



Excluding NTSB Final Aircraft Accident Reports and FAA Airworthiness Directives at Trial

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Civil trials of air crash cases typically pose two key evidentiary issues that can impact the fundamental landscape of the proceedings:

(1) whether the National Transportation Safety Board's (NTSB) Final Aircraft Accident Report, containing the Board's probable cause determination concerning the crash, is admissible, and (2) whether post-crash Airworthiness Directives, which are promulgated by the Federal Aviation Administration (FAA) to mandate changes to an aircraft or its components, are admissible as evidence of negligence or defect. These two evidentiary issues are important in all cases because a court, in both instances, must balance the policies of promoting safety and accident prevention—which weigh in favor of excluding such evidence—against legal principles that encourage the disclosure of reliable facts to the jury.

These two issues were especially significant in the federal court trial last summer involving the crash of USAir Flight 427. Flight 427 crashed on September 8, 1994, while on final approach to the Pittsburgh Airport, resulting in an exhaustive NTSB investigation and extensive multidistrict and other litigation. In the *Flight 427* case, the airline brought a contribution action against a component part manufacturer seeking to recover settlements and other payments that were made as a result of the crash. The district court's rulings during trial on the above issues colored both the jury's perspective and its determination of the events leading up to the crash. Accordingly, they are worthy of analysis.

In this article, we discuss the impact

that these two evidentiary issues have on any trial and had on the *Flight 427* trial. We also outline the relevant case law and offer suggestions to help refine the decisions in the area.

Admissibility of NTSB Final Reports

The first, highly significant evidentiary issue that a court typically faces during an air crash trial is the extent to which the NTSB's Final Accident Report, and the supporting factual determinations and reports concerning the crash, are admissible. During the *Flight 427* trial, the component part manufacturer moved *in limine* to exclude the entire NTSB Final Report,¹ while conceding that investigator and group chairmen reports were admissible. The airline opposed the manufacturer's motion, arguing that, at minimum, factual portions of the Report were admissible. The district court ruled that while the Final Report in its entirety was inadmissible, either side could make use of group chairmen and investigator reports containing factual data.² The court reasoned that "[i]f someone went to the scene and made factual observations, they certainly can testify about that. It's the [R]eport with its conclusions that is excluded."³

Such a "middle ground" position ensures that the parties have access to factual data that cannot easily be re-created in the litigation context, while at the same time preventing the NTSB's probable cause determination from effectively usurping the jury's role of determining causation. The district court's seemingly simple ruling in the *Flight 427* case, however, proved unwieldy to apply during the course of the trial, and the results provide some valuable insights to the practitioner.

Federal Law and Regulations

Federal law in 49 U.S.C. § 1154(b) states broadly that "no part" of the NTSB's Final Accident Report may be admitted into evidence or "used" in civil litigation:

No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.⁴

Despite this unequivocal language, many early court decisions construed the Section to bar only evidence of opinions and the NTSB's probable cause determination in a Final Accident Report.⁵ In essence, these decisions created a judicial exception for the factual portions of a Final Report and, consequently, large portions of Reports were admitted into evidence.⁶ Courts credited the need to ensure that victims had access to investigators' factual data surrounding an accident. One court, for example, stated that barring factual portions of the Final Accident Report could prove "detrimental to a private citizen proceeding as a plaintiff seeking the true facts triggering such a disaster . . ."⁷

When confronted with this judicial gloss, the Board amended its regulations to make clear that investigators' factual reports are different from Final Accident Reports, and that the latter should not be admitted in civil litigation. The regulations noted that a "Board accident report" contains "the Board's determinations, including the probable cause of an accident, issued either as a narrative report or in computer format," and that "no part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports."⁸ By contrast, the agency noted that "[t]he Board does not object to, and there is no statutory bar to, admission in litigation of *factual accident reports*. In the case of a major investigation, group chairman factual reports are factual accident reports."⁹

Following the amended regulations, several circuits have applied the plain language of Section 1154(b) to exclude the entire NTSB Final Accident Report

from evidence in a civil trial. While these courts have recognized that underlying facts gathered during an accident investigation, which are generally contained in investigators' reports, are admissible, they have held that Congress plainly chose to prevent NTSB conclusions and data from usurping the role of the jury.

