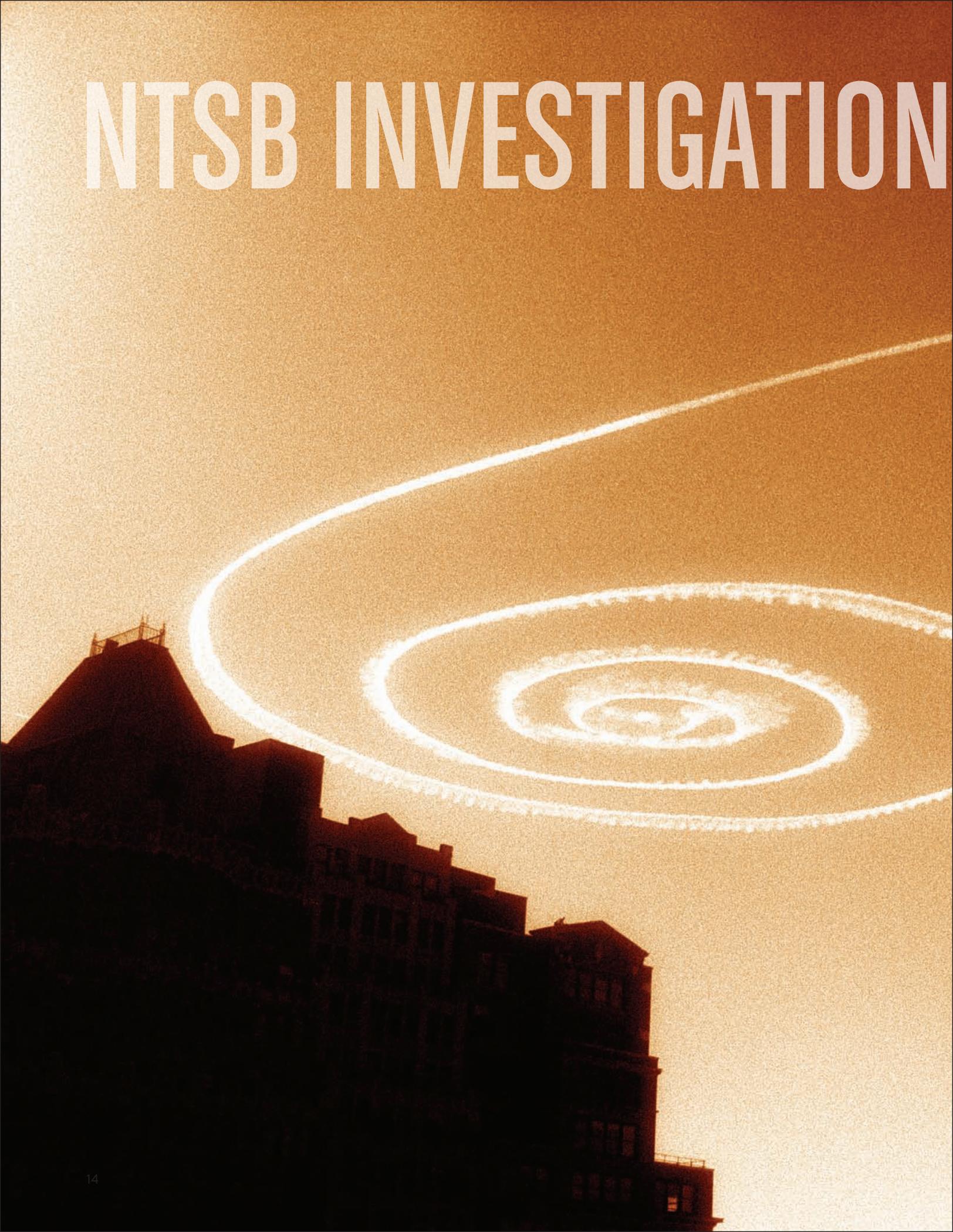


NTSB INVESTIGATION



S: THE INS AND OUTS

by John D. Goetz

Early one Sunday morning, the president of ABC Manufacturing Company is awakened by a frantic call from the vice president of engineering. Hours earlier, an airliner containing the company's newly designed computer avionics equipment crashed in a remote area in bad weather. Initial media stories have blamed the accident on a failure of the plane's electronic systems. Local law enforcement officials, in a press conference, have demanded accountability and a full investigation.

The company has been contacted by the National Transportation Safety Board (the "NTSB" or "Board") for technical assistance immediately at the scene. The vice president asks several questions: Should the company agree to participate? Will it help or hurt the company to assist the NTSB? Will it make litigation more likely? What should the company be prepared to face, and can it protect itself?

THE NTSB INVESTIGATION PROCESS

The NTSB conducts independent investigations of all civil aviation accidents in the United States and also major accidents involving rail, highway, and marine transportation and pipelines. When the Board is first notified of a major accident, it quickly assembles and dispatches a "Go Team" to the accident site.¹ While the Go Team may vary in size, depending on the severity of the accident and the complexity of the issues, the NTSB has two goals: to begin the investigation as quickly as possible and to assemble a broad spectrum of technical expertise to determine exactly what happened.

