

INVESTIGATIONS HISTORY

HISTORICAL DATED MATERIAL CIRCA 1985

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The **Civil Aeronautics Board** used to be responsible for aircraft investigations in the United States. Note that responsibility has been transferred to the **N.T.S.B.** through the Department of Transportation Act of 1976, 49, U.S.C. The N.T.S.B. has the duty of investigating all civilian accidents in the United States. It combines with the military and conducts a joint investigation when there is military involvement with a civilian aircraft. (midair's) It provides investigators to an **I.C.A.O** investigation, and at times sends an investigator to foreign investigations at the request of the foreign country made through State.

The main job is in the United States, Alaska and territories. Functionally they are set up to handle two varieties of investigations. The Mass Air Disasters (airlines and commuters) and General Aviation Crashes. The N.T.S.B. has Regional offices throughout the United States co located with the F.A.A. Regions (often not in the same building). The Board consists of 5 members who are political appointees, with some transportation experiences. They are not recognized experts in aviation or transportation for the most part.

The N.T.S.B. will conduct all investigations of aviation accidents. Because of manpower restrictions it is not unusual to have the local F.A.A. investigate agricultural crashes and experimental and ultra light crashes, and some when a region is short of manpower. If that occurs the N.T.S.B. is still in charge and all reports will go to them as per regulation. The purpose of the field investigation is to gather fact. The purpose of the BOARD REPORT is to assign PROBABLE CAUSE and make recommendations for Safety. The Board was made truly independent from The D.O.T. by virtue of the Independent Safety Board Act, 49 U.S.C.

HOW IT WORKS

When an accident occurs, a local region is informed immediately. A decision is made as to how to handle the crash. Mass Air Disaster or local general Aviation.

A Mass disaster

Assume first a Mass disaster: In this case the accident will be headed up by the Washington Office. It will dispatch a "go" team of one or usually more investigators. It is not unusual at a really big crash to have a dozen or more assigned. The team is headed by a member of the N.T.S.B.

Since 9/11 and even before the FBI is present. The FBI is notified and has a mandate to be in charge of Investigations until foul play is ruled out. If terrorism or

foul play is evident the FBI is in charge and the area is handled first like a Crime scene. The NTSB investigator works subservient for a while.

An N.T.S.B. investigator is designated as Investigator in charge. He organizes, conducts and controls the actual in field investigation. He is solely responsible for the coordination and supervision of all field investigators. The first job of responders is to insure the wreckage is benign enough that EMS can do their work. The next job of the investigator is to assure that survivors are taken care of. This is usually done well before the N.T.S.B. gets there. Thus it is usual, that local authority handles all or part of that task. The next task is to secure the evidence, and run a safety audit to insure the safety of the area, ordinance, hazardous cargo, and fuel and fire potentials. The next reason to insure security is protection of the evidence from looters and sightseers and amateurs. Once the N.T.S.B. investigator in charge (I.I.C.) has shown up at the scene he has sole charge of who may enter the area. The investigator in charge will allow owners, manufacturers, operators, pilots' union investigators to become part of the investigation team. He may allow others with specialized knowledge that would be of aid to the investigation to be allowed aboard. The Board specifically excludes lawyers and investigators for the passengers from participating.

If the accident does not involve a crime, the N.T.S.B. "Go Team" will form at least ten investigative subsections. Sometimes a single investigator will head up more than one subsection; sometimes a selectee from a professional support activity may head up a section (these decisions are left to the I.I.C. based on available manpower) the groups are:

1. Operations.
2. Weather Group.
3. Air Traffic Control Group.
4. Structures Group.
5. Power Plant Group.
6. Systems Group.
7. Human Factors Group.
8. Maintenance Group.
9. Witness Group.
10. Human Performance group.

All of these functions are self explanatory except the Human Factors and Human Performance Groups. Human Factors restricts itself to Crashworthiness, rescue and survivability while the Human Performance group is more esoteric delving into pilot and other errors and performances or lack thereof.

The N.T.S.B. has access to a number of laboratories to aid them. In Oklahoma City they have a medical lab that provides toxicology, and drug scan. In Washington they have a Metals lab, a flight Data recorder facility, and a pathetic sound lab sufficient to listen to Cockpit voice recorders. They have provisions that allow them access to other government labs when needed.

After securing the wreckage the first job is a meeting to organize into the

aforementioned committees. Daily progress meetings are held after which the I.I.C. or a designated information officer may release factual findings to the media. No other releases are authorized except those approved by the I.I.C.

