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The Use Of Aviation Accident Reports By Civil Litigants: The Historical Development Of 49 U.S.C. Section 1441 (e) †

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When aviation accidents occur, the National Transportation Safety Board conducts an investigation to determine the conditions, circumstances, and ultimately the probable cause of the accident. There is a federal statutory privilege which renders these reports, as well as testimony from the attending investigator, inadmissible as evidence in any suit or action arising from the accident. However, certain judicially created excep-

† The opinions expressed in this article are those of the individual authors and do not necessarily represent the views of the Civil Aeronautics Board, the National Transportation Safety Board, the Department of Transportation, or the United States.

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tions have arisen which permit portions of the report and certain investigator testimony to be admitted into evidence.

The authors delineate and analyze these exceptions as they discuss the trend toward increased report and testimony admissibility. The authors conclude with a recommended statutory revision which would set out a predictable and consistent scheme for determining admissibility of National Transportation Safety Board aviation accident reports and testimony from the investigators who prepared them.

I. INTRODUCTION

When Congress established the Department of Transportation, it declared that the general welfare, economic growth, and stability of the nation required, among other things, policies and programs conducive to safe transportation.¹ The American use of transportation is extensive. In aviation, for instance, scheduled air carriers made more than 10,000,000 takeoffs and landings in 1980.²

Given this mobile environment, the circumstances creating a potential for accidents are almost infinite. In 1980, general aviation flying accounted for 1,375 fatalities in this nation.³ Total "transportation accidents" claim American lives to a degree comparable with heart disease and cancer. Just as the medical community of doctors has set out to counteract the tide of lives lost due to disease, Congress has given the National Transportation Safety Board (NTSB)⁴ authority to maximize safety through accident investigation in an attempt to cure the disease of carelessness. In the United States, this authority to investigate and prevent accident reoccurrence is delegated to the Board⁵ for five

1. (a) The Congress hereby declares that the general welfare, the economic growth and stability of the Nation and its security require the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest cost consistent therewith and with other national objectives, including the efficient utilization and conservation of the Nation's resources. 49 U.S.C. § 1651(a) (1976).

2. NATIONAL TRANSPORTATION SAFETY BOARD, ANNUAL REPORT TO CONGRESS 11 (1980).

3. *Id.*

4. The term "Board" will be used for both the Civil Aeronautics Board and the National Transportation Safety Board.

5. (d) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Civil Aeronautics Board, and of the Chairman, members, officers, and offices thereof under titles VI (72 Stat. 775) 49 U.S.C. § 1421 *et seq.* and VII (72 Stat. 781) 49 U.S.C. § 1441 *et seq.* of the Federal Aviation Act of 1958, as amended: Provided however, that these functions, powers, and duties are hereby transferred to and shall be exercised by the National Transportation Safety Board made pursuant to the exercise of the functions, powers, and duties enumerated in this subsection shall be administratively final, and appeals as authorized by law or this chapter shall be taken directly to the courts.

49 U.S.C. § 1655(d) (1976).

modes of transportation, one of the most important being aviation.⁶

Under the Independent Safety Board Act of 1974, the board is charged with authority to "investigate or cause to be investigated, and determine the facts, conditions and circumstances and the probable cause"⁷ of any civil accident. At the completion of the Board's air crash investigation, a written report is prepared. By an act of Congress, section 701(e) of the Civil Aeronautics Act of 1938, these aviation accident reports were to remain privileged, being used solely to ensure future air safety. The language of section 701(e) provided: "no part of any report or reports of the Board or the Authority relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."⁸

By that express privilege-creating statute⁹ the documents which comprise the reports of the Board following an accident investigation are not to be disclosed through the normal discovery procedure of the courts. Statutes of this kind are an anomaly. They are considered an absolute and complete bar to discovery.¹⁰

In 1950, a "reasonable argument [could] be made that Section 701(e) preclude[d] opinion testimony by [Board] employees, but [then] there [were] no court opinions on the question."¹¹ Today, however, there are numerous decisions ruling upon the use of aviation accident reports by civil litigants.¹² This paper will examine

6. The others are rail, highway, marine, and pipeline.

7. 49 U.S.C. § 1653 (1976).

8. Civil Aeronautics Act of 1938, ch. 601, § 701(e), 52 Stat. 1013 (repealed 1958).

9. This type of statute "expressly privileges the document at issue from disclosure in court proceedings." Comment, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 149 (1976).

10. See 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* 2019 (1970).

11. See Simpson, *Use of Aircraft Accident Investigation Information in Actions for Damages*, 17 J. AIR L. AND COM. 283, 291 (1960) where the author discusses the scope of the privilege granted by section 701(e) of the Civil Aeronautics Act of 1938.

12. *Benna v. Reeder Flying Serv., Inc.*, 578 F.2d 269 (9th Cir. 1978); *Keen v. Detroit Diesel Allison*, 569 F.2d 547 (10th Cir. 1978); *American Airlines, Inc. v. United States*, 418 F.2d 547 (5th Cir. 1969); *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628 (3d Cir. 1963); *Lobel v. American Airlines, Inc.*, 192 F.2d 217 (2d Cir. 1951); *Universal Airlines, Inc. v. Eastern Air Lines, Inc.*, 188 F.2d 993 (D.C. Cir. 1951); *Kline v. Martin*, 345 F. Supp. 31 (E.D. Va. 1972); *Fidelity and Casualty Co. of New York v. Frank*, 227 F. Supp. 803 (D. Conn. 1963); *Tansey v. Transcontinental & Western Air, Inc.*, 97 F. Supp. 458 (D.D.C. 1949); *Ritts v. American Overseas Airlines, Inc.*, 97 F.

those rulings and their impact upon the statutory privilege given these aviation accident reports.