The Go Team is coordinated by an investigator-in-charge, a career NTSB employee with years of investigation experience. As many as 14 specialties may be

represented, in areas such as aircraft operations, airframe structures, aircraft systems, power plants, human performance factors, piloting, fire and explosion, meteorology, radar data, event recorders, air traffic control, and witness statements. Each specialist on the Go Team manages a group of individuals from government agencies and experts invited from private industry, in order to collect the facts and determine the circumstances surrounding the accident. These smaller teams are called “working groups.”

The NTSB conducts investigations of major accidents according to procedures set forth in its *Investigation Manual*.² During the on-scene phase, one member of the Board conducts daily media briefings on the latest, confirmed factual information that has been developed. The working groups work on site, gathering facts, analyzing pieces of wreckage, reviewing records and data, taking measurements, and talking with witnesses. They work continuously and diligently, remaining at the accident scene as long as necessary to complete their designated areas of work. This can vary from several weeks to months. Some working-group members also travel to manufacturers' plants or to the NTSB's testing laboratories to complete tear-downs of key systems or parts or to conduct sophisticated analyses of the recorder tapes.

Each working group eventually prepares a factual report containing the information it has developed. Each member of the group must verify the report's accuracy. The Board also may hold public hearings to gather sworn testimony from witnesses, both voluntary and subpoenaed, and to allow the public to observe the investigation's progress.

After an investigation is completed, the NTSB staff prepares a draft final report. The report analyzes the investigative record in detail and identifies the probable cause(s) of the accident. Parties that have been invited to participate in the investigation, along with family members, can also submit proposed findings of cause to the Board for consideration. The Board then deliberates over the draft report and other submissions in closed session. A final report is completed and presented to the full Board for adoption at a public meeting. When the report is approved, an abstract containing the Board's conclusions, probable-cause determinations, and safety recommendation is placed on the Board's web site. The full report is posted shortly afterward.

THE PARTY-REPRESENTATIVES PROCESS

The NTSB is quick to recognize that product manufacturers have the most, and best, technical knowledge of the components on an aircraft. The Board, in its discretion, will therefore invite companies to be “parties” to accident investigations. When the Board designates a manufacturer to be a party representative, the company agrees to provide technical and specialized expertise regarding its system or component parts on the plane. The manufacturer essentially agrees to work for the Board during the investigation.

Each party representative must sign a “Statement of Party Representatives” form, pledging to work with the Board in a neutral, objective manner. Family members, insurance representatives, and attorneys are not permitted to be involved in an investigation. It is important to note that the company must also pledge that while information obtained may ultimately be used in litigation, the company's participation is not for the purpose of preparing for litigation.³ The company also must agree not to assert any privilege in subsequent litigation with respect to information or documents that are obtained during the course of, and as a result of participation in, the NTSB investigation. This agreement, however, does *not* prevent a company or its employees who become party representatives from participating in subsequent litigation arising out of the accident. Nor does it require disclosure of a company's communications with counsel at any stage.

TIPS FOR PRODUCT MANUFACTURERS: BEING PART OF THE PROCESS

A company should quickly accept an invitation from the NTSB to be a party representative to an accident investigation. There is little downside, because being part of the process is far better than standing outside it. If a manufacturer becomes a party representative, it will learn relevant facts and information in “real time,” as it is being developed. The company will have the opportunity to propose and review field notes created by its assigned working group⁴ and to make comments on draft reports before they are finalized and become part of the public record. The company will see the process firsthand and won't have to wait months before learning the results of the Board's fact investigation. This can be extremely valuable later on, if plaintiffs' counsel in subsequent litigation give in to the temptation to mischaracterize the facts or contents of the accident report.

The benefits of participating in an NTSB investigation are so great that a company should be *proactive* in contacting the Board to offer assistance. A wise manufacturer will make its presence known to the Board and identify the products that it manufactured. Otherwise, it may be left out of the process and stuck with a lot of disagreements after reading the Board's final report—months or years after the incident.

After becoming party representatives, a company and its employees will want to pay close attention to how the investigation is being conducted. Who was involved in the recovery efforts? What measures were taken to preserve and document the physical evidence? What happened during each day or event, and what follow-up analysis was (or should have been) conducted? The company's team will want to have its eyes and ears open, to learn as much information as possible under the Board's direction and without interfering with the Board's essential and overriding function.

EARLY EXAMINATION OF COMPONENT PARTS

Companies also will want to examine their products at the earliest stage possible. Investigations may take years to resolve: recovery, handling, movement, shipping, and storage of wreckage can and do change the condition of sensitive component parts. Debris may be jarred or altered, parts and fragments may be lost, settings may change, data may be corrupted, and damage to parts may occur during human efforts to recover and analyze evidence. This may create the potential for plaintiffs' counsel to skew the record unfavorably in subsequent litigation, by making claims about the condition of products that were not true at the time of the accident.

