

FORMS AND LETTERS

The purpose of this section is to acquaint the investigator with various forms and letters used to record or obtain factual information, identify the investigator or provide the public with information.

Often times it is not necessary to generate a letter or fill out a form to successfully accomplish an objective, however, some instances may require the completion or generation of the appropriate form or letter to document the event.

The following is a brief description of the forms and letters samples for use by the investigator:

FORMS

1. 2450.1 Claim for Hazardous and/or Physical Hardship Pay

This form is completed when hazardous conditions or physical hardship has been endured by the investigator. However, the claim must be filed in accordance with FAA Payroll Regulations and Procedures.

2. 6100.1 Subpoena

This form is used to require the appearance of an individual to produce certain documents and records.

- 6100.8 Subpoena Duces Tecum

This form is used to obtain necessary factual information pertinent to an incident/accident investigation. This subpoena may be served by the investigator to person(s) possessing information that could not be obtained through voluntary means.

3. 6120.1/2 National Transportation Safety Board
Pilot/Operator Aircraft Accident Report

This form is to be provided to the pilot/operator of an aircraft involved in an incident/accident. The 6120.1/2 is used to record information related to the incident/accident as provided by the pilot (or operator) involved. It is made part of the investigator's factual report.

- 6120.5 International Aircraft Accident Notification

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This form is used to record the notification of an international accident in which the NTSB will participate.

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4. 6120.19A Preliminary Report - Aviation

This form is used to open the accident file docket. The information recorded on the 6120.19A is preliminary and subject to change as the investigation progresses. The preliminary report contains basic information about the aircraft, the pilot and passenger(s) involved in the incident/accident. Additionally, it also contains flight itinerary and weather information along with a brief, factual narrative describing the circumstances of the incident/accident.

5. 6120.3 National Transportation Safety Board
Accident File Contents

This form will be used to record the contents of the factual incident/accident report. It will be used in conjunction with NTSB form 6120.4.

6. 6120.4 National Transportation Safety Board
Factual Report Aviation Accident/Incident

This form is used to record factual information obtained in the investigation of **ALL** incidents/accidents. The 6120.4 "Core Form" contains both data block entry items and the narrative factual report. The core form is enhanced with 22 "Supplements" that record a variety of information pertaining to the overall investigation of an incident or accident.

The 6120.4 "Supplements" contain data block entry items with some direct entry "specify" blocks. The supplements document pertinent information used to support a probable cause finding. In addition, the information is also recorded for statistical data retrieval.

7. 6120.6 Request for Transportation Accident Information

This form should be completed when the investigator or regional office receives a request by an individual for a copy of the factual accident report/probable cause, or any other information available to the public.

8. 6120.9 Passenger Statement

This form is provided by the investigator to a passenger involved in an aircraft accident. The investigator will include this form in his factual report.

9. 6120.11 Statement of Witness

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This form is provided to a witness by the investigator to record the individual's observation of the aircraft involved in an accident. The completed form will be included in the investigator's factual report.

10. 6120.13 Autopsy Authorization

The investigator will complete this form to authorize the person(s) to conduct an autopsy on a pilot and/or a person suspected of having a contributory effect in the aircraft accident.

11. 6120.15 Release of Aircraft Wreckage

This form (completed in duplicate) will document the release of any and all aircraft wreckage, including component parts, retained during the course of the accident investigation. The completed form will be included in the investigator's factual report.

12. 6120.20 Request for Flight Recorder Readout

The investigator will complete one form for each flight recorder needing to be read out. The form will accompany the recorder, however it will not be included in the investigator's factual report.

13. Statement of Party Representatives to NTSB Investigation

This form states who may participate in an NTSB incident/accident investigation, as defined in Title 49, part 831, Accident/Incident Investigation Procedures.

The form will be signed to document those person(s) designated by the investigator as a party to the investigation. The investigator will complete this form regardless of the number of participants and will also complete this form if there is no party involvement. To indicate no parties, write in the signature area NO PARTY PARTICIPATION. The only party excluded from signing the form is the Federal Aviation Administration representative. The party form will be included in the investigator's factual report.

