

**THE ADMISSIBILITY OF FACTUAL PORTIONS OF NTSB REPORTS IN AIR  
CRASH LITIGATION**

**By: Alan Armstrong\***

**I.**

**INTRODUCTION**

The admissibility of factual portions of National Transportation Safety Board (“NTSB”) reports is fertile ground for litigation when litigating claims of liability and damages arising out of an aircraft accident. This paper is intended to provide a very brief overview of this interesting area of aviation law. In writing this article, it is the intent of the author to give the newcomer to aviation law an appreciation for some of the challenges presented in litigating aircraft disasters.

**II.**

**OVERVIEW**

The NTSB is charged with investigating, establishing facts, and determining probable cause in aircraft accidents including both civil aircraft and public aircraft.<sup>1</sup> Except in matters involving suspected criminal activities, the NTSB has priority over any other investigation by any federal agency.<sup>2</sup> The NTSB conducts investigations of aviation accidents and uses the results to determine probable cause.<sup>3</sup>

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<sup>1</sup> 49 U.S.C. §§1131(a)(1)(A), 1132(a)(1)(A).

<sup>2</sup> 49 C.F.R. §831.5(a)(1).

<sup>3</sup> 49 C.F.R. §831.4(a).

Generally, with regard to cockpit voice recorders, only the released portions of the cockpit voice recorder transcript may be discovered in civil litigation.<sup>4</sup> However, if a court conducts an in camera review of the cockpit voice recorder transcript and concludes that the portions of the transcript that are publicly available are insufficient to provide a party a fair trial and concludes that discovery of additional portions of the transcript is necessary to provide a party with sufficient information to receive a fair trial, then additional portions of the cockpit voice recorder transcript may be obtained through discovery.<sup>5</sup>

49 U.S.C. §1154(b) is explicit, unambiguous and provides:

No part of a report of the Board, 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.

The clear and unambiguous language in 49 U.S.C. §1154(b) notwithstanding, 49 C.F.R. §835.2 provides as follows:

Accident, for purposes of this part includes “incident.”

Board action report means the report containing the Board’s determinations, including the probable cause of an accident issued either as a narrative report or in a computer format (“briefs”) of accidents). Pursuant to Section 701(e) of the Federal Aviation Act of 1958 (FA Act), in §304(c) of the Independent Safety Board Act of 1974 (49 U.S.C. 1154(b)) (Safety Act) no part of a Board accident report 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.

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<sup>4</sup> 49 U.S.C. §1154(a)(1)(B).

<sup>5</sup> 49 U.S.C. §1154(a)(2)(A)(i), (ii).

Despite the clear language in 49 U.S.C. §1154(b) declaring that “no part” of report of the Board is admissible in a civil action for damages, the following language articulated by the United States Court of Appeals for the District of Columbia in *Chiron Corp. and PerSeptive BioSystems, Inc., v. NTSB*,<sup>6</sup> made the following observation about the state of the law in the admissibility of factual portions of NTSB reports versus Board reports:

Our research indicates that, since the promulgation of the Board’s 1975 rule, only two circuit court opinions have failed to recognize that the admissibility of investigators’ reports obviates the need for a judicial exception to the statute. *See Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 848 (10<sup>th</sup> Cir. 1986) (“[E]xpert witness properly relied on the factual portions of the NTSB report”); *Curry v. Chevron, USA*, 779 F.2d 272, 274 (5<sup>th</sup> Cir. 1985) (acknowledging judicial gloss of the statute “that allow[s] factual portions of the report to be admitted”). In each case, the Courts distinguished between “factual portions” of the Board reports and “parts of the NTSB reports which contain agency conclusions of the probable cause of accidents.” *Mullan*, 797 F.2d at 848. However, neither opinion is weighty authority, even for the limited rule enunciated, because there are later decisions from both circuits that adhere to the strict terms of the statute. Subsequent to *Mullan*, the Tenth Circuit has held that, “[c]onsistent with its fact-finding mission, that is litigation neutral, NTSB reports are barred as evidence in court.” *Thomas Brooks v. Burnett*, 920 F.2d 634, 639 (10<sup>th</sup> Cir. 1990); *Accord Jet Craft Corp. v. Flight Safety Int’l*, 16 F.3d 362, 366 (10<sup>th</sup> Cir. 1993). And even more recently, in 1998, the Fifth Circuit has noted that:

Federal law flatly prohibits the NTSB accident report from being admitted into evidence in any suit for damages arising out of accidents investigated by the NTSB.