Each group will complete a written Committee report, signed by the team leader. It is to be factual in nature.

At the discretion of the Director of the Aviation Division a "Public Hearing" may be held. If it is held it is generally at a location near the crash sight. The hearing is designed to make public facts already gathered; Parties to the Hearing are designated by the I.I.C. and as a result access to the forum is again limited. Exhibits, testimony are transcribed by court reporter and are available through F.O.I.A. at reasonable cost.

From these facts the N.T.S.B. members will issue a condensed finding of probable cause. This finding will include their opinion of what the facts mean and it will give probable cause.

No portion of the BOARD'S REPORT may be introduced into evidence in any civil litigation whatsoever. However bifurcated and separate factual portions are admissible as a government record of a regularly conducted activity. It has been admitted as a discretionary function of the court as found to be trustworthy. An Attorney is advised to either get a certified Blue Ribbon copy or keep transmittal letters of the Freedom of Information request for the data to show the court it is in fact a government record.

SMALL AIRCRAFT ACCIDENTS

The system works in a similar Fashion with General Aviation Crashes. This time the crash is usually handled by a single N.T.S.B. investigator from the region where the crash occurs, he is often aided by local investigators of the F.A.A. from the closest General Aviation District Office. The same situation exists with respect to the N.T.S.B. investigators duties as I.I.C.

He conducts the investigation. He chooses who is allowed and who is excluded from participation. Instead of separate committees the investigation is combined under his or her auspices. The I.I.C. completes a Factual investigation that includes the same type of materials as gathered by the committees in the mass air disaster. It is very unusual, but not unheard of that a public hearing is held. This Factual Aircraft Accident Report is signed by the I.I.C. and send to the BOARD for determination and assignment of probable cause.

Again the Factual Report is usually admissible as a Government record of a regularly conducted activity and because it is trustworthy, The BOARD'S REPORT, in this case usually a one page computer print out of PROBABLE CAUSE is never intended to be admitted into evidence. Depositions of N.T.S.B. personnel are not encouraged.

THE MILITARY ACCIDENT REPORT

All services are similar in the Handling of an aircraft accident investigation. I will limit myself to a discussion of the U.S.A.F. Reports and then talk generally of the others. Here are two separate accident investigations, and there are two separate accident reports. The way the accidents are investigated is delineated in military

instructions.

One investigation is conducted for the purpose of gathering and disseminating fact. It is supposed to be devoid of opinion, conclusion or recommendation for safety. When a witness statement appears it has been obtained with a warning "you have been advised, that you do not need to testify, whatever you say can and will be used against you, you have a right to counsel. Your statement will be sworn and recorded." or words to that effect.

The other Report is called the Board's Safety Report or the Board's Accident Report. This Board is convened to determine the cause of the accident and contributing Factors to the accident. It includes opinions, conclusions and recommendations for safety. It naturally contains a lot of the same facts that were gathered by the other board as well as independently gathered fact. The Boards sole purpose for existing is to enhance safety by determining what happened and recommending fixes to prevent re occurrence. Witnesses are not sworn and they are told their statements will not see the light of day nor will they be used against them in matters of discipline. Military contractors who are enlisted to aid in the investigation are afforded the same privilege against disclosure. Witnesses are free to give opinions and to speculate.

The Air Force and the other services recognize that factual portions of the Safety boards report are releasable while, opinion, conclusion, recommendation for safety and work done by the contractor and unsworn witness statements are privileged from release either to F.O.I.A. requests or to discovery.

The Air Force used to call their SAFETY BOARD REPORT the 127-4 Report and The Judge Advocate Generals Report the 110 -14 Report. Since it has been so well litigated as to what is releasable and what is not the Air Force has segregated it's 127-4 Report into Parts 1 and Part 2. The materials in 127-4 part 1 are factual in nature and the materials in 127-4 part 2 are privileged and not releasable. It is routine for the 127-4 Board to release all portions of part 1 to the Jag board for inclusion in their 110-14 report. This is not always the case especially with respect to the thousands of photographs that are routinely taken as part of the 127-4 activities. Unless the photo's come under some other restriction they are releasable fact!

The Navy calls its report The M.I.R. or mishap report when speaking of the Boards Safety Report or Aircraft Accident Report. The releasable report is called the J.A.G. Report or the Collateral report. The same privileges are in place with respect to the M.I.R. The Navy is not as formalized as the Air Force in pre sorting factual material from the M.I.R. Report so as to be included in the collateral report. They however are reasonable when it comes to producing materials that are obviously factual in nature.