14. 6120.23 NTSB Authorization for Personal Injury Records

The investigator will complete this form and obtain the signature of the person authorizing the release of injury information pertaining to a person involved in an aircraft accident. This authorization will be included in the investigator's factual report.

15. 6221.1 Survival Factors - Aircraft Passenger Questionnaire

The investigator will provide those individuals involved in an aircraft accident, the

Original

Survival Factors questionnaire in an attempt to obtain information relevant to the accident. The questionnaire should be used as an additional tool to document survival related issues. This form will be included in the investigator's factual report.

16. The Pilot/Operator Cover Letter

This is a sample of a cover letter sent by the investigator to the pilot/operator involved in an aircraft accident. The cover letter will accompany the NTSB form 6120.1/2 and a return envelope.

17. The Pilot/Operator Letter

The investigator will send this letter to the individual responsible for providing information concerning an accident when the investigator fails to receive a completed NTSB form 6120.1/2. The investigator should document the date and results of prior attempts to obtain the form 6120.1/2 for use in this letter. This letter should be sent by certified, return receipt mail. If this letter fails to obtain successful results, a copy of this letter should be included in the investigator's factual report.

18. Request for Materials Laboratory Examination

The investigator shall complete this form letter when requesting laboratory services from the NTSB Materials Lab in Washington, D.C. A copy of this letter should accompany the part(s) to be examined and a copy should be kept in the file folder until the examination has been completed and the part(s) returned to the proper person.

19. Request for Toxicological Samples

The investigator shall complete this form letter when requesting biological samples from persons identified by the investigator, when their physiological and/or psychological performance is in question.

20. Chain of Custody Letter

When the investigator has requested and received biological samples from the identified individuals, the Chain of Custody Letter should be completed to document the disposition of the samples received. This letter should be retained in the accident file as documentation of purity if ever questioned about sample tampering/contamination.

21. 4200.2 Investigator Physical Measurements

This form should be completed by the investigator to record clothing sizes, etc.

22. 6200.3 Sign for Automobiles

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This sign should be carried and displayed by the investigator in his vehicle for identification of the vehicle to the appropriate authorities involved in an aircraft accident.

23. 6120.18 Part Tag

This tag should be attached to any parts required for holding for future examination.

24. 6200.2 Sign for Wreckage

This sign should be attached to wreckage to prohibit disturbance by unauthorized personnel.

25. SF 705 Confidential Cover Sheet

This cover sheet should be attached to any document(s) that require handling at the confidential security level.

26. 6200.1 Attendance Record

This is to be used for all meetings to record individuals attending the meeting during investigations with numerous parties.

27. ATC Request Checklist

This form will be used in coordinating ATC requests through AS-30 to the FAA, AA-100, when headquarters specialists are involved.