*Campbell v. Keystone Aerial Surveys, Inc.*, 128 F.3d 996, 1001 (5<sup>th</sup> Cir. 1998).

We agree with these recent decisions by the Fifth and Tenth Circuits, and also a decision from the Ninth Circuit, *See Benna v. Reeder Flying Serv., Inc.*, 578 F.2d 269, 271 (9<sup>th</sup> Cir. 1978), holding that, under the plain terms of the statute, NTSB reports are inadmissible in civil litigation. When the statute was interpreted broadly to

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<sup>6</sup> *Chiron Corp. and PerSeptive BioSystems, Inc. v. NTSB*, 198 F.3d 935 (D. C. Cir. 1999).

include the investigator's reports, there may have been a public policy justification for admitting factual information. However, once the statute was interpreted more narrowly, no justification remained for any exception to Section 1154(b).<sup>7</sup>

### III.

#### **AN EXAMINATION OF A PRE-TRIAL RULING OF JUDGE TIMOTHY M. BURGESS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA IN AN AVIATION ACCIDENT CASE ON THE ADMISSIBILITY OF FACTUAL ACCIDENT REPORTS AND INADMISSIBILITY OF BOARD ACCIDENT REPORTS**

Judge Timothy M. Burgess of the United States District Court for the District of Alaska in *Specter v. Texas Turbine Conversions, Inc.*,<sup>8</sup> had before him a motion in limine brought by the plaintiff's attorney to exclude the probable cause report, the final report, and other matters arising out of a crash of a DeHavilland DHC-3 Otter with FAA Registration N928RK. The NTSB concluded that the probable cause of the accident was:

Pilot's decision to depart in dark night...which resulted in his subsequent spatial disorientation and loss of airplane control. Contributing to the accident was the pilot's failure to determine the airplane's actual pre-flight weight and balance and center of gravity (CG) which led to the airplane being loaded and operated outside of the weight and CG limits and to a subsequent aerodynamic stall.<sup>9</sup>

In rendering his decision, Judge Burgess noted: "The NTSB determined that the aircraft exceeded its maximum weight by about 508.6 pounds and that the center of gravity was 4.08 inches aft of the aft center of gravity limit."<sup>10</sup> The plaintiffs requested that the court preclude references in the reports from any legal conclusions or opinions or probable cause determinations on the theory that

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<sup>7</sup> 198 F.3d at 941.

<sup>8</sup> *Specter v. Texas Turbine Conversions, Inc.*, 2020 WL 7701484 (D. AK 2020)

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.*

legal conclusions are inadmissible and the report should be excluded as untrustworthy under Federal Rule of Evidence 803(8).<sup>11</sup>

The aircraft was equipped with a “Max-Viz Enhanced Vision System” that uses an infrared sensor and a visible light camera to display a real-time video image of the environment outside the aircraft.<sup>12</sup> Consequently, Mark E. Madden, an expert for the Defendants proposed as part of his testimony to use videos and documents from the FAA as part of his testimony before the jury on special disorientation.<sup>13</sup> The Defendants opposed the Plaintiffs’ motion in limine arguing that federal law did not bar admission of NTSB reports on the basis that they contain inadmissible hearsay or legal conclusions or based on the purported inability to cross-examine the NTSB investigator who accumulated the data.<sup>14</sup> The Defendants further maintained that redacting portions of the NTSB report was acceptable.<sup>15</sup> The Defendants further argued that the Plaintiffs failed to object to large portions of the NTSB investigation including passenger statements and other factual findings such as a weight and balance analysis.<sup>16</sup> Moreover, the Defendants maintained that their expert, Mr. Madden, could use FAA videos in providing testimony because they were to be used only as demonstrative exhibits to clarify his testimony before the jury.<sup>17</sup>

The Plaintiffs clarified their arguments by conceding that “[t]he facts discussed...which are from the work of the NTSB investigation team are admissible – this could include, for example, photographs and measurements at the crash scene, the flight path, and other work actually performed by the NTSB.”<sup>18</sup> The Plaintiffs further maintained that redaction of portions of the

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<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 8, fn. 17.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

NTSB reports were impracticable or impossible with the result that the Board reports should be excluded in their entirety.<sup>19</sup>