II. NTSB ACCIDENT REPORTS

A. *Distinguishing Facts and Observations from Opinions, Conclusions, and Findings*

In 1947, *Ritts v. American Oversea Airlines*¹³ decided that testimony given by a witness before the CAB (the NTSB's predecessor as to aircraft accident investigation) was not privileged and could be used to refresh the witness's recollection or impeach his testimony in a trial proceeding. The court determined from its reading of section 701(e), that only the Board's reports themselves were privileged. The judge assumed that the prohibition against the use of the Board's accident reports was "based upon the fact that the reports would contain findings and conclusions, the receipt of which at trial might be prejudicial to a party who had no part in the investigation of the Board and no opportunity to be heard by the Board."¹⁴

Two years later, in *Tansey v. Transcontinental and Western Air, Inc.*,¹⁵ the court relied upon the reasoning in *Ritts* and held that it was quite possible Congress intended to withhold only the conclusions of the investigating agency from use. The court drew a distinction between the information (factual matter) received by the Board during its investigation and its reports which contained opinions and conclusions.

The Board had an opportunity to exhibit its displeasure with the *Tansey* decision in *Universal Airlines v. Eastern Airlines*.¹⁶ The Board filed an amicus curiae brief, wherein it argued against the use as evidence of testimony by its investigators when the cause of action sought damages. The Board gave five reasons in support of withholding the information: (1) the Board's sole pur-

Supp. 457 (S.D.N.Y. 1947); *Adkins v. Lester*, 530 P.2d 11 (Alaska 1975); *Murphy v. Colorado Aviation, Inc.*, 588 P.2d 877 (Colo. App. 1978); *Todd v. Weikle*, 36 Md. App. 663, 376 A.2d 104 (1977); *McCutcheon v. Larsen*, 333 P.2d 1013 (Mont. 1959); *Myers v. Cessna Aircraft Corp.*, 553 P.2d 355 (Or. 1976).

13. 97 F. Supp. 457 (S.D.N.Y. 1947). The court held that the provision of the Civil Aeronautics Act which excluded reports of the Board from admission into evidence in an action relating to an accident or investigation thereof did not bar the use of testimony of a witness examined by the Board during its investigation.

14. *Id.* at 458.

15. 97 F. Supp. 458 (D.D.C. 1949). In a suit for personal injuries sustained in an airplane accident, the court permitted the plaintiff to examine accident investigations and reports required to be made to the CAB.

16. 188 F.2d 993 (D.C. Cir. 1951). The court held that where the CAB investigation of airplane accidents is the sole source of evidence relevant to the position and condition of the aircraft involved and reasonably available to the parties, the investigation report must be made available in an action for damages.

pose in preparing accident reports is to gain information in order to prevent a reoccurrence of similar accidents and not to provide evidence for private litigants; (2) refusal to release information encourages frank disclosure; (3) testimony by one investigator might differ from the final determination by the Board; (4) testimony would tend to influence civil liabilities; and (5) time of the investigators would be taken up when they testified as experts.¹⁷ In its brief, the Board contended that the appellate court's decision on the admissibility of its accident investigator's testimony concerning observations, opinions, and reports "would establish a precedent not only of interest to [the Board], but of great importance to the public."¹⁸

As to the first issue regarding observation, the *Universal Airlines* decision recognized that the Board's investigators may often be the only witnesses to facts such as the location of wreckage prior to its removal. The appellate court concluded that it was not error to permit such testimony; in fact, use of deposition testimony taken from CAB investigations was preferred because it caused less interference with the investigators' official duties. When the deposition is refused or inadequate, the court may then compel attendance at trial.

Secondly, *Universal Airlines* reasoned that conclusions and opinions of the Federal Aviation Administration (FAA) or the Board, or any testimony directly or indirectly reflecting those opinions, would generally be held inadmissible. Along with the statutory prohibition of section 701(e) (the predecessor of section 1441(e)), the court noted that administrative hearings and investigative proceedings are inadmissible for evidentiary reasons. In particular, the decision pointed out the ex parte nature of the administrative proceedings, the improper character of the evidence, the irrelevance of the proffered testimony, and that the evidence would be hearsay based upon hearsay.

Finally, *Universal Airlines* maintained the confidentiality of the CAB's reports from both direct and indirect disclosure. The court acknowledged a line of decisions that supported the CAB's right to reasonable regulations protecting their reports, records, and regulations barring testimony by their employees concerning

17. *Id.* at 997-1000.