BOARD ORDERS

<u>NTSB ORDER</u>	<u>TITLE</u>
46A	RAPIDRAFT PAYMENT SYSTEM
50	NTSB ACCIDENT INVESTIGATOR UNIFORMS
52A	USE OF ACCESS TO AIRCRAFT AUTHORIZATION
70	MAJOR ACCIDENT/INCIDENT INVESTIGATION AND REPORT PREPARATION
71	PUBLIC HEARINGS AND DEPOSITIONS IN CONNECTION WITH MAJOR ACCIDENT/INCIDENT INVESTIGATIONS
80	PROCEDURES FOR PROVIDING PARTIES TO AN INVESTIGATION, HEARING OR SAFETY STUDY (1) ADVANCE NOTICE OF ALL FORMAL BOARD PROCEEDINGS RELATED TO A MAJOR INVESTIGATION OR SAFETY STUDY AND (2) INFORMATION ON AVAILABILITY OF RELATED DOCUMENTS
81	SAFETY STUDIES PROGRAM
82	NATIONAL TRANSPORTATION SAFETY BOARD SAFE RECOMMENDATIONS
83	"MOST WANTED" SAFETY RECOMMENDATIONS PROGRAM
1160.6D	ORGANIZATION AND FUNCTIONS - BUREAU OF ACCIDENT INVESTIGATION
1320.6	PREPARATION OF ACCIDENT REPORTS AND SPECIAL STUDIES
1660.1	NTSB CREDENTIALS AND IDENTIFICATION CARDS
1700.14	PHOTOGRAPHIC SUPPLIES AND SERVICES
1730.1A	USE AND OPERATION OF MOTOR VEHICLES FOR OFFICIAL GOVERNMENT BUSINESS
3300.5	EMPLOYMENT OF EXPERTS AND CONSULTANTS
6100.1	PROCEDURE FOR HANDLING REQUESTS FOR RECONSIDERATION OF BOARD DETERMINATION OF PROBABLE CAUSE
6200.3	POLICY GOVERNING PREPARATION OF ACCIDENT REPORTS, SPECIAL STUDIES, AND RECOMMENDATIONS
6200.5	ACCIDENT NOTIFICATION PROCEDURES

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***** AVAILABLE THROUGH NTSB FACILITIES DIVISION *****

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TITLE 49 - TRANSPORTATION
CHAPTER VIII - NATIONAL TRANSPORTATION SAFETY BOARD
AMENDED: MARCH 13, 1989

NATIONAL TRANSPORTATION SAFETY BOARD
49 CFR Part 800

Organization and Functions of the Board and Delegations of Authority

PART 800-ORGANIZATION AND FUNCTIONS OF THE BOARD AND DELEGATIONS OF

AUTHORITY

Subpart A-Organization and Functions

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- Appendix-Request to the Secretary of the Department of Transportation To Investigate Certain Aircraft Accidents for a Temporary Period
Authority; Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2166 (49 U.S.C. 1901 *et seq.*).

Subpart A-Organization and Functions

§ 800.1 Purpose.

This part describes the organization, functions, and operations of the National Transportation Safety Board (Board).

§ 800.2 Organization.

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The Board consists of five Members appointed by the President with the advice and consent of the Senate. One of the Members is designated by the President as Chairman with the advice and consent of the Senate, and one as Vice Chairman. The Members exercise the functions, powers and duties of Titles VI and VII of the Federal Aviation Act of 1958 (49 U.S.C. 1441), and the Independent Safety Board Act of 1974 (88 Stat. 2166 *et seq.* (49 U.S.C. 1901 *et seq.*)). The Board is an independent agency of the United States. A detailed description of the Board and its components is published in the Board's internal orders, which are available for inspection and copying in the public reference room in the Washington office of the Board. The various delegations of authority from the Board and the Chairman to the staff are set forth in Subpart B of this part. The Board's staff is comprised of the following principal components:

(a) The Office of the Managing Director, which assists the Chairman in the discharge of his functions as executive and administrative head of the Board, coordinates and directs the activities of the staff, is responsible for the day-to-day operation of the Board, and recommends and develops plans to achieve the Board's program objectives. The Office of the Managing Director also provides executive secretariat services to the Board.

(b) The Office of Government and Public Affairs, which supplies the public, the Congress, other Federal state and local government agencies, the transportation industry and the news media, with current, accurate information concerning the work, programs, and objectives of the Board.

(c) The Office of the General Counsel, which provides legal advice and assistance to the Board and its staff components, prepares Board rules, opinions and/or orders, and advice to all offices and bureaus on matters of legal significance; and represents the Board in court actions to which the Board is a party or in which the Board is interested.

(d) The Office of Administrative Law Judges, which conducts all formal proceedings arising under Title VI of the Federal Aviation Act of 1958, including proceedings involving suspension or revocation of certificates and appeals from actions of the Administrator, in refusing to issue airman certificates.