For example, in *Chiron Corp. v. National Transportation Safety Board*,¹⁰ the NTSB investigated the crash of a Federal Express flight following a fire in the cargo hold. Plaintiff Chiron, a target of the NTSB investigation, sought judicial review of a NTSB order denying it access to the cargo list for the flight. Chiron wanted the list because it was concerned that the agency would find that its cargo aboard the flight caused the crash. Seeking to rebut the agency's anticipated conclusions, or to explore other possibilities for the crash on its own, Chiron argued that it required the information to correct the Board's faulty report, which would eventually be used against it in a civil suit.

The D.C. Circuit held that Chiron lacked standing to assert its claims. In summarily dismissing Chiron's fear that the Board's report would be introduced against it in litigation, the court noted that Congress in Section 1154(b) explicitly made NTSB Final Reports inadmissible in civil actions. In discussing earlier decisions, the *Chiron* court stated:

A careful review of those opinions, however, shows that these early cases actually focused only on the admissibility of investigators' reports which were mislabeled by the courts as "report[s] of the Board." [citations omitted]. Because of this judicial mislabeling, these circuits created what they supposed was an "exception" to § 1154(b) for factual data from NTSB investigations in order to protect the interests of the alleged victims.¹¹

The *Chiron* court noted that the NTSB, when faced with these earlier decisions, amended its regulations to clarify that "investigators' reports" are not "reports of the Board," as that phrase is used in Section 1154(b). Accordingly, the court reasoned that "because investigators' reports are now plainly admissible under agency regulations, victims have access to necessary factual information. Therefore, courts no longer need to employ an 'exception' to the statute to protect parties in litigation."¹² *Chiron* concluded that Section 1154(b) means what it says: *No part* of the Board's Final Report is

admissible in a civil suit. The Fifth, Ninth, and Tenth Circuits have held similarly.¹³

The *Chiron* decision indeed appears sound, as admitting factual or other portions of a Final Report contravenes the plain language of the statute. Moreover, the length, complexity, and quite often the wording of "factual portions" of a Final Report make the task of separating facts from Board opinions difficult. For example, of the 298 pages in the NTSB Final Report for the Flight 427 incident, 239 pages are labeled "factual information." Numerous opinions are contained in these pages, along with references to and explanations of other air crash accidents. Separating opinion from fact, a cumbersome task in the abstract, becomes even more difficult during the heat and time constraints of a trial.

Use of Factual Reports During the *Flight 427* Trial

During the *Flight 427* trial, the district court followed *Chiron* and kept the NTSB Final Report out of evidence in its entirety. However, the court held that factual information and other data assembled by group chairmen were admissible, and that investigators could be called to testify about what they observed at the scene or when analyzing the physical evidence. This simple ruling, however, proved difficult to enforce, as the parties at several junctures attempted to use group chairmen and investigators' reports for much more than neutral data. Attempts were made to use factual reports to convey, subtly but nevertheless unmistakably, what the Board as a whole concluded on various issues including, in the case of the airline, the NTSB's conclusion on causation.

For example, counsel at times sought to cloak helpful observations by investigators with the authoritativeness of the Board in order to bolster the credibility of the observations in the eyes of the jury. Investigators' observations were referred to as "NTSB" findings, and both sides casually used the terms "NTSB" and "Agency" in their questioning. Attempts were made to include the "NTSB" legend on demonstratives. At other times, experts described observations of investigators, or group chairmen test results, as "conclusions" of the "NTSB" or of the "NTSB's" group chairmen. The experts testified that "NTSB" group chairmen relied on data to "conclude" that certain events could have occurred before the crash, or that a particular scenario was likely.

Counsel's and the witnesses' portrayals of seemingly neutral data as being something additional were designed to blur the district court's ruling and clear distinction. The obvious intent was that jurors would gain an impression of what the Board concluded on various issues—without ever seeing the Final Report. Post-verdict interviews of jurors revealed that this intent may have been realized. Some jurors indicated that they believed the NTSB Final Report had been introduced into evidence. Other jurors acknowledged that they did not know about, or appreciate, the distinction between the Board and its investigators or group chairmen.