18. *Id.* at 997.

those privileged documents.¹⁹

The *Universal Airlines* decision became the impetus for a succession of court rulings. It played an important, although confused, role in *Lobel v. American Airlines*.²⁰ The *Lobel* decision pointed out that the Board's report "consisted wholly of investigator's personal observations with no opinions or conclusions about the condition of the plane after the accident."²¹ The accident report was admitted into the trial proceedings. The court cited and applied a rule it perceived to have been established in the *Universal Airlines* case. While Universal Airlines objected to the ex parte nature of the Board's hearings and the improper nature of the evidence, *Lobel* reasoned that cross-examination was available at trial, and because the information could have been extracted through such a method, the evidence was proper. In answer to Universal Airlines's objection to the reports as hearsay upon hearsay, the court allowed the report to be admitted only as a past recollection recorded because it was auxiliary to the direct testimony of the investigator given in deposition.²²

The court appeared to reason that when admission of the report does not violate the rules of evidence, then, in accordance with the decision in *Universal Airlines*, the statutory privilege is negated. Recall, however, that *Universal Airlines* excluded the reports as violative of the rules of evidence, thereby obviating the need to confront the challenge of privilege under 49 U.S.C. section 1441(e).

Regardless of its misapplication of the facts in *Universal Airlines*, the *Lobel* decision resulted in the admission into evidence of Board Aviation Accident Reports, notwithstanding the clear language of section 701(e) of the Civil Aeronautics Act. The court, in part, allowed those reports into evidence by drawing what was to be a lasting distinction between facts and observations on the one hand and opinions, conclusions, and findings on the other.

B. Admission of Opinion Testimony

The original version of section 701(e) of the Civil Aeronautics Act of 1938 was reenacted twenty years later as the Federal Aviation Act of 1958 and codified as 49 U.S.C. section 1441(e). The lan-

19. *Id.* at 999.

20. 192 F.2d 217, 220 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952) (in an action by a passenger for damages arising out of a crash, a CAB deposition and report containing personal observations about the condition of the aircraft following a crash were properly admitted into evidence).

21. *Id.*

22. *Id.*

guage remained unchanged, yet the court in *Berguido v. Eastern Airlines*²³ viewed "the judicial interpretations of this section [as having] not been too extensive or precise."²⁴

In *Berguido*, the court declined to follow *Lobel* and held that section 1441(e) precluded Board investigators from testifying, except as to their "personal observations about the scene of the crash and the condition of the plane afterwards."²⁵ The court concluded that to adopt the reasoning in *Lobel* would be to follow an argument which blurred the purpose of the statutory privilege with other policies affecting the admissibility of evidence.²⁶

Lobel concluded that the goal of section 701(e) was to preclude the use in evidence of Board reports which expressed agency views and opinions which would unwisely penetrate areas "within the functions of courts and juries to decide."²⁷ *Berguido*, on the other hand, saw the fundamental policy underlying section 701(e)'s modern counterpart, section 1441(e), as one of "compromise between the interests of those who would adopt a policy of absolute privilege in order to secure full and frank disclosure as to the probable cause and thus help prevent future accidents²⁸ and the countervailing policy of making available all accident information to litigants in a civil suit."²⁹ "The primary thrust of the provision is to exclude [Board] reports which express agency views as to the probable cause of the accident."³⁰

The court's decision spoke of a balancing test and held that opinion testimony came within the rule of section 1441(e). However, testimony relating to personal observations of the Board investigator about the scene of the crash and the subsequent condition of the plane was held admissible because it was not

23. 317 F.2d 628 (3d Cir.), cert. denied, 375 U.S. 895 (1963).

24. *Id.* at 631.

25. *Id.*

26. *Id.*

27. 192 F.2d at 220.

28. In *Universal Airlines*, the court stated that "the Board had been instructed by Congress to investigate aircraft accidents solely for the purpose of gaining the information necessary to prevent the recurrence of similar accidents, and not for the purpose of securing evidence or providing witnesses for the benefit of parties and private litigation." 188 F.2d at 998.

29. *Berguido v. Eastern Airlines*, 317 F.2d at 631-32. See *Tansey v. Transcontinental and Western Airlines, Inc.*, 97 F. Supp. at 461 for a similar view of the policy behind a statute privileging reports of accident investigations.

30. 317 F.2d at 632.

"within the ambit of privilege."³¹ The testimony, the court concluded, could not be opinion testimony since it in no way reflected the Board's findings as to the probable cause of the accident.

In *Fidelity and Casualty Co. of New York v. Frank* (*Frank I*),³² the court expanded the holding in *Berguido*. Testimony about the probable cause of the accident was the only matter to be excluded from evidence. Other conclusions or opinions by the Board were held to be admissible. The court held that testimony "which lies within or close to the ambit of the *ultimate question* in the case, which the trier will have to decide, should be excluded. On the other hand, conclusions and opinions which are outside the area of the ultimate question may be admitted, *even though they have been incorporated in the report of the Board*."³³

The results reached in *Berguido* and *Frank* did not last long. One year and one month later the court amended its initial ruling because the "ultimate question" test proved to be more confusing than helpful. So, in *Frank II*³⁴ the court returned to what it considered a more workable rule. All evaluation, opinion, and conclusion evidence contained within the Board's report would be barred in its entirety. The court held that this was the "only practical way to give adequate effect and to fulfill the purpose" of section 1441(e).³⁵

The inroads taken by *Frank I* in liberalizing section 1441(e) were only temporarily eradicated by *Frank II*. Five years later, another court, in *American Airlines v. United States*,³⁶ established its own interpretation of the scope of section 1441(e). The court determined that "a very sophisticated evaluation of the data had to be made."³⁷ The court decided the rule in *Frank II* would cause uncertainty in sorting fact from opinion. Therefore, the court concluded "it would be better to exclude opinion testimony only when it embraces the probable cause of the accident or the negligence of the defendant" (the ultimate issues).³⁸

By 1971, other courts were abandoning the "simple approach" and returning to the original rule as expressed in *Frank I*. In *Falk*

31. *Id.*

32. 214 F. Supp. 803 (D. Conn. 1963).