(e) The Bureau of Accident Investigation, which conducts investigations of all major transportation accidents and other marine, pipeline and hazardous materials accidents within the Board's jurisdiction; recommends to the Board whether a public hearing or deposition proceeding should be held to determine the facts, conditions, and circumstances of major accidents; prepares a report for release to the public regarding such accidents for submission to the Board including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents where delegated authority to do so by the Board; initiates safety recommendations to prevent future transportation accidents; and participates in the investigation of accidents which occur in foreign countries and which involve U.S.-registered and/or U.S.-manufactured aircraft, pursuant to Annex 13 of the Chicago Convention.

(f) The Bureau of Field Operations, which oversees the Board's field offices located throughout the United States, and conducts aviation, rail and highway accident investigations within the Board's

Original

jurisdiction other than those conducted by the Bureau of Accident Investigation; prepares a report for release to the public regarding such accidents; determines the probable cause(s) of accidents where authority to do so is delegated by the Board; initiates safety recommendations to prevent future transportation accidents; and conducts special investigations into selected aviation, rail or highway accidents involving safety issues of concern to the Board.

(g) The Bureau of Technology, which provides technical advice and services, analytical studies and tests on all aspects of the Board's accident investigation, accident prevention, and safety promotion activities, including safety recommendations, studies, and special investigations.

(h) The Bureau of Safety Programs, which conducts safety studies of specific safety issues; coordinates the development of and follow-up on the safety recommendations issued by the Board; coordinates preparation of Board comments on Notices of Proposed Rulemaking by other Federal agencies which involve transportation safety issues; provides statistical analyses of transportation accident and incident data; and prepares transportation safety program proposals for submission to the Board.

(i) The Bureau of Administration, which provides administrative support for the Board in the following areas: Budget, accounting and audit; personnel, training and payroll; information management and automatic data processing; property, space, communications, facilities and transportation management; and printing, publications, mail, procurement, contracting, and accident inquiry services.

§ 800.3 Function.

(a) The primary function of the Board is to promote safety in transportation. The Board is responsible for the investigation, determination of facts, conditions, and circumstances and the cause or probable cause or causes of: All accidents involving civil aircraft; highway accidents including railroad grade-crossing accidents, the investigation of which is selected in cooperation with the States; railroad accidents in which there is a fatality, substantial property damage, or which involve a passenger train; pipeline accidents in which there is a fatality or substantial property damage; and major marine casualties and marine accidents involving a public and a non-public vessel or involving Coast Guard functions. The Board makes transportation safety recommendations to Federal, State, and local agencies and private organizations to reduce the likelihood of recurrence of transportation accidents. It initiates and conducts safety studies and special investigations on matters pertaining to safety in transportation, assesses techniques and methods of accident investigation, evaluates the effectiveness of transportation safety consciousness and efficacy in preventing accidents of other Government agencies, and evaluates the adequacy of safeguards and procedures concerning the transportation of hazardous materials.

(b) Upon application of affected parties, the Board reviews in quasijudicial proceedings, conducted pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, denials by the administrator of the Federal Aviation Administration of applications for airman certificates and orders of the Administration modifying, amending, suspending, or revoking certificates. The Board also reviews

on appeal the decisions of the Commandant, U.S. Coast Guard, on appeals from orders of administrative law judges suspending, revoking, or denying seamen licenses, certificates, or documents.

(c) The Board, as provided in Part 801 of this chapter, issues reports and orders pursuant to its duties to determine the cause or probable cause or causes of transportation accidents and to report the facts, conditions and circumstances relating to such accidents; issues opinions and/or orders after reviewing on appeal the suspension, amendment, modification, revocation, or denial of any certificate or license issued by the Secretary of the Department of Transportation (who acts through the Administrator of the Federal Aviation Administration or the Commandant of the United States Coast Guard); and issues and makes available to the public safety recommendations, studies, safety recommendations, safety studies, and reports of special investigations.

§ 800.4 Operation.

