

COMPONENT MANUFACTURERS AND NATIONAL TRANSPORTATION SAFETY BOARD (NTSB) INVESTIGATIONS

by

Frank J. Chiarchiaro

One of the advantages in participating in an accident investigation conducted by the National Transportation Safety board (NTSB) is being able to examine the products that may potentially have been involved in an accident, at the earliest opportunity after an accident occurs. In order to appreciate what occurs during an NTSB accident investigation, it is helpful to know a little bit about the NTSB itself.

The National Transportation Safety Board

A. What is it?

The NTSB was established in 1967 and, although independent, it relied on the United States Department of Transportation for funding and administrative support. In 1975, under the Independent Safety Board Act, all organizational ties to the Department of Transportation were severed. Now, the NTSB is not a part of any other federal agency, including the Federal Aviation Administration.

The NTSB is comprised of five (5) members, all appointed by the President of the United States, and confirmed by the Senate. Each member serves on the Board for five (5) years. Two (2) of the members are designated by the President as Chairperson and Vice Chairperson, each serving two (2) years in that position. The Chairperson requires separate Senate confirmation. Not more than three (3) of the Board members may be from the same political party and at least three (3) are appointed based on their technical qualifications. Therefore, it is not surprising to find Board members having backgrounds as pilots, air traffic controllers, design engineers, human factors engineers, accident reconstructionists, and airframe and power plant mechanics. The Board is assisted by a highly competent technical staff whose experience cuts across many disciplines that are essential to a thorough and complete accident investigation.

B. What does it do?

The NTSB's primary purpose is to promote safety in transportation. In order to accomplish this, it investigates certain types of accidents and determines the *facts* of those accidents and their probable causes. *Most people are familiar with the NTSB's involvement in investigating* aircraft accidents, in particular, major aircraft disasters. But, the NTSB is responsible to investigate not only major aircraft disasters, but *every* civil aviation accident in the United States whether it involves United States' registered aircraft or aircraft registered in a foreign country. In addition, it will investigate accidents that occur in international waters where the aircraft involved is registered in the United States. If an accident involving an aircraft manufactured or registered in the United States occurs in a foreign country, the NTSB *may* investigate that accident as well, but only at the invitation of the foreign government. In that

case, the NTSB will not be in control of the investigation. Since its creation in 1967, the NTSB has investigated a total of over 100,000 accidents. It is on call 24 hours a day, 365 days a year.

C. How does it do it?

The NTSB has approximately 500 employees, which at first blush, may appear to be sufficient for it to perform its assigned task. But, with approximately 2,000 *aviation* accidents investigated *each year* (about 500 "other" types of transportation accidents are investigated as well), this number is hardly adequate. The Board, obviously, must receive some assistance in performing its accident investigations. This assistance is obtained by designating parties to the investigation.

When there is an accident, one of the Board members will head the investigation and will be supported by a team of several investigators, one of whom will be designated the Investigator In Charge. The Investigator In Charge will organize, conduct, and control the investigation, forming several groups that will conduct sort of "mini investigations" that are in support of the larger investigation. These groups can include operations, air traffic control, weather, structures, and powerplants, among others. The groups will issue their own reports of their investigations. And the factual findings of those reports will form a basis for the Board's final report.

Role In NTSB Accident Investigations

The Investigator In Charge will also designate parties to the investigation. The parties are usually companies whose products may potentially have been involved in the accident and who have the technical expertise to assist the Board in its investigation. Generally, a party will be asked to visit the accident site and inspect the wreckage, which the Board secures immediately after an accident. In particular, as part of one of the Board's investigating groups, parties will be asked to examine, teardown, inspect and perhaps even test the product that they manufactured. This will most always be done at the party's facility, at the direction of and attended by only those authorized by the Investigator In Charge or group chairperson. No one representing potential claimants or insurers may attend these inspections, and those attending may not be attorneys. The results of the party's investigation will, in the case of major aircraft disasters, be used to generate the group report which the assisting party will be able to verify as accurate based on the investigations in which that party participated. In the case of less serious accidents, the results of a party's investigation are usually included as part of the NTSB's report itself.