33. *Id.* at 805 (emphasis added).

34. *Fidelity and Casualty Co. of New York v. Frank*, 227 F. Supp. 948 (D. Conn. 1964).

35. *Id.* at 949.

36. 418 F.2d 180 (5th Cir. 1969) (qualified testimony reaching beyond merely personal observations is admissible where it does not presume to be the official opinion of the CAB).

37. *Id.* at 196.

38. *Id.*

v. United States,³⁹ it was held that when the government acts as a litigant rather than as a regulatory agency, its status is akin to that of a private citizen.⁴⁰ Support for that ruling was drawn from 49 U.S.C. section 1654(e), which provides that the Board shall make public, among other things, all of its reports. The court assumed that legislation which made available the Board's reports to the public domain also rendered them accessible to civil litigants and admissible in evidence.⁴¹

One year later, the United States District Court for the Eastern District of Virginia also adopted the *American Airlines* rules of the "ultimate issue" test. In *Kline v. Martin*,⁴² the court vitiated the *Falk* requirement that the government be a litigant by noting that "neither of these agencies [NTSB and FAA] nor the United States is a party to this action."⁴³ Therefore, with that decision it became evident that the *American Airlines* rule and the "ultimate issue" test were winning acceptance. Opinion testimony by the Board's investigators would no longer be absolutely barred under section 1441(e). Unless the opinions embraced the probable cause of the accident or the negligence of the defendant, the court might rule in favor of admitting the testimony.

III. RECENT FEDERAL COURT DECISIONS

A. *The Trend Continues*

In 1978, three decisions furthered the trend of liberal interpretations away from earlier cases which sought to bar or delimit the use of the Board work product in civil actions for damages. The first case was *Keen v. Detroit Diesel Allison*,⁴⁴ decided in the Tenth Circuit. Testimony of a Board investigator regarding his observations at the scene of the accident was allowed into evi-

39. 53 F.R.D. 113 (D. Conn. 1971). In a tort claims action against the federal government, the oral opinion of the government's chief investigator may be sought in deposition testimony because such reports are public documents available for inspection by all litigants).

40. *Id.* at 115.

41. See *Berguido v. Eastern Airlines*, 317 F.2d at 632.

42. 345 F. Supp. 31 (E.D. Va. 1972). The court required the NTSB air safety investigator and the general aviation inspector for the FAA, both of whom had conducted investigations at the site of the airplane crash, to answer depositions regarding the cause of the accident, even where answering questions involved the giving of opinion.

43. *Id.* at 32.

44. 569 F.2d 547 (10th Cir. 1978).

dence even though the plaintiff raised claims of inadmissibility under section 1441(e) and title 49, section 835.3(b) of the Code of Federal Regulations.⁴⁵ The latter regulation essentially creates a jural right protecting Board employees and limiting their testimony to mere factual information obtained in the course of the investigation. Prohibited by the regulation is testimony "regarding matters beyond the scope of the investigations"⁴⁶ or "opinion testimony concerning the cause of the accident."⁴⁷

The court allowed the Board investigator and an FAA maintenance supervisor to testify about their observations at the accident site and the manner in which they undertook their investigation. The court held the testimony of the investigators admissible because it did not go to the "proximate cause of the crash."⁴⁸ Therefore, it viewed the testimony as not subject to an "absolute prohibition."⁴⁹

Another recent interpretation of section 1441(e) was handed down by the Ninth Circuit in *Benna v. Reeder Flying Service, Inc.*⁵⁰ The issue was whether it was error for the jury to view the Board's accident report (statutorily inadmissible as evidence), where the report as a whole was merely cumulative of the other voluminous evidence produced at trial. The report had been left on the judge's bench and the jury mistakenly viewed it along with other evidence. The court determined that the report did not include the Board's official conclusion nor any opinion as to the probable cause of the accident. Nevertheless, on the basis of section 1441(e) alone, the court found it to be error for the jury to see the accident report even though it consisted primarily of factual evidence. This finding would infer a return to a conservative reading of the statutory privilege afforded accident reports. However, the actual ruling of the court suggests only a token deference to the statute.

While there was error, the court determined it was but "harmless error."⁵¹ In summarizing the ruling, the court stated that where there is substantial evidence to support the verdict and the accident report is merely cumulative and "not of a character to prejudice the unsuccessful party,"⁵² then consideration by the jury of the accident report is harmless.

45. 49 C.F.R. § 835.3(b) (1978).

46. *Id.* at 549.

47. *Id.*

48. *Id.* at 551.

49. *Id.*

50. 578 F.2d 269 (9th Cir. 1978).