Suggestions for Future Cases

Factual information from investigators' reports and probable cause determinations from a Final Accident Report are not synonymous and, on their face, are easily distinguishable. Yet, the practitioner will want to exercise vigilance to ensure that both the distinction and the rationale behind it are explained and observed during trial. Permitting use of, or references to, factual information in investigators' reports allows litigants access to sources of proof otherwise unavailable to them in aviation cases. At the same time, the evidence should not be used to influence the jury on how the issue of causation should be decided.

If a party seeks to introduce factual data from investigators' reports at trial, it should be done in a neutral, even-handed way. For example, an expert may testify about data contained in a group chairman report in order to bolster the soundness of his opinions. Moreover, as in the *Flight 427* case, an expert may properly testify about the metal content that investigators found in hydraulic fluid after the crash, and a metallurgist may properly testify that he observed no burrs, chip-outs, or other deformities in component parts collected from the accident site. Similarly, testifying about the results of group chairman testing is also proper, as long as it is done objectively.

What should not be permitted—under the guise of admitting factual data—is testimony or statements that investigators, group chairmen, or the NTSB as a whole reached "conclusions" based on the data. Attempts by an expert, or by an attorney during opening or closing statements, to "spin" factual observations into conclusions of the Board

about what did or did not occur, or about the likelihood of a particular scenario before a crash, should be recognized as a tactic to end-run the inadmissibility of the NTSB's probable cause determination. These types of statements seek to turn factual information into the Board's opinions, which are inadmissible and substantially prejudicial to the opposing party. The fact that counsel or an expert may qualify such "conclusions" as being reached only by an investigator or a group chairman, instead of by the Board itself, is inconsequential. To a jury, such conclusions become vested with the larger authority of the Agency itself, and thereby become powerful evidence. If the fact versus opinion distinction is not clearly drawn and maintained during trial, testimony and statements by counsel can easily impair the jury's independent role in determining causation.

Accordingly, counsel should take care to ensure that factual data and opinions do not become inextricably intertwined. Motions *in limine* should be used to advise the trial judge on how factual data are used properly, and to educate the court on how it could be used improperly, during trial. Counsel should consider moving to exclude references to the NTSB and Agency altogether—

in testimony, in statements by counsel, and on exhibits and demonstratives. If such references are permitted, counsel should request that the jury be instructed on who group chairmen are, how their role differs from that of the Board as a whole, and, most importantly, that their observations and data are not binding or determinative on the issue of causation. Counsel also should not be permitted to improperly characterize neutral data during opening and closing statements. If the line noted in *Chiron* is crossed during trial, counsel should object and insist on adequate limiting instructions.

An NTSB investigation is a "fact-finding proceeding[] with no formal issues and no adverse parties. It is . . . not conducted for the purpose of determining the rights or liabilities of any person."¹⁴ Accordingly, the Board and its Final Report should not be used to the advantage or disadvantage of any party in a civil lawsuit. Similarly, information contained in investigators' reports should be presented in a factual, not conclusory, manner. What is inadmissible expressly should not come in subtly through the back door.

Admissibility of FAA Airworthiness Directives

Another significant evidentiary issue in air crash cases is whether Airworthiness Directives (ADs) are admissible on the issues of negligence or defect, or whether they should be excluded as subsequent remedial measures under Federal Rule of Evidence 407. ADs are issued by the FAA to mandate that product manufacturers, airlines, or other operators and end users comply with changes or modifications necessary for aviation safety.¹⁵ The FAA quite often issues ADs in response to affirmative, corrective measures initiated voluntarily by a manufacturer. For example, a manufacturer might inform the FAA of a safety-related change and recommend that owners, operators, and end users be informed of a proper course of action.¹⁶ The FAA then has the discretion whether to issue an AD.¹⁷

In the *Flight 427* case, the airline sought to introduce into evidence an AD that required end users of 737-100 through -500 series aircraft to replace the rudder mechanism with a new design. The airline sought to use this and other ADs as proof that some problem or defect in the rudder mechanism, which was remedied post-crash, existed at the time of the crash. The airline attempted to bypass the subsequent remedial measures doctrine by relying on a "superior authority" exception that has been recognized by some courts and applied in a broad variety of cases.¹⁸