In the Air Force a class A Mishap entails loss of life, loss of aircraft or damage in excess of \$1,000,000. The Board president will have the rank of Colonel or higher and all members will have at least 4 years service. There is no J.A.G. representative allowed...The 127 -4 board produces a preliminary report, progress reports, supplemental reports and the final report that is a limited use document. We have already discussed parts one and part two of the final report.

There are severe penalties for illegal and unauthorized release of the privileged portions of the 127-4 Boards report. This is a U.C.M.J. Offense punishable by courts martial. No board member may testify and release privileged information obtained by participation on a board. This is apparently a lifetime restriction. The privilege is a governmental privilege and must be asserted by them. This usually happens through government affidavit or deposition.

The Air Force 110-14 report is conducted separately and concurrently with the 127-4 report. It is a government record, totally releasable to the public, and generally admissible.

INTERNATIONAL ACCIDENTS

When an accident occurs in the Nation of a Warsaw Convention Airline, the accident will be conducted by I.C.A.O. The procedure is outlined in the Current version Of the I.C.A.O. Accident investigation Manual. ANNEX 13.

Remember that in some instances the country of the crash may be so set up to accomplish an investigation on its own that it will conduct it as that state requires. The U.S., Canada, United Kingdom, France and many others are perfectly capable of in state investigations. Many of the Warsaw Convention Countries and Third world nations are less equipped and that is when at their invitation and agreement an I.C.A.O. investigation is undertaken. Those countries that are not participants conduct their own. The former Soviet Block and communist countries are in this category.

The Country of Occurrence is tasked to conduct an investigation in accordance with ANNEX 13 Manual Protocol Standards. This does not preclude that nation from conducting a far greater investigation. The state of occurrence may delegate portions of the accident inquiry to the state of registry, if so the state of occurrence must facilitate the inquiry. Whenever there is no state of occurrence (lost at sea) the state of registry shall conduct the investigation. The State of manufacturer may delegate appropriate technical help. Other states who have a proven interest, may petition the state of occurrence to be allowed to participate. A Normal I.C.A.O. investigation will result in several Reports (Preliminary, Final Report, and Report Summary) these can be obtained from I.C.A.O. Montreal.

The Host countries laws prevail and a very different set of rules may face the investigator in the foreign country. Whenever a foreign accident occurs involving a U.S. Aircraft the State Department is involved.

Whenever an accident occurs in non I.C.A.O. the appropriate way to obtain an accident report is through Diplomatic channels. Sometimes money is faster, but you have to have contacts. This is not a suggestion to do something illegal, but the facts of life are that some skids are rusty and need greasing.

PETITIONING A BOARD

In an N.T.S.B. Accident investigation an accident is never closed. An outside person may submit factual data to the board at any time and the board will receive such data. Even after the board has closed it may be petitioned to reopen and accept new evidence. An attorney for a passenger or flight crew member may consider this as an option. On one occasion I petitioned an N.T.S.B. Board successfully for the

removal of all references to blood alcohol in the pilot. This after a positive showing that the indication of the blood alcohol test was totally botched.

The same holds true for the military accidents. I have been successful in opening both a Navy and an Air Force board. In the case of the Air Force they reconvened the original Board 5 years after the accident to review the new evidence. Unfortunately the results were officially privileged but off the record there were indications that we were vindicated.

MORE ABOUT INVESTIGATIONS

The N.T.S.B. is assigned the responsibility to investigate civil transportation accidents. This includes, trains planes and busses (interstate), pipeline, interstate trucking and inland waterway. Their job is to investigate the facts, conditions and circumstances. Eventually the Washington office (the Board itself) assigns probable cause. Since the investigation itself is for the purpose of fact finding, that portion of the report is usually admissible in a courtroom. The portion that the board acts on (probable cause) is privileged and "no portion of the BOARD's report is allowed to be used in a court of law "(See chapter on admissibility of reports"

In aviation accidents the investigation is listed as one of five categories:

CAT 1: IS a major air disaster, usually involving an airliner, this involves the Washington office and a team of investigators.

Cat 2: This is a less serious air disaster in which significant safety issues have been identified. Some airline accidents and most commuters fall in this category.