51. *Id.* at 271.

52. *Id.* at 272.

Probably the most important recent decision to address the issue of admissibility of aircraft accident reports is *Seymour v. United States*.⁵³ The court, citing *American Airlines*, reemphasized that opinion testimony by Board employees should only be excluded when such testimony ~~embraces~~ embracesthe probable cause of the accident or the negligence of the defendant.

The facts in *Seymour* reveal the United States was the defendant. It was uncontested that the plaintiff did not participate in any way in the investigation of the accident, nor did the plaintiff have any influence on the preparation of the report. The court, in allowing the plaintiff to use the reports, held that "since these reports were prepared by defendant's employees, the plaintiff should not be required to shoulder the extreme burden of locating, subpoenaing and deposing all Army and federal investigators involved."⁵⁴ The court then announced the most expansive rule since *American Airlines*: "If the defendant honestly believes that its own employees erred in certain fact findings and notations, defendant can depose them to establish the inaccuracy. Placing the burden on defendant to disprove the findings is justified since defendant's employees prepared these reports."⁵⁵

The court's decision in *Seymour v. United States* represents a complete reversal from the rule stated in section 1441(e). The Board's aviation and accident report was not only stripped of its privileged nature, but its contents and findings were elevated to a presumption of accuracy. Moreover, the government employees of the Board will be saddled with a conflict of interest and a challenge to the loyalty owed to their employer. By investigating an accident that involved the United States Government, these investigators would begin their undertaking with the knowledge that their report will not only serve to prevent future accidents, but might also be used to form a basis of liability against the United States. Prior to the *Seymour* decision, the courts were reluctant to grant such weight to the Board investigators' reports.

B. Other Justifications For Circumventing The Rule

Not all courts have found it necessary to narrowly interpret the

53. 15 Av. Cas. (CCH) ¶ 17,141 (1978). The court held that a NTSB factual report concerning an aircraft collision is admissible into evidence in a civil action.

54. *Id.* at 17,142 (quoting *American Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969)).

55. *Id.*

intent of section 1441(e) in order to avoid its restrictions. For a variety of reasons some courts have been able to circumvent the statutory language, thereby permitting accident reports to be admitted into evidence.

In *Faith M. Lewis Kochendorfer*,⁵⁶ the Court of Claims needed only to examine the statute's wording to decide that "Congressional reference case[s] . . . are arguably not a '*suit or action for damages*' in the conventional sense [and], 49 U.S.C. § 1441(e) would not seem to bar ~~the~~ the Report."⁵⁷

Even if it is to be assumed that in fashioning Section 1441(e), Congress intended to extend the confidentiality that it conferred on CAB accident investigation reports to Congressional reference-type proceedings . . . it lift[s] that cloak [when] it include[s] the Report among the evidentiary materials that it transmitted to the Chief Commissioner for his consideration in arriving at his ultimate recommendation to the Congress.⁵⁸

The ingenuity of the trial attorney has often resulted in evading the prohibition. One attorney accomplished this by using interrogatories to get the Board report into evidence indirectly. He embodied a portion of the report into his interrogatory and then used the interrogatory in evidence.⁵⁹

Conversely, an attorney's lack of diligence has allowed his opponent to bring accident reports into evidence because an objection was not promptly made.⁶⁰ Once admitted, the opposing party waives his continued objection if he also elects to introduce portions of the report into evidence.⁶¹ When a report is accepted into evidence over a party's objections, the opposing party must have adequately preserved his rights. In addition, the party does "not fulfill the duty that is upon the objecting party"⁶² until he "makes clear to the district court that he is pressing his point, and what point it is."⁶³ He cannot let the court assume he has "accepted a ruling."⁶⁴

Another argument that might result in the admission into evidence of the Board accident report is the equitable principle of mutuality.⁶⁵ If the accident report is released to one party in the

56. 193 Ct. Cl. 1045 (1971) (negligence action under the Federal Tort Claims Act stemming from a mid-air collision between an Air National Guard military jet plane on flight training maneuvers and a private airplane of decedent).

57. *Id.* at 1059 (emphasis added).

58. *Id.* at 1060.

59. *Wenninger v. United States*, 234 F. Supp. 499, 519-21 (D.C. Del. 1964).

60. *Israel v. United States*, 247 F.2d 426, 429-30 (2d Cir. 1957).

61. *Id.*

62. *Krause v. Chartier*, 406 F.2d 898, 901 (1st Cir. 1968).

63. *Id.*

64. *Id.*

65. The reference to the equitable doctrine of mutuality refers to mutuality of estoppel which is one of eight essential elements generally required under the doctrine of collateral estoppel. Those eight elements are:

litigation, then fairness requires it be given to the other.⁶⁶

Often, a party will claim the NTSB report is a record made in the regular course of business and therefore admissible in evidence under the Federal Rules of Evidence.⁶⁷ In *Palmer v. Hoffman*,⁶⁸ the United States Supreme Court interpreted this business records provision to be inapplicable. The Court denied the use in evidence of an accident report prepared by the railroad. The rationale was that parties should not be permitted to manufacture self-serving evidence. In *Seymour v. United States*,⁶⁹ the court deemed the decision in *Palmer* not binding when the United States is the defendant and another party seeks to use the accident reports in evidence. The evidence offered is no longer self-serving to the originator.