The superior authority exception provides that when remedial measures are mandated by a "superior" governmental authority, like the FAA or the Food and Drug Administration, which is vested with power to require certain conduct, Rule 407 does not apply. The rationale underlying the exception is that when remedial directives are man-

dated by a government agency, changes taken in response to the directives are not voluntary and, therefore, do not qualify for the protection afforded by Rule 407. While the language of Rule 407 does not expressly require that remedial changes be made *voluntarily* for the rule to apply, the superior authority exception nevertheless has been used to admit evidence of such changes on the theory that the mandatory nature of the governmental directive makes Rule 407 inapplicable. Some courts have applied the superior authority exception in air crash cases to admit ADs at trial.¹⁹

The Conflict in the Circuits

The federal circuits are split over whether to recognize a superior authority exception at all. With regard to whether the exception applies to allow the admission of ADs in civil trials, the circuits are equally inconsistent. For example, in *Herndon v. Seven Bar Flying Serv., Inc.*,²⁰ the Tenth Circuit applied the superior authority exception to hold that ADs were admissible as proof of negligence. In that case, plaintiffs claimed that a defective spring contained in a switch on a Piper Aztec aircraft caused the aircraft to "nose dive." Before the crash, Piper modified the switch's design and had notified aircraft owners through a service bulletin. However, because the modification did not completely remedy the situation, Piper issued a second service bulletin one year *after* the crash. Afterward, the FAA issued two ADs to require end users to make the modifications identified and described in Piper's service bulletins.²¹

At trial, the district court admitted the service bulletins but prevented the plaintiffs from introducing the ADs into evidence, finding that they were cumulative and prejudicial to Piper. The Tenth Circuit held that the district court erred in excluding the ADs.²² The court reasoned that because the FAA, a superior authority, required Piper to make the post-accident repairs, the underlying policy of Rule 407 was irrelevant. The court held that "[w]here a superior authority requires a tortfeasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force—a tortfeasor cannot be discouraged from voluntarily making repairs if he *must* make repairs in any case."²³

The Sixth Circuit took the opposite

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view in *In re: Airport Disaster at Metropolitan Airport, Detroit, Michigan*.²⁴ In that case, plaintiff claimed that the manufacturer, owner, and lessee of a Gates Learjet was strictly liable for failing to warn that an aerodynamic stall might occur when small amounts of ice form on the airplane's wings. Plaintiffs also alleged that the pilot's supervisor was negligent in permitting the aircraft to reach stall speed, after which the plane did not recover.

Several months after the accident, the FAA issued AD 79-12-05, which required operators to increase the Learjet's landing and approach speeds under certain conditions. The AD also warned that "even small accumulations of ice on the wing leading edges can cause aerodynamic stall" prior to activation of the stall warning and prevention system. At trial, the owner and lessee of the plane sought to introduce AD 79-12-05 against the manufacturer, arguing that if the manufacturer had taken these steps, they would have decreased the chances of the accident. The trial court excluded the AD, finding that it was improperly offered as proof of an admission of fault. Declining to follow *Herndon*, the court stated that "nothing in Rule 407 limits its applicability to subsequent remedial repairs taken by manufacturers."²⁵ The district court rejected the mandatory versus voluntary distinction offered by the owner as support for his position that the AD should be admitted.

The Sixth Circuit affirmed, reasoning that admitting subsequent warnings under the superior authority exception in order to prove culpability would violate the policies underlying Rule 407. Finding that the district court's reasoning was consistent with the policies underlying Rule 407, the Sixth Circuit held that "if subsequent warnings are admitted to prove antecedent negligence simply because [a government agency] required or might have required the change, then [manufacturers] might be discouraged from taking earlier action on their own and from participating fully in voluntary compliance procedures."²⁶

ADs in the *Flight 427* Case

In the *Flight 427* case, the airline sought to introduce a series of ADs, which had been issued after the crash as proof that a defect existed in the power-control unit of the rudder assembly of the 737-300 aircraft. The most significant AD

at issue, AD 97-14-04, was effective on August 4, 1997, and required that the main rudder power control unit on 737-100 through -500 series airplanes be replaced with a new design. The AD also required that owners or operators perform a leak test on the unit within 4,000 to 6,000 hours of the effective date, and also to perform repeat leak tests at 6,400-hour intervals.