Cat 3: A "prevention" category exists when a significant safety issue exists and has been identified; These are investigated by the regional offices of the N.T.S.B. These are the most common and cover most of the general aviation accidents,

Cat 4: Are "delegated" investigations. These accidents are the experimental accidents, balloons, ultra lights and general aviation accidents where there are no fatalities. Sometimes they are where the N.T.S.B. is too short of manpower. In this case the F.A.A. investigates. The report goes to the board for probable cause as usual.

Cat 5: Are limited accidents where there are no fatalities and no serious injuries. These are handled by the F.A.A.

WHO MAY PARTICIPATE IN THE FIELD INVESTIGATION?

"PARTIES to the field investigation shall be limited to those persons, government agencies, companies, and associations whose employees, functions, activities or products were involved in the accident or incident and who can provide suitable qualified technical personnel to actively assist in the field investigation. "49 U.S.C. Section 831

Translated to the real world this means: owners, operators, airframe manufacturer, engine manufacturer, propeller manufacturer, suspect component manufacturer, airline union representatives and some F.A.A. people. Generally it precludes others and almost always precludes attorneys and the representatives of possible litigants. (Of course this is a catch 22 because it is prevalent that the very participants allowed by the N.T.S.B. are almost predictably to become litigants in causes of action arising from

the accident they are investigating). This rule is the genesis of the trial lawyer's complaint that the "N.T.S.B. sleeps with the manufacturer"

To an extent the investigator in charge has some latitude, for he may chose to allow persons with technical skills and specialized skills to participate so long as that person is not a claimant's representative or an insurer. In the real world it is unusual for this to happen.

F.A.A. participation is allowed under the rules. (Participation in the N.T.S.B. investigation means in effect temporarily working for the board). Thus an F.A.A. participant may not use information gained in an enforcement action. The F.A.A. person is operating under N.T.S.B. auspices and subject to their rules, regulations, and procedures. They often participate in the areas of, weather briefing, flight plans, air traffic control, air traffic reconstruction, airmen records and other specialty areas. It is usual that they retrieve and provide air traffic data for the board.

One must be careful in this regard since the F.A.A. is mandated by law to investigate accidents for another purpose as well. The point is that the investigator of the F.A.A. who is an N.T.S.B. participant may not be the same person nor may he divulge information to the F.A.A. for enforcement actions.

Concurrently the F.A.A. may be conducting a separate investigation whose purpose is enforcement. This investigation is seeking out: F.A.R. Violations in the form of, Airworthiness violations, Air crew man competency and currency, adequacy of the rules, airport standards and medical certification.

The N.T.S.B. provides (if requested FOIA or through discovery) several documents during the pendency of an investigation.

1. A preliminary report
2. If a public hearing is held, transcripts and exhibits.
3. A Factual investigation report.
4. Open Public Docket materials received.
5. The Boards findings.

ICAO

The member where the accident occurred shall notify the state of the operator and the operator. The operator shall provide relevant information about the registry of the aircraft and about the flight crew. The state (country) of the accident's occurrence and the country of origin shall have the right to conduct the investigation and delegate participation. The N.T.S.B. makes a case by case determination as to their participation. It is usual that when a flag carrier crashes that the N.T.S.B. will be represented. The N.T.S.B. will release documents in accordance with the host nation's rules as to public releases.

The state of registry may appoint the owner operator to participate with concurrence of the host state. (the state of occurrence). Technically qualified advisers (investigators) may be made participants. The Host state (the state of occurrence) may not be able to conduct the full investigation and may delegate the

responsibility to another. The laws of the state of occurrence will be adhered to .When the aircraft is lost at sea the host state is the state of ownership or registry.

When the investigation legality has been established, all member states of ICAO should furnish the accident team any requested relevant information. Obviously things get sticky when situations exist that may not be pure accidents. Lockerbie and ARROW AIR - Gander are examples where other involvements and rules were interjected in the conduct of the investigation. In these cases accident reports and data may be retrieved from various sources. The N.T.S.B. if they participated. The State Department, the host country, I.C.A.O., Montreal are all sources depending on the individual circumstances.

In either the N.T.S.B. or I.C.A.O. case as well as U.S. military cases the accident investigation is never so closed that it can not be reopened based on obvious error or newly discovered evidence. The rules of the investigative body all provide methodology to reopen investigations.

For instance I have been successful in having a blood alcohol finding removed from an N.T.S.B. report. I have reopened the investigation of an F-16 accident in Korea and in fact the Air Force reconvened the original board 5 years after the accident. I have gotten the Navy to accept new data on a T-28 accident. In the last chapter there is a petition to reopen a board on a recent DC-8 crash.