Similarly, when the government is the defendant, accident reports have been used in contravention of section 1441(e) on the basis of a conflicting code—49 U.S.C. § 1654(e). That section pro-

-
- (a) a suit and an adversary proceeding;
 - (b) a final judgment;
 - (c) a decision on the merits;
 - (d) rendered by a court of competent jurisdiction;
 - (e) identity of the parties;
 - (f) identity of subject matter or issues;
 - (g) capacity of parties; and
 - (h) mutuality of estoppel.

Amann v. Tankersley, 149 Ind. App. 501, 509, 273 N.E.2d 772, 777 (1971).

The mutuality doctrine refers to the situation where both parties are aware of the fact that a particular issue may be significant in a later proceeding and were originally afforded a fair and equal opportunity to litigate the issue. If neither party raises such an issue in the state court, the parties will be precluded, or mutually estopped, from raising that issue in later proceedings.

66. In *O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965), an Air Force accident report released to the aircraft manufacturer for safety reasons was held to be grounds for release to the plaintiff suing the manufacturer. There was "good cause," under FED. R. Crv. P. 34, for discovery and inspection of the records of fact but not for any part of the report dealing with opinions, speculation, recommendations, or discussion of Air Force policy.

67. 28 U.S.C. § 1732(a) (1978) states: "1975—Pub. L. 93-595 struck out subsec. (a) which had made admissible as evidence writings or records made as memorandum or record of any act, transaction, occurrence, or event if made in the regular course of business"

68. 318 U.S. 109 (1943). The Court stated that:

In short, it is manifest that in this case these reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court not in the business. Their primary utility is in litigating, not in railroading.

Id. at 114.

69. See note 52 *supra*.

vides that "all reports" of the Board, are considered part of the public domain. The cases that have allowed the accident reports to be admitted into evidence have done so even though section 1654(e) is limited by the words "except as otherwise provided by statute,"⁷⁰ i.e., section 1441(e).

One notable decision held section 1441(e) should be interpreted so as to avoid elimination of accident reports when they provide the only source of information.⁷¹ That same case suggested that at times the privilege afforded accident reports might be avoided by receiving into evidence the subcommittee's reports.

In another decision,⁷² the plaintiff argued that the investigator working for the Board should be allowed to testify because he was actually employed by the FAA and section 1441(e) restricts only Board employees from testifying.⁷³

C. Protecting the Privilege

In spite of the widespread trend to admit Board accident reports into evidence, some courts have upheld and protected the privileged nature of these reports. In 1977, a United States district court judge indicated he would not likely construe the section protecting the confidentiality of accident reports "in a manner harmonious with prior interpretations in the aviation cases."⁷⁴ Thereafter, he refused to admit the Board report into evidence, although his decision was based upon other evidentiary reasons.

There exist historic⁷⁵ and recent⁷⁶ statutes which protect the confidentiality of the Board's aviation accident reports from use in any proceeding for damages. The clear language of the legisla-

70. See, e.g., *Falk v. United States*, 53 F.R.D. 113 (D.C. Conn. 1971) where the court construed § 1441(e) in light of new § 1654(e).

71. *Fidelity and Casualty Co. of New York v. Frank*, 214 F. Supp. 803, 805 (D.C. Conn. 1963).

72. *Beech Aircraft Corp. v. Harvey*, 558 P.2d 879, 883 (Alaska 1976) (wrongful death action of a pilot and passenger in the crash of a private aircraft).

73. But see 49 C.F.R. §§ 9.7, 9.11, 9.13 (1978). Section 9.7 provides:

Subject to Sections 9.9 and 9.13, an employee of the Department of Transportation may not testify as an expert or opinion witness, as to any matter related to his duties or the functions of the Department, in any legal proceeding between private litigants, for the following reasons:

- (a) To conserve the time of employees for conducting official business.
- (b) To minimize the possibility of involving the Department in controversial issues that are not related to its mission.
- (c) To prevent the possibility that the public will misconstrue variances between the personal opinions of employees and departmental policy.
- (d) To avoid spending the time and money of the United States for private purposes.

74. *Complaint of American Export Lines, Inc.*, 73 F.R.D. 454, 459 (S.D.N.Y. 1977).

75. Civil Aeronautics Act of 1938, ch. 601, § 701(e), 52 Stat. 1013 (repealed 1968).

76. 49 U.S.C. § 1441(e) (Supp. III 1979).

ture is repeated in several different sections of the United States Code.⁷⁷ Not only are the reports themselves confidential, but testimony by those who prepare the reports is protected as a jural right. Testimony by Board employees is limited in scope. They may not testify as to the "ultimate view" of the Board concerning the "cause or probable cause of an accident."⁷⁸ Board employees may only testify as to the "factual information they obtained during the course of the accident investigation, including factual evaluations"⁷⁹

Specifically, a Board employee may use a copy of his factual accident report only to "refresh his memory."⁸⁰ These restrictions apply equally to former Board employees.⁸¹ While the FAA is not covered by these code provisions, other regulations⁸² provide similar rules for its employees.

