the factual report can be challenged, however, as inadmissible hearsay as well. The formatting of the NTSB reports has changed and the Probable Cause section may be

incorporated into the final report and not as a separate document as was done before; questions arise as to how courts may view this formatting and the extent to which the report will be excluded.

<sup>7</sup> *Edens v. Sensenich Propeller Service, Inc.*, No. 15-cv-00272, ECF 49 (E.D. Tenn., filed May 13, 2016).

<sup>8</sup> *Bolick*, at 447.

<sup>9</sup> *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d. 632, 636 (3rd Cir. 1977)

constitute inadmissible hearsay.” Some courts around the country will also choose to exclude the entire report to avoid the “arduous” process of weeding through which facts are not hearsay, as a matter of judicial economy.<sup>10</sup> Still, other courts will require the parties to redact the portions of the NTSB report that contain hearsay.<sup>11</sup>

The *McShain* court went on to state that memoranda submitted to the government by its investigators often contain statements from witnesses, and such memoranda would actually encompass double hearsay. Thus, while factual portions from official investigative reports are admissible under Rule 803(8)(c), “any hearsay contained in the report must also fall under one of the hearsay exceptions” or it should be excluded from evidence. In fact, the NTSB Advisory Committee’s notes also make clear that Federal Rule of Evidence 803(8)<sup>12</sup> exempts from the hearsay rule only reports by officials; and of course, pilots and other witnesses are not “officials” for this purpose.<sup>13</sup>

It is also important to note that federal law prohibits FAA and NTSB employees or similarly employed government personnel

from giving opinion testimony and/or acting as an expert witness concerning an accident in civil litigation. 14 C.F.R. § 13.227 (“An employee of the agency may not be called as an expert or opinion witness, for any party other than the FAA...”) and 49 C.F.R. § 835.3 (“Board employees...shall not give any expert or opinion testimony) (emphasis added).

The policy behind the exclusion of these opinions from NTSB investigations is clear: to assist the FAA in protecting against future accidents.<sup>14</sup> The agency’s investigatory procedures are “not designed to facilitate litigation, and Congress made it clear the Board and its reports should not be used to the advantage or disadvantage of any party in a civil lawsuit.”<sup>15</sup>

Thus, Congress put strict limits on how NTSB materials and employees may be used in civil litigation to keep the NTSB “free of entanglement of such suits” and to ensure that the NTSB “does not exert an undue influence on litigation.”<sup>16</sup> 49 C.F.R. § 835.3(a) (the policy is to exclude reports that express agency views as to probable cause of the accident).

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<sup>10</sup> *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, 2012 WL 425164, MDL No. 2179 (E.D. La. Feb. 9, 2012).

<sup>11</sup> *Sheesley v. The Cessna Aircraft Co.*, 2006 WL 1084103 at \*38-39 (D.S.D. April 20, 2006).

<sup>12</sup> The N.C. Rules of Evidence mirror the Federal Rules of Evidence on Rule 803(8).

<sup>13</sup> *McShain* at 632.

<sup>14</sup> *Chiron Corp. and Perceptive Biosystems, Inc. v. NTSB*, 198 F.3d 935, 937 (D.C. Cir. 1999);

Importantly, because aviation crash reports are

prepared pursuant to a federal statute, “the holdings and underlying rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute.” *Hill v StubHub, Inc.*, 219 N.C. App. 227, 235, 727 S.E.2d 550 (2012).

<sup>15</sup> *Chiron* at 940.

<sup>16</sup> See *Universal Airline v. Eastern Airlines*, 188 F.2d 993 (C.A.D.C. 1951); *Hickson Corp. v. Norfolk S. Ry. Co.*, 124 Fed. Appx. 336, 340 (6th Cir. 2005)

While NTSB employees may testify as to facts, i.e. what they personally observed during investigation, the FAA requires 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). In our experience, it is unlikely that the NTSB will voluntarily provide *any* testimony in a civil lawsuit, and the effort required to compel the NTSB personnel or investigators to testify is cumbersome with a low likelihood of such resulting in any useful testimony or evidence that could not have been obtained elsewhere or by other means.

Thus, upon proper objection by legal counsel, the hearsay testimony contained in the NTSB report is also not admissible in Court.

This information is important to bear in mind during aviation accident cases, as it might be tempting to rely heavily, but inappropriately, on the investigation the NTSB has undertaken and its reports. The federal law makes it clear that the NTSB reports are not intended to be used in civil litigation, but rather, the NTSB is to do its investigation independent of any potential entanglement in any lawsuit.

Should you have any questions about the admissibility of a particular NTSB report or information contained therein, please contact the CSH Law Aviation Practice Group.

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