In arguing that the AD was admissible, the airline relied on the superior authority doctrine. Despite the AD's effective date of almost three years after the crash, the airline argued that the mandatory nature of the AD brought it outside the protective realm of Rule 407. Accordingly, it contended that the AD was probative evidence on the issue of whether the design of the power control assembly was defective at the time of the crash.

The component part manufacturer opposed the airline's attempt to introduce the AD. First, it contended that the design change, which was implemented after the crash, was designed to promote safety. Second, the manufacturer noted that it had collaborated with the finished product manufacturer on the new design and, together, they informed the FAA of the changes and recommendations—which contributed to the directive ultimately issued. Finally, the component part manufacturer argued that the AD was prejudicial on its face because the airline's intent was to inflame the jury. For all of these reasons, the manufacturer contended that the AD was not admissible under Rule 407 to prove negligence or culpable conduct and that the prejudice of such evidence outweighed its probative value under Rule 403.

In making its ruling, the district court faced a novel issue, as the Third Circuit has not yet ruled on the propriety of a superior authority exception.²⁷ Ultimately, the district court excluded the ADs, but under a slightly different rationale than that used by other courts. The district court stated that admitting such evidence would chill a manufacturer's incentive to cooperate with the government in investigating accidents and implementing safety changes. The court noted, "[i]t seems to me that it will chill such cooperation if you're going to let the changes that come out of the investigation into evidence. So, although it's not exactly the theory that is generally used . . . I am not going to let it in on

that basis."²⁸ The district court also based its decision on the policy underlying Rule 407, i.e., if evidence of remedial changes is admitted to show or suggest past negligence or defect, efforts to remedy alleged hazards will be discouraged. The court clearly rejected the argument that subsequent design changes should be admitted merely because they were mandated by a governmental authority.

We believe the judge made the correct decision in excluding the ADs from evidence. They indeed were subsequent remedial measures, implemented well after the crash of Flight 427, and they were developed perhaps from information learned as a result of the lengthy investigation of the crash. The district court's ruling furthered the important policy of Rule 407, i.e., to prevent remedial measures from being introduced to show defect or fault.

Admissibility of ADs in Future Cases

The continued vitality of the superior authority doctrine, at least with regard to ADs, is questionable. While the doctrine is still viable in certain jurisdictions and in certain types of cases, applying the exception to ADs is significantly vulnerable to attack. The precedential value of *Herndon*, the case that most strongly supports the doctrine's application to ADs, is eroding. Indeed, a close reading of the *Herndon* decision reveals that it actually supports the proposition that ADs are subsequent remedial measures inadmissible pursuant to Rule 407. *Herndon* does not hold that subsequent design changes made pursuant to a government mandate lose their protection under Rule 407. Rather, the appellate court's holding that the ADs were admissible was limited to the particular facts in that case. In fact, in reaching its holding, the court confirmed the principle that design changes implemented after an accident are generally *inadmissible* under Rule 407.²⁹

The *Herndon* court further applied the exception only to the negligence

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claims in that case and refused to recognize Rule 407's application at all to strict liability cases. In 1997, Rule 407 was amended to make clear that it applies to strict liability cases, abrogating *Herdon's* holding on this point. The *Herdon* court's discussion of the superior authority exception further has been characterized as dicta.³⁰

The fundamental premise of the superior authority doctrine, i.e., that the mandatory nature of a directive precludes application of Rule 407, is also weak. Requiring that subsequent remedial actions be made voluntarily in order to exclude them from evidence is a false standard. Nothing in the text of the Rule requires that the actions be taken voluntarily, and nothing in the Rule precludes its application where the government mandates the remedial measure.³¹

Even if the superior authority doctrine has some continued vitality, ADs should be excluded under a Rule 403 analysis. Post-accident FAA directives are nothing more than evidence of hindsight, evidence that has a prejudicial effect well beyond its probative value on issues of negligence and defect. Allowing evidence of changes required well after an accident would prejudicially focus the jury on the wrong time frame. There is also a substantial danger that the jury will reach a verdict based merely on the fact that a government agency mandated the change. Rule 403 was designed to protect against these types of prejudice. Cases should be decided on evidence presented, not by the prejudicial effects of post-accident changes, some of which are initiated by the manufacturers against whom the very AD would be introduced at trial.