Any pretrial ruling affecting the use of the accident report in evidence is of necessity reviewable at later stages but is subject to the circumstances at trial that may have been relevant to admissibility.⁸³ However, once the court rules on the admissibility of the Board's accident report, a party cannot allude to what is contained therein. If it were to so allude, it might be "so prejudicial to [the opponent's] . . . case that it . . . is ground for a new trial."⁸⁴ Other cases have even argued that dismissal of an appeal is an appropriate "sanction against the Government for its violation of the statutory provisions regarding the use of reports of the National Transportation Safety Board."⁸⁵

77. See also 49 U.S.C. § 1903(c) (amended 1978) and 49 U.S.C. § 835.2 (1978). Section 1903(c) states: "No part of any report of the 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." All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred by Section 1551 of this title, effective in part on Dec. 31, 1981, in part on Jan. 1, 1983, and in part on Jan. 1, 1985.

78. 49 C.F.R. § 835.3(a) (1978).

79. *Id.* § 835.3(b).

80. *Id.* § 835.4.

81. *Id.* § 835.7.

82. See note 72 *supra*.

83. *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 274 (2d Cir. 1965) (Lumbard, C.J.) (tort action brought on behalf of a passenger killed in defendant's airplane).

84. *Berguido v. Eastern Airlines*, 35 F.R.D. 200, 211 (E.D. Pa. 1964) (second published decision in this case). See also *Hockaday v. Red Line, Inc.*, 174 F.2d 154, 156 (D.C. Cir. 1949).

85. *Aetna Casualty and Surety Co. v. United States*, 570 F.2d 1197, 1200 n.3 (4th

Sanctions are not limited to party litigants. Unauthorized communications by the Board's employees are prohibited even outside of the court's proceedings.⁸⁶ A "substantive communication" may either be written or oral so long as it is apposite to the merits of the proceeding. Wrongful disclosure in violation of the privilege is a serious matter, and criminal sanctions under the law are provided.⁸⁷

IV. SUMMARY

The succession of rulings from *Ritts* to *Seymour* has resulted in an erosion of the absolute privilege and confidentiality that section 1441(e) intended to provide Board accident reports. The court in *Ritts* strictly adhered to the language of section 701(e). The Board accident report was entirely excluded from the trial proceedings whereas factual testimony by the Board's investigator was permitted. In *Tansey*, the court divided the Board's work product into separate classifications. Opinions and conclusions constituted the "report." Data collected by the Board's investigators was described as factual or informational "matter" and therefore, subject to discovery.

The decisions in *Universal* and *Lobel* combined their discussion of section 701(e) with an analysis of other evidentiary policies. *Universal* deemed the Board's reports to be ex parte in nature and inadmissible as hearsay. *Lobel* misapplied the *Universal* holding and found that the accident report was admissible under the rules of evidence. The issue of privilege was never adequately addressed in the *Lobel* decision.

The court in *Berguido* departed from the four prior decisions in its application of section 1441(e). The *Berguido* decision criticized *Lobel* for commingling the purpose of section 581 with other evidentiary policies. *Berguido* also ended the distinction drawn in *Ritts* between investigator's testimony and their re-

Cir. 1978) (subrogation suit involving insurers as subrogees against United States and four air traffic controllers on duty at time of crash).

The court, however, found that reference to the report in the government's appellate brief did not warrant sanctions because such reference did not contravene 49 U.S.C. § 1903(c) and 49 U.S.C. § 1441(e).

86. 14 C.F.R. § 300.2(a) (1979). Section 300.2 states:

Prohibited communications.

(a) Basic requirement. Except as provided in paragraphs (c), (d), and (e) there shall be no *substantive communications* in either direction between any concerned Board employee and any interested person outside the Board, concerning a public proceeding, until after final disposition of the proceeding, other than as provided by Federal Statute or published Board rule or order.

Id. (emphasis added).

87. 18 U.S.C. § 1905 (1976).

ported findings. This was seen as a policy of form rather than substance. In addition, *Berguido* contradicted the rationale in *Universal* that suggested prevention of future accidents was the sole purpose of the accident investigation report. The court chose to establish a balancing test that weighed the Board's concern for confidentiality against a policy that favored the litigant's accessibility to the information. The pivotal holding in *Berguido* was its departure from the *Tansey* decision. In *Berguido*, opinions expressed within the accident report were no longer granted absolute privilege; henceforth, only those opinions suggesting the probable cause of the accident were to be excluded from the trier of fact.

Following *Berguido*, a line of cases firmly established that section 1441(e) applied only to testimony that evaded the ambit of the ultimate question/issue or that dealt with the probable cause of the accident. Those cases included *Frank I*, *American Airlines*, *Falk*, *Kline*, *Keen*, and *Seymour*.

The requirements of a "very sophisticated" analysis of the evidence convinced the courts in *American Airlines* and *Keen* to rely upon the findings of the Board's experts. In *Falk* and *Seymour*, the government, as preparer of the accident reports, was also the defendant. This dual role, the court reasoned, justified admission of the accident report's findings into evidence. The prerequisite that the United States be a party was eliminated in the *Kline* decision, where the Board's findings were admitted into a trial involving private litigants. In addition, the *Keen* decision permitted the Board's employees to testify with the proviso that their testimony not purport to be official agency opinion. Finally, the *Seymour* ruling established a presumption of accuracy in the findings of the aviation accident report whenever the government was the defendant. The United States Government had the burden of challenging the reported findings since they were prepared by its agency.