In exercising its functions, duties, and responsibilities, the Board utilizes:

(a) The Board's staff, consisting of specialized bureaus and offices dealing with particular areas of transportation safety and performing administrative and technical work for the Board. The staff advises the Board and performs duties for the Board that are inherent in the staff's position in the organizational structure or that the Board has delegated to it. The staff is described more fully in § 800.2.

(b) Rules published in the **Federal Register** and codified in this Title 49 of the Code of Federal Regulations. These rules may be inspected in the Board's public reference room, or purchased from the Superintendent of Documents, Government Printing Office.

(c) Procedures and policies set forth in the agency's internal directives system which govern the activities of employees and organizational components of the Board. The internal directives system is designated as the NTSB Manual and consists of instructions which are called NTSB Orders and NTSB Notices.

(d) Meetings of the Board Members conducted pursuant to the Government in the Sunshine Act.

(e) Public hearings in connection with transportation accident investigations and public hearings and oral arguments in proceedings concerned with certificates or licenses issued by the Secretary or an Administrator of the Department of Transportation. They are held at the time and place announced in the notices thereof which are served on the parties to the proceedings or published in the **Federal Register**.

§ 800.5 Office locations.

The principal offices of the National Transportation Safety Board are located at 800 Independence Avenue, S.W., Washington, DC 20594. The Board maintains field offices in selected cities throughout the United States.

§ 800.6 Availability of information and materials.

Original

Part 801 of this chapter provides detailed information concerning the availability of Board documents and records. That part also provides a fee schedule and information concerning inspection and copying.

Subpart B-Delegations of Authority to Staff Members

§ 800.21 Purpose.

The purpose of this Subpart B is to publish all delegations of authority of staff members which do not appear in other Board regulations.

§ 800.22 Delegation to the Managing Director.

(a) The Board hereby delegates to the Managing Director the authority to:

(1) Make the final determination as to whether to withhold a Board record from inspection or copying, pursuant to Part 801 of this chapter.

(2) Approve for publication in the **Federal Register** notices concerning issuance of accident reports and safety recommendations and responses to safety recommendations, as required by sections 304(a)(2) and 307 of the Independent Safety Board Act of 1974 (49 U.S.C. 1903(a)(2) and 1906).

(b) The Chairman delegates to the Managing Director the authority to exercise and carry out, subject to the direction and supervision of the Chairman, the following functions vested in the Chairman:

(1) The appointment and supervision of personnel employed by the Board;

(2) The distribution of business among such personnel and among organizational components of the Board; and

(3) The use and expenditure of funds.

§ 800.23 Delegation to the administrative law judges, Office of Administrative Law Judges.

The Board hereby delegates to the administrative law judges the authority generally detailed in procedural regulation, Part 821, of this chapter.

§ 800.24 Delegation to the General Counsel.

The Board hereby delegates to the General Counsel the authority to:

(a) Approve, disapprove, or request further information concerning requests for testimony of Board employees with respect to their participation in the investigation of accidents, and, upon receipt of notice that an employee has been subpoenaed, to make arrangements with the court either to have the employee excused from testifying or to give the employee permission to testify in accordance with the provisions of Part 835 of this chapter.

(b) Approve or disapprove in safety enforcement proceedings, for good cause shown, requests for changes in procedural requirements subsequent to the initial decision, grant or deny requests to file additional briefs pursuant to § 821.49 of this chapter.

(c) Approve or disapprove, for good cause shown, requests to extend the time for filing comments on proposed new or amended regulations.

(d) Issue regulations for the purpose of making editorial changes or corrections in the Board's rules and regulations.

(e) Issue orders staying, pending judicial review, orders of the Board suspending or revoking certificates, and consent to the entry of judicial stays with respect to such orders.

(f) Compromise civil penalties in the case of violations arising under Title VII of the Federal Aviation Act of 1958, or any rule, regulation, or order issued thereunder.

(g) Issue orders dismissing appeals from initial decisions of Board administrative law judges pursuant to the request of the appellant.

(h) Correct Board orders by eliminating typographical, grammatical, and similar errors, and make editorial changes therein not involving matters of substance.