A review of the order of Judge Burgess reveals that the generic NTSB reports and other data could actually be described as various subcategories. For example, the Court described a document as Exhibit No. 2 which was an NTSB Aviation Accident Final Report, and the Plaintiffs did not contest the admissibility of: (1) pilot information; (2) aircraft and owner/operator information; (3) meteorological information and flight plan; (4) wreckage and impact information; (5) the description of the wreckage as the NTSB found it; and (6) the aircraft flight path data as contained in Exhibit 2.<sup>20</sup> However, the Plaintiffs did contest the admissibility of two studies done by the NTSB and contained in Exhibit 2, to wit: (1) the Weight and Balance Study and (2) the Airplane Performance Study.<sup>21</sup>

At the Court's request, the Plaintiffs stated their position on the admissibility of other documents located in the NTSB Docket Summary located as Exhibit A to the Response of Defendant Texas Turbine Conversions, Inc.<sup>22</sup> For example, the Plaintiffs did not contest the admissibility of the Wreckage Diagram, Photo Array, Pilot / Operator Aircraft Accident Report and the Automatic Dependent Surveillance Broadcast ("ADS-B") data that mapped the aircraft flight path which was located in the NTSB Factual Figure and Tables document.<sup>23</sup> The Plaintiffs sought to exclude all other documents on the NTSB docket including the Civil Twilight information and the Medical Factual Report and the two studies previously mentioned above.<sup>24</sup> The Defendant's opposed Plaintiff's motion in limine to exclude any factual reports including

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

documents identified on the NTSB docket and argued the factual reports were admissible as a matter of law.<sup>25</sup>

Judge Burgess in ruling on the Plaintiff's motion in limine observed that the NTSB is responsible for investigating aircraft accidents and charged with establishing the facts and circumstances, and their cause or probable cause.<sup>26</sup> Judge Burgess further noted that NTSB officers or employees may enter the crash site and inspect any record that is related to the accident investigation.<sup>27</sup> Judge Burgess further found that NTSB investigations may "result in a report or brief of the NTSB's conclusions" along with "factual records, safety recommendations, and other safety information."<sup>28</sup> Judge Burgess further noted that NTSB investigations "are not adversarial proceedings or conducted for the purpose of 'determining the rights...or blame of any person.'"<sup>29</sup> He further noted that federal regulations prevent "Board accident report[s]" from being admitted as evidence but state that "factual accident reports" may be admitted.<sup>30</sup> Judge Burgess noted: "[t]he Board accident report is the report that 'contain[s] the Board's determinations, including the probable cause of an accident[.]'"<sup>31</sup> Conversely, Judge Burgess declared: "[t]he factual accident report is the report that 'contain[s] the results of the investigator's investigation of the accident.'"<sup>32</sup> While noting that evidence must be admissible under the Federal Rules of Evidence and that hearsay is inadmissible,<sup>33</sup> he noted that Federal Rule of Evidence 803(8) allows records or statements from a public office (such as the NTSB) to be admitted, including "factual findings

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<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, fn. 38, citing 49 C.F.R. §835.2.

<sup>31</sup> *Specter v. Texas Turbine Conversions, Inc.*, *supra* at 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

from a legally authorized investigation.”<sup>34</sup> He further noted that public records can only be admitted if “the opponent does not show that the source of the information or other circumstances indicate a lack of trustworthiness.”<sup>35</sup> Judge Burgess then noted that evidence must conform to Rules 401 and 403 of the Federal Rules of Evidence such that it must be relevant and the probative value must not be substantially outweighed by unfair prejudice; and he further noted that under Federal Rule of Evidence 703, expert testimony may rely upon information that need not be admissible for the opinion to be admitted; provided, if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury... substantially outweighs their prejudicial effect.<sup>36</sup>

Judge Burgess, after outlining and considering the foregoing Federal Rules of Evidence granted Plaintiff’s motion in limine with respect to the NTSB Reports identified as Exhibits 1 through 3 but denied the motion in limine without prejudice with respect to the “Factual Information” section of Exhibit 2.<sup>37</sup> Plaintiff’s motion in limine was granted as to the Weight and Balance document and the Civil Twilight document at Dockets 9-10 of the NTSB Docket but denied without prejudice as to the Weight and Balance Study, the Performance Study, the Medical Factual Report and the Factual Figure and Tables document at Dockets 13, 19, 20 and 22 of the NTSB Docket.<sup>38</sup> The Court denied, without prejudice, the Plaintiffs’ motion to exclude potential use of the FAA videos as part of Madden’s expert testimony and declared it would rule on the admissibility of Madden’s potential use of the videos when offered at trial.<sup>39</sup>