With regard to this latter point, the policies underlying Rules 407 and 403 are directly aligned. The policy underlying Rule 407 is that evidence of subsequent remedial measures significantly, and prejudicially, influences a jury. Indeed, in the *Flight 427* case, the airline sought to argue that if the FAA issued the directives, then the manufacturer(s) must have done something wrong, or that the product must somehow be defective.

Moreover, the superior authority doctrine directly conflicts with the FAA's duty to promote safe air travel. In the interest of air safety, manufacturers often seek assistance from the FAA to mandate certain safety changes that might otherwise be delayed or ignored by end-users. Manufacturers may be less

willing to urge the FAA to adopt safety changes if such cooperation will be used against them in a later trial. This cannot be the result Congress intended when it empowered the FAA with discretion to issue ADs.

Safety to air travelers and personnel may be compromised if ADs are admitted in civil trials, a result that Rule 407 was precisely designed to prevent. Simply put, applying the superior authority doctrine to ADs would undermine the policies of Rule 407 without providing any benefits to air travelers.

Notes

1. NTSB Aircraft Accident Report: Uncontrolled Descent and Collision with Terrain, USAir Flight 427, Boeing 737-300, N513AU, Near Aliquippa, Pennsylvania, September 8, 1994.

2. During an aircraft accident investigation, NTSB investigators gather factual information, test data, notes, and other materials. Group chairmen, who are responsible for investigating specific technical issues, then prepare factual reports pertaining to the specific technical disciplines assigned to them, such as the "Operations Group Chairman's Report," "Cockpit Voice Recorder Group Chairman's Report," etc. These reports are sometimes referred to in case law as "factual reports" or "investigators' reports." At the end of the investigation, this factual information is analyzed by the NTSB in a "Final Accident Report," which contains the Agency's findings of "probable cause" along with its safety recommendations. See 49 C.F.R. § 835.2 (1999).

3. *US Airways, Inc. v. Parker Hannifin Corp.*, et al., No. 99-917 (W.D. Pa.), Tr. from Proceedings on May 29, 2002, at 17.

4. 49 U.S.C. § 1154(b); see also 49 C.F.R. § 835.2 (1999).

5. See, e.g., *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1493 (D. Colo. 1989); *Keen v. Detroit Diesel Allison*, 569 F.2d 547, 551 (10th Cir. 1978).

6. See *Curry v. Chevron*, 779 F.2d 272, 274 (5th Cir. 1985) (factual portions of report admitted); *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 848 (10th Cir. 1986) (excluding only agency conclusions on probable cause of accident); *Travelers Ins. Co. v. Riggs*, 671 F.2d 810, 816 (4th Cir. 1982) (admitting factual portions but not conclusive statements); *Lobel v. American Airlines, Inc.*, 192 F.2d 217 (2d Cir. 1951) (report admitted because it did not contain probable cause finding), *cert. denied*, 342 U.S. 945 (1952). See also *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969) (no error in admitting portions of NTSB report).

Numerous federal district courts have held similarly. See, e.g., *In re Air Crash near Morrisville*, 1997 U.S. Dist. LEXIS 3809, 13 (M.D.N.C. 1997); *McLeod v. ERA Aviation*,

1996 U.S. Dist. LEXIS 3204 (E.D. La. 1996); *In re Air Crash at Charlotte*, 982 F. Supp. 1071, 1078 (S.D.S.C. 1996) (NTSB group chairmen factual reports admitted with portions containing opinions or conclusions redacted); *In re Armatour, S.A.*, 710 F. Supp. 390, 402 (D.P.R. 1988) (general rule is that NTSB factual findings are admissible if based on trustworthy sources, whereas evaluative conclusions are not); *Texasgulf, Inc. v. Colt Electronics, Inc.*, 615 F. Supp. 648 (S.D.N.Y. 1984) (NTSB factual findings admissible). See also *Hurd v. United States*, 134 F. Supp. 2d 745, 750 (D.S.C. 2001) ("[c]ourts have consistently held that the factual portions of an NTSB report are admissible into evidence while excluding any agency conclusions on the probable cause of the accident").

Finally, state courts in California, North Carolina, Missouri, Indiana, and Maryland have allowed NTSB Reports to be admitted into evidence except for the probable cause determination.