The last thirty years have witnessed a gradual, yet definite, weakening of the confidentiality granted to NTSB aviation accident reports. Several courts excluded those reports because they perceived a danger that the Board's investigation would usurp the fact-finding role of the judge or jury. If that is the true purpose for restricting the use of accident reports, then the courts may have properly admitted the reports into evidence. The courts should be able to exercise their discretion to protect the role of

the judge/jury as fact finder. The trial court must also use its judgment in determining to what degree it will allow its rulings to be influenced by outside agencies and their findings.

Other courts have found "[t]he fundamental policy underlying 1441(e) . . . to be a compromise between . . . absolute privilege in order to secure full and frank disclosure . . . and prevent future accidents, and the countervailing policy of making available all accident information to litigants. . . ."⁸⁸ It would appear that the trend of the courts has been to shift this balance of conflicting interests to a policy of admitting the reports which is weighed in favor of the individual litigant.

V. A RECOMMENDATION

The time may be ripe for Congress to reexamine the legitimacy of the privilege specifically afforded NTSB accident reports. Many questions remain to be answered. What has been the impact of the expanded access to and use of these reports in trial proceedings? Has the decline in the protection of confidentiality had an adverse impact? Has this openness diminished the willingness of air crash witnesses and informants to come forward with a complete disclosure? If so, Congress may wish to amend section 1441(e) in order to reemphasize and restore the absolute privilege once given these reports.

Studies may indicate, however, that the use of accident reports by civil litigants has not had a "chilling effect" upon the flow of information to accident investigations. If this is so, then Congress may nonetheless wish to amend section 1441(e). Congress should take the initiative and enumerate guidelines that will provide added use of the NTSB accident reports, thereby obviating the need for the judiciary to assume this legislative task.

There are three primary arguments consistently raised in opposition to use of the Board Aviation Accident Reports in trial proceedings. First, it is argued that informants and witnesses to aviation accidents would be less frank in their statements to Board investigators were it not for the privilege afforded the Board's investigation report. Second, there persists the fear that Board investigators and their reports would usurp the independent decision-making role of the judge/jury fact finder. Third, the Board is opposed to the expense it incurs when its employees are absent from their duties as public servants whenever they are under subpoena to testify for private litigants.

The concern over maintaining the frankness of the Board's wit-

88. *Berguido v. Eastern Airlines*, 317 F.2d at 631.

nesses is valid since the investigation's primary purpose is to aid future air safety. Yet, by allowing air crash witnesses to designate their statements as "confidential," the shroud of protection provided by section 1441(e) could be maintained on an elective basis. All other statements and information would be provided to the Board with the understanding that it might ultimately be used at a court proceeding to assist in determining the probable cause of the aviation accident. Such a policy would be consistent with 49 U.S.C. § 1905(a),⁸⁹ which presently allows public access to the Board's Aviation Accident Reports, including communications made to the Board. The protection provided the Board's Aviation Accident Reports under section 1441(e) applies only to court proceedings.

A second argument is made by the attorneys themselves who often express concern whenever Board accident reports or the deposition of the Board's investigators are introduced into the trial proceedings. The National Transportation Safety Board has gained a tremendous amount of respect in the eyes of the American public. The organization's prestige would attach to its employees were they to testify in open court. The result would be that a Board investigator would be held in higher esteem, and his testimony would be overly persuasive before a panel of lay jurors. Even a judge who finds himself less qualified in the area of technical aviation expertise might tend to rely heavily upon the conclusions drawn by the Board's investigation.

To alleviate this presumption of accuracy subconsciously afforded to Board investigators, the courts could instruct the jurors that the witness is testifying as an individual and does not represent the position or view of the Board itself. The Board could go further and instruct employees that they are not to reveal their official employment, and thereafter their credibility as an expert witness would depend on their individual education, training, experience, and credentials. When trial is by judge alone, an amendment to section 1441(e) might include an admonition to the judge that the Board's reports and testimony by its investigators is deemed to represent the official government position *only* when used for its designed purpose, i.e., that of future air safety. A caution could be further given that in determining civil liabilities, the work product of the Board is limited by the human factors inher-

89. 49 U.S.C. § 1905(a) (1976).

ent in its preparation. The judge, just as the juror, must weigh the Board investigator's testimony in light of his individual qualifications.

Lastly, the National Transportation Safety Board, like all departments and agencies of the United States, has a responsibility of carrying out its role within a limited and predetermined fiscal budget. Each time an investigator employed by the Board is subpoenaed to participate in civil litigation, the manpower available to the Board to investigate accidents is diminished. A modification to section 1441(e) might designate an expert witness fee that civil litigants would pay to the Board whenever they use its investigators as experts. Hopefully the assessment of fees would act as a limitation on the use of Board investigators as witnesses in private litigation. In any event, it would afford some compensation to the government for the use of its employees.

The National Transportation Safety Board, through its role in reducing accidents, has increased the productivity of this nation by boosting the efficiency of transportation in the United States. A revision of section 1441(e) might serve to enhance the already fine job done by the investigators of the Board.