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<sup>34</sup> *Id.* at 3.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 3.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*



#### IV. AN ANALYSIS OF THE LOGIC EMPLOYED BY JUDGE BURGESS IN RENDERING HIS DECISION

Judge Burgess, in explaining his decision, noted that the parties agreed that while the probable cause findings were not admissible, they also agreed that some factual information in the NTSB report is admissible.<sup>40</sup> Correctly recognizing that 49 C.F.R. §835.2 differentiates between the “accident report” as opposed to the “factual accident report,” Judge Burgess then turned to the exhibits before him and analyzed them in terms of whether they contained opinions or factual data.<sup>41</sup> Since Exhibit 1 focused exclusively on probable cause, it clearly was not admissible.<sup>42</sup> However, with regard to Exhibits 2 and 3, Judge Burgess found the analysis was less straightforward. For example, Exhibit 2 contained four headings including, “Analysis,” “Probable Cause and Findings,” “Factual Information,” and “Preventing Similar Accidents.”<sup>43</sup> Exhibit 3 contained headings including “Analysis,” “Flight Events,” “Probable Cause,” and “Findings.”<sup>44</sup> Judge Burgess noted that perhaps one of the reasons that Congress limited the admissibility of NTSB Reports was “because of their prejudicial effect on a jury or fact finder.”<sup>45</sup> Citing *Benna v. Reeder Flying Service, Inc.*, 578 F.2d 269 (9<sup>th</sup> Cir. 1978), Judge Burgess noted that the Ninth Circuit believed that the “probable cause” finding would “definitely prejudice the jury by unfairly placing a government stamp of officiality on the probable case of the accident.”<sup>46</sup> He then observed: “Because the Reports contain probable cause analysis and findings, the Court finds that

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<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

all portions of the Reports at Plaintiffs' Exhibits 1-3 are inadmissible, except for the 'Factual Information' section of Exhibit 2 at pages 3-12."<sup>47</sup> Judge Burgess then made this observation:

The Court finds that the "Factual Information" section of Exhibit 2 is admissible, but the Court will defer decision on whether or how to redact this section from the Report. The "Factual Information" section contains information that might be helpful to the jury in this case, such as information collected by the NTSB about the aircraft, pilot, wreckage, and impact. This is information that may not be available elsewhere and the parties have indicated a desire to admit such information.<sup>48</sup>

Then, in terms of factual information he considered the Weight and Balance Study, the Airplane Performance Study, and the Medical Factual Report.<sup>49</sup>

Addressing the Weight and Balance Study, Judge Burgess noted that the weight values appearing in the study were estimates and the Plaintiffs' expert did not criticize the weight and balance calculations and in fact relied on them.<sup>50</sup> Judge Burgess reasoned that the probative value of the weight study did not appear to be substantially outweighed by unfair prejudice and therefore the motion in limine with respect to same would be provisionally denied with the right afforded to Plaintiff at trial to renew an objection as to its admissibility.<sup>51</sup>

With regard to the Airplane Performance Study, the Plaintiffs did not object to Figure 1 in Exhibit 2, a rendering of the aircraft flight path based upon ADS-B data. The Defendants maintained that the Airplane Performance Study is part of the factual record and that Plaintiffs' objections to the study go to the weight not to the admissibility of the evidence.<sup>52</sup> The Court reasoned that the Airplane Performance Study was admissible as factual data since the flight path

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 6.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

of the aircraft was recreated from a GPS receiver that derives precise positions from global navigation satellite systems and then combines the information with the speed and altitude of the aircraft.<sup>53</sup> While the Court recognized that ADS-B-derived calculations had some room for inherent error, nevertheless, the evidence would be deemed provisionally admissible with the right of the Plaintiffs to raise the issue again at trial.<sup>54</sup>

In and to the extent the Plaintiffs objected to portions of the NTSB Report on the claim that they would be deprived of the right to cross-examine NTSB employees at trial, Judge Burgess noted that the Plaintiffs' failure to pursue deposition testimony of NTSB employees before trial during discovery would not defeat the admissibility of portions of the NTSB Report at trial.<sup>55</sup>