7. *Keen*, 569 F.2d at 551; see also *Universal Airline, Inc. v. Eastern Air Lines, Inc.*, 188 F.2d 993, 999 (D.C. Cir. 1951).

8. 49 C.F.R. § 835.2 (1999) (emphasis added).

9. *Id.* Investigators' reports are admissible pursuant to the hearsay exception contained in FED. R. EVID. 803(8).

10. 198 F.3d 935 (D.C. Cir. 1999).

11. *Id.* at 940. See also *In re Air Crash Disaster at Sioux City, Iowa*, 780 F. Supp. 1207, 1210 (N.D. Ill. 1991) ("Congress plainly chose to serve its purpose of preventing NTSB data from 'usurping the function of the jury' by absolutely barring admission of NTSB reports while permitting limited testimony from NTSB employees.").

12. *Chiron*, 198 F.3d at 941.

13. *Thomas Brooks v. Burnett*, 920 F.2d 634, 639 (10th Cir. 1990) ("[c]onsistent with its fact-finding mission that is litigation neutral, NTSB reports are barred as evidence in court"); *Campbell v. Keystone Aerial Surveys*, 138 F.3d 996, 1001 (5th Cir. 1998) ("Federal law flatly prohibits the NTSB accident report from being admitted into evidence in any suit for damages arising out of accidents investigated by the NTSB."); *Benna v. Reeder Flying Serv., Inc.*, 578 F.2d 269, 271 (9th Cir. 1978) (same).

14. 49 C.F.R. § 831.4 (1997).

15. See 49 U.S.C. § 40101 *et seq.*

16. See, e.g., *Smolar-Hutton v. Beech Aircraft Corp.*, 647 F. Supp. 1348, 1349 (D.N.J. 1986) (recognizing that the FAA can require users of an aircraft to make modifications required by a manufacturer's service instruction).

17. 49 U.S.C. § 40101 *et seq.*

18. See, e.g., *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980) (discussing the superior authority doctrine in relation to an FDA warning label), *cert. denied*, 449 U.S. 1080 (1981); *O'Dell v. Hercules Inc.*, 904 F.2d 1194

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(8th Cir. 1990) (recognizing the existence of the superior authority exception for EPA and CDC findings); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1340 (5th Cir. 1978) (declining to apply the superior authority doctrine where the cost trend analysis was prepared *in anticipation of* a directive by the NHTSA); *Kociemba v. G.D. Searle & Co.*, 683 F. Supp. 1579 (D. Minn. 1988) (addressing the propriety of the doctrine relating to an FDA warning label requirement).

19. *See, e.g.*, *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322 (10th Cir. 1983) (ADs are admissible because of their mandatory nature), *cert. denied*, 466 U.S. 958 (1984).

20. 716 F.2d 1322 (10th Cir. 1983).

21. *See id.* at 1324.

22. The appellate court deemed the error of admitting the service bulletin harmless because the trial court should have admitted the ADs. *See id.* at 1331.

23. *See id.* at 1331 (emphasis in the original).

24. 782 F.2d 1041 (Table) (6th Cir. 1979), 1985 WL 14069.

25. *See id.* at *5.

26. *Id.* (quoting *Werner*, 628 F.2d at 859).

27. *See, e.g.*, *Stecyk v. Bell Helicopter Textron, Inc.*, 1998 WL 744087 (E.D. Pa. 1998) (“the Third Circuit has not ruled on whether to recognize a superior authority exception to Rule 407”).

28. *US Airways, Inc. v. Parker Hannifin Corp., et al.*, No. 99-917 (W.D. Pa.), Tr. from proceedings on June 10, 2002, at 4.

29. *See Herndon*, 716 F.2d at 1331.

30. *See, e.g.*, *Kociemba*, 683 F. Supp. at 1581 (as “dicta” in *Herndon* suggests...).

31. *See, e.g.*, *Polec v. Northwest Airlines, Inc.*, 86 F.3d 498, 528-29 (6th Cir. 1996) (“By its terms, the Rule seems to exclude evidence of remedial measures regardless of who undertook them.”); *see also Villari v. Terminix Intern, Inc.*, 692 F. Supp. 568, 574 (E.D. Pa. 1988) (“voluntariness of a remedial effort should be presumed absent a clear showing of coercion”).