A company should videotape any disassembly of its components, without audio. It should bring the very best cameras possible to photo-document its parts or any analysis or movement that occurs. Close-up photos should be taken to obtain fine detail. More photos and videotape should be taken than the company believes it will ever need, because wreckage and components may never be seen in the same condition again. It is critically important to preserve the moment carefully—and completely.

A company should ensure that measurements are taken of all critical areas and are memorialized in field notes. Draft notes should be meticulously reviewed before they are signed. Any

comments that a company provides on draft field notes and reports should be purely factual in content. Opinions or speculation should not be offered. An ongoing investigation is simply the wrong time to offer conjecture or opinions beyond the narrow factual subject matter at hand.

A company's role in an NTSB investigation is thus to assist the NTSB fully and within the parameters of the party-representatives process. The manufacturer should also carefully document and photograph its products and participate fully in the process, to put itself in the best position to defend litigation if and when it comes.

ACCIDENTS OUTSIDE THE U.S.

International accidents present unique issues. The NTSB sends Go Teams to accidents that occur on U.S. territory or in international waters, but for accidents occurring outside the U.S., the lead investigator is the government in whose territory the crash occurred. The NTSB is generally invited to assist in these investigations abroad, especially if a U.S. carrier or U.S.-manufactured plane is involved. The NTSB will always choose to do so, and it will invite companies to participate as well. Obviously, however, the Board is a guest in another land, and it is not the lead.

International accident investigations require close, professional cooperation between representatives of different states.⁵ Annex 13 of the International Civil Aviation Organization ("ICAO") outlines procedures and standards for accident investigations, and the *ICAO Manual of Aircraft Accident Investigation* contains technical information and examples of objective investigative techniques. In reality, however, language barriers and cultural differences can present major obstacles to a complete, objective investigation. Politics and a variety of local pressures, seen and unseen, can also threaten to impede or even influence the results of an investigation. Local media and authorities can create a highly charged atmosphere by rushing to judgment and loudly calling for criminal investigations and prosecutions.⁶

In addition, some countries lack experienced, professional investigators to recover and analyze evidence and to lead complicated investigations. Investigation teams may wind up working in isolation, and evidence and findings developed

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during investigations may not be taken into account in the final report. In short, investigative practices and cultures differ. Final reports can contain unexpected “points of view” and conclusions that did not come to light earlier.

It is especially critical for a manufacturer to take advantage of any opportunity to participate in an accident investigation abroad. The company should assemble the most talented, complete team possible and send it quickly to the site. Steps like documenting evidence, observing daily developments in the investigation, providing technical expertise and commentary, and appropriately memorializing any shortcomings in the process become even more important in an investigation outside the U.S.

A company should immediately retain experienced legal counsel to advise on the parameters and the local subtleties of the investigation process abroad. An experienced accident investigator, who has been through the process in that country, also should be retained as a consultant. If possible, the manufacturer should retain a former investigator for the agency that will be charged with the proceeding. Finding out about the dos and don'ts of participating in the investigation, and learning about the personalities and backgrounds of those who are in charge, is well worth the investment and will prove invaluable.

When it participates in an investigation outside the U.S., the NTSB usually has the opportunity to submit a proposed report with findings for the lead investigating authority to consider. The NTSB also may choose to file an addendum, or a dissenting report, to a country's final accident report if the Board disagrees with it. In these situations, a careful manufacturer will be well rewarded for learning about the ins and outs of the process *in advance* and for carefully documenting the evidence as the investigation unfolds.

CONCLUSION

A prudent product manufacturer will seek out the opportunity to participate in an NTSB investigation. It is also well advised to learn about the procedures in advance. A few ounces of

preparation and attention to detail will be worth a pound of cure when and if litigation arises. ■

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¹ See http://www.ntsbt.gov/abt_ntsbt/invest.htm (last visited June 25, 2008).

² The *National Transportation Safety Board Aviation Investigation Manual, Major Team Investigations*, can be downloaded from its web site.

³ This is consistent with the overarching purpose of the NTSB: to investigate accidents in a neutral manner and to render probable-cause determinations objectively and free from outside influences, in order to enhance future public safety.

⁴ The NTSB investigation procedures specify that only one set of official field notes may be developed and that every working-group member must sign it. *NTSB Aviation Investigation Manual, Major Team Investigations*, Sec. 3.6.1.

⁵ The International Society of Air Safety Investigators is an example of an entity that promotes close, professional cooperation between accident-investigation professionals from different countries.

⁶ There are various recent examples of government attempts to “criminalize” aviation accidents and prosecute basic human error. This is a grave mistake, because these efforts interfere with the objective investigation of an accident and shift the focus to exacting punishment. Investigations should focus instead on what happened and why and make recommendations to prevent recurrence of the accident.