Regardless of the seriousness of the accident being investigated, there is one thing that is of primary importance-documentation. When a party participates in an NTSB accident investigation, it has the opportunity to memorialize the condition of the product it manufactured as it exists immediately after the accident. And, as a result of the examination, teardown, inspection, and testing of that product, a party may be able to show, based on factual observations that its product did not contribute to the cause of the accident. This same opportunity usually doesn't exist when an investigation is conducted independently from the NTSB.

When the investigation is performed at the direction of the NTSB, since the party is considered "the expert," it is usually given fairly wide latitude in the teardown and testing of its own product. The very reason why one is designated as a party is because of that party's expertise. The teardown and testing will usually be done in accordance with that party's own standard protocols. And, since the teardown, inspection, and testing are not being witnessed by experts for potential claimants, there are generally candid discussions with the NTSB and other parties about the test results and their significance to the accident.

Parties will be able to submit to the Board their proposed findings of fact based on the evidence produced during the investigations that they either conducted or in which they participated

A. Public Hearing

The Board may hold a public hearing as part of its investigation of a major aircraft disaster. This is usually done when there is wide and sustained public interest or significant safety issues involved. It is done to supplement the facts discovered during the investigation itself and to maintain objectivity in, and exclude bias or undue influence from industry or government agencies from, the investigation. Sworn testimony is obtained from witnesses subpoenaed by the Board. These witnesses can be parties to the investigation, outside experts and anyone else whose testimony will provide the best available information on issues related to the accident. A Board of Inquiry, made up of senior Safety Board staff and chaired by the presiding Board member, is established and is assisted by a technical panel, many of whom participated in the accident investigation itself. Actually, the public hearing resembles a civil trial. There is a prehearing conference at which witnesses, issues, evidence, and exhibits are identified. At the hearing itself, the witnesses are examined not only by the Board of Inquiry and the technical panel, but also by the parties. Therefore, parties have the opportunity to significantly affect the record created at the hearing not only by being able to cross examine the witnesses called by the Board, but also by the parties' own testimony, if called as witnesses. It is not unusual for further testing and analyses to be undertaken as a result of the testimony given at the public hearing. The transcript of the public hearing and all exhibits entered into the record become part of the Safety Board's public docket on the accident and it is available to the public.

After the investigation is complete, all parties have an opportunity to review the factual record and to attend a technical review meeting to ensure that all that was necessary to the investigation has been done. A final report is submitted by the staff to the Board for its consideration and is discussed and adopted at a public meeting held by the Board in Washington, D.C.

The record created at an NTSB public hearing could have a significant impact on subsequent civil litigation that is brought as a result of the accident being investigated. Transcripts of testimony given during the public hearing may be used at trial to impeach witnesses or to refresh their recollection. The NTSB's report containing its determinations, analyses and probable cause may *not* be admitted as evidence or used in any lawsuit or action for damages growing out of any matter mentioned in that report. However, the factual part of the report containing the results of the Board's investigation of the accident *may* be admitted into

evidence in a civil suit arising from the accident. And in the case of the investigation of a major aviation disaster, the group chairman reports *may* also be admitted into evidence.

Less serious accidents, usually involving general aviation aircraft, are investigated in a similar fashion to the major accidents. An NTSB investigator from the region where the accident occurs handles the investigation. The responsibilities of the regional investigator are the same as the Investigator In Charge of a major accident. He or she conducts the investigation and decides who is allowed to participate either as a party, as a consultant or as an expert. However, instead of separate groups being formed, the investigation is combined. But, the same type of information is gathered. Again, as with the investigation of a major accident, a manufacturer may be called on to teardown, inspect and test its product. The manufacturer will be given the same wide latitude as in the investigation of a major accident. But, in the case of a less serious accident investigation, the report of the teardown, inspection, and testing will usually become a part of the actual NTSB's report. This is because there are no investigative groups established as part of the investigation of these less serious accidents.

A final report is generated and signed by the investigator. The report is submitted to the Board for its consideration, adoption, and determination of probable cause.

Differences Between Inspection And Testing Done As Part Of NTSB Investigation And One Done Independently

When teardowns, inspections, and testing are done as part of the NTSB's investigation, no potential claimants, insurance representatives, or attorneys are present. When done independently, all potential parties must be invited to attend; if they are not, one runs the risk of being accused of destroying evidence. These parties will include potential claimants, perhaps their experts and attorneys, as well as insurance representatives.