The next thing Judge Burgess considered was the Medical Report in the NTSB Report. Judge Burgess found that the Medical Report would be admissible under Rule 803(8), Federal Rules of Evidence, as a government report, and the information set forth therein was relevant to the Defendants' arguments regarding spatial disorientation being the cause of the accident.<sup>56</sup> Judge Burgess noted that the report would be admissible regardless of whether it contains hearsay.<sup>57</sup> Judge Burgess further noted that the Medical Report did not evidence any lack of trustworthiness which would be a requirement for the Plaintiff to prove to preclude admission of the Medical Report into evidence.<sup>58</sup>

Next, Judge Burgess considered the fact that there were hearsay statements in the Report that were attributed to individuals. The Plaintiffs argued that the better course of action would be to bring the witnesses to trial and have them testify live, while the Defendants argued that the

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

statements, although hearsay, should be admitted on the premise that the statements were obtained shortly after the accident and therefore more reliable, due to the decay in the witnesses memories or other reasons.<sup>59</sup> Judge Burgess found that both arguments had merit and therefore deferred any decision on the admissibility of the hearsay statements in the Report. Judge Burgess noted: “The Court does not find them inadmissible at this time and will allow Plaintiffs to renew their objection at trial.”<sup>60</sup> With regard to the recitations in the report of Civil Twilight time, the Court found it was inadmissible and there were better ways to establish Civil Twilight time than references made in the Report.<sup>61</sup> With regard to a Weight and Balance document in the report, Judge Burgess noted that he did not have enough information at that time to make a determination as to its trustworthiness and noted the information appeared to be incomplete and a duplicate.<sup>62</sup> With regard to Factual Figures and Tables in the Report, Judge Burgess found that they were admissible.

Finally, with regard to FAA Videos that Defendants’ expert, Mr. Madden, desired to use during the presentation of his testimony, Judge Burgess noted that an expert may rely upon inadmissible evidence if its probative value substantially outweighs its prejudicial effect.<sup>63</sup> Judge Burgess found that the videos were relevant to the Defendants’ spatial disorientation theory and explain the mechanics in the concept and the equipment installed in the aircraft.<sup>64</sup> He then opined that the Court did not reach the question of whether the probative value of the videos substantially outweighed their prejudicial effect.<sup>65</sup> Accordingly, the Court concluded that the Plaintiff could

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 8.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

reassert their objection to the videos at trial at a time when the Court would have a more comprehensive understanding about their proffered testimony and proposed exhibits.<sup>66</sup>

## V.

### CONCLUSION

While there is an argument to be made that no part of an NTSB Report is admissible under 49 U.S.C. §1154(b), 49 C.F.R. §835.2 distinguishes between a “Board accident report” and a “Factual accident report.” This has resulted in courts permitting experts to base their opinion testimony on factual data appearing in Board reports.<sup>67</sup> While opinions as to “probable cause” clearly should not be admitted in civil litigation, factual data which is relevant under Rule 401 of the Federal Rules of Evidence and which is not outweighed by unfair prejudice under Rule 403 of the Federal Rules of Evidence should be admitted. Factual data in Board reports may be admitted under Rule 803(8) of the Federal Rules of Evidence, since the Board report is a public record and therefore admissible unless the opponent can demonstrate the report is unreliable. Even though the Factual accident report may contain hearsay, nevertheless, under Rule 703 of the Federal Rules of Evidence, an expert witness may rely upon evidence that is not admissible provided the opponent to the admission of the evidence cannot demonstrate it is unfairly prejudicial. Finally, in and to the extent expert witnesses may rely upon videos or illustrations that include hearsay, if the probative value is not outweighed by unfair prejudice and if there is no intention to literally seek admission of the video into evidence, then videos and demonstrative aids may be employed by expert witnesses in providing testimony.

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<sup>66</sup> *Id.*

<sup>67</sup> *See, e.g., Benna v. Reeder Flying Service, Inc. supra.*

This article is not intended to be a *magnum opus* on the admissibility of Board reports in civil litigation. It is intended, however, to provide the newly-minted aviation lawyer with a basic understanding of the admissibility of excerpts from Board reports in civil litigation.

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