§ 800.25 Delegation to the Director, Bureau of Accident Investigation.

The Board hereby delegates to the Director, Bureau of Accident Investigation, the authority to:

(a) Order an investigation into the facts, conditions, and circumstances of transportation accidents which the Board has authority to investigate.

(b) Disclose factual information pertinent to all accidents or incidents as provided for in Part 801 of

this chapter.

(c) Determine the probable cause(s) of accidents in which the determination is issued in the “Brief of Accident” format, except that the Bureau Director will submit the findings of the accident investigation to the Board for determination of the probable cause(s) when (1) any Board Member so requests, (2) it appears to the Bureau Director that, because of significant public interest, a policy issue, or a safety issue or other matter, the determination of the probable cause(s) should be made by the Board, or (3) the accident investigation will be used to support findings in a safety study. Provided, that a petition for reconsideration or modification of a determination of the probable cause(s) made under § 845.41 of the Board’s regulations (49 CFR 845.41) shall be acted on by the Board.

Original

§ 800.26 Delegation to the Director, Bureau of Administration.

The Board hereby delegates to the Director, Bureau of Administration, the authority to:

(a) Determine initially the withholding of a Board record from inspection or copying, pursuant to Part 801 of this chapter.

(b) Settle claims for money damages of \$2,500 or less against the United States arising under section 2672 of 28 United States Code (the Federal Tort Claims Act) because of acts or omissions of Board employees.

§ 800.27 Delegation to investigative officers and employees of the Board.

The Board hereby delegates to any officer or employee of the Board who is designated by the Chairman of the Safety Board the authority to sign and issue subpoenas, and administer oaths and affirmations, and to take depositions or cause them to be taken in connection with the investigation of transportation accidents.

§ 800.28 Delegation to the Director, Bureau of Field Operations.

The Board hereby delegates to the Director, Bureau of Field Operations, the authority to:

(a) Order an investigation into the facts, conditions, and circumstances of transportation accidents which the Board has authority to investigate.

(b) Disclose factual information pertinent to all accidents or incidents as provided for in Part 801 of this chapter.

(c) Determine the probable cause(s) of accidents in which the determination is issued in the “Brief of Accident” format, except that the Bureau Director will submit the findings of the accident investigation to the Board for determination of the probable cause(s) when (1) any Board Member so requests, (2) it appears to the Bureau Director that, because of significant public interest, a policy issue, or a safety issue or other matter, the determination of the probable cause(s) should be made by the Board, or (3) the accident investigation will be used to support findings in a safety study. Provided, that a petition for reconsideration or modification of a determination of the probable cause(s) made under § 845.41 of the Board’s regulations (49 CFR 845.41) shall be acted on by the Board.

Appendix - Request to the Secretary of the Department of Transportation to Investigate

Certain Aircraft Accidents.

(a) Acting pursuant to the authority vested in it by Title VII of the Federal Aviation Act of 1958 (49 U.S.C. 1441) and section 304(a)(1) of the Independent Safety Board Act of 1974, the National Transportation Safety Board (Board) hereby requests the Secretary of the Department of Transportation (Secretary) to exercise his authority subject to the terms, conditions, and limitations of Title VII and section 304(a)(1) of the Independent Safety Board Act of 1974, and as set forth below to investigate the facts, conditions, and circumstances surrounding certain fixed-wing and rotorcraft aircraft

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accidents and to submit a report to the Board from which the Board may make a determination of the probable cause.

(b) The authority to be exercised hereunder shall include the investigation of all civil aircraft accidents involving rotorcraft, serial application, amateur-built aircraft, restricted category aircraft, and all fixed-wing aircraft which have a certified maximum gross takeoff weight of 12,500 pounds or less except:

(1) Accidents in which fatal injuries have occurred to an occupant of such aircraft, but shall include accidents involving fatalities incurred as a result of aerial application operations, amateur-built aircraft operations, or restricted category aircraft operations.

(2) Accidents involving aircraft operated in accordance