The results of any inspection and testing of a product by its manufacturer is subject to disclosure in a civil case. In connection with the NTSB's investigation, discussions with the NTSB *may* be exempt from disclosure to the public or in connection with a civil case.

In addition, a manufacturer will, in all likelihood, be allowed to inspect and test its product in accordance with its standard protocols when this is done as part of the NTSB's investigation. When done independently, the protocols will have to be agreed by all interested parties. Under these circumstances, a manufacturer may not be able to do all that it wants to do. Or, it may be forced to do *more* than it would have wanted to do.

As stated previously, the factual part of the NTSB's report *may* be admissible as evidence in a civil case arising from the accident. Therefore, reports that are generated as part of the inspection and testing of a product as part of the NTSB's investigation are also discoverable and may be admitted into evidence. This is no different from when independent inspection and testing is conducted, except, when done as part of the NTSB's, the NTSB is instructing you as to what is to be done. When the inspection and testing is being done independently, a manufacturer may have to justify what it did and why it did it.

Board employees may give testimony at the trial of civil actions arising from the accident. However, it may only be through depositions or written interrogatories. They may not appear at the trial to give live testimony. Board employees may testify only about the factual information they obtained during the course of an investigation, including factual evaluations contained in their factual accident reports. They will not be allowed to testify regarding matters beyond the scope of their investigation. And they will not be allowed to give any expert or opinion testimony.

One may ask whether an investigation done at the request of the NTSB is really any different, in the final analysis, from one that is conducted independently. Is there really a palpable and meaningful difference that matters? Juries are made up of ordinary people. And, given the "mystique" still associated with air travel, they are somewhat in awe of those involved in this industry, including the NTSB. Also, they, as well we, are probably still somewhat daunted by what occurs during the investigation of an aircraft accident. Therefore, some strongly believe that the NTSB's final accident report, including the testimony of its employees, is quite important to, and quite influential with, juries in civil trials. Others disagree, suggesting that NTSB investigations and reports are of no importance to liability issues. For example, the NTSB can find that a pilot was responsible for causing an accident but, in a civil trial, the manufacturers are still sued and may pay a portion of any settlement or judgment. This is not necessarily due to the lack of importance of NTSB investigations and reports. Rather it may be due to the fact that plaintiff attorneys sometimes tend to ignore the results of those investigations and are willing to "role the dice" in a judicial system that clearly favors the injured party over the corporate manufacturer.

What Should A Manufacturer Do?

A manufacturer should *never* refuse to participate in an NTSB accident investigation. Developing a relationship with the NTSB is important to help ensure that it will rely on the manufacturer's expertise in the future and, whenever its products are potentially involved in an accident, designate the manufacturer as a party to the investigation.

Manufacturers should have an investigative team in place to be able to quickly respond not only to NTSB requests for assistance, but also to engage in accident investigation in general. This will help to establish the manufacturer's expertise and credibility.

Good and accurate records of all inspections and testing performed on a product when it is initially sold and whenever it comes back for repairs or overhaul should be kept.

The format for incident and accident reports should be standardized so that the same information is always reported regardless of who actually generates the report within the company. Also, many times information about an incident or accident will be obtained from outside equipment manufacturers on whose equipment another product may be installed. In addition, a wealth of information is available from the NTSB's internet web site.

The flow of accident investigation information should be controlled within a company. This will serve to minimize the number of people who will then be involved in providing

information and material to respond to discovery demands in connection with any civil case brought as a result of an accident. And, to also minimize the number of people whose deposition will be taken. This will help prevent inconsistencies in evidence and testimony that plaintiff attorneys look for as leverage in settlement discussions.

Lastly, it is important that information obtained about a company's product, either through accident investigations, field reports, or customer complaints, be feed back within the company in order to determine if remedial action is necessary. This can go a long way to establish that a manufacturer acted reasonably and wasn't negligent, and to aid in the defense of claims for punitive damages.

Participation in NTSB accident investigations provides a manufacturer a unique opportunity not only to obtain early and first hand information about its product that may potentially have been involved in an accident, but also to contribute to the prevention of future accidents, and help further the NTSB's primary purpose of promoting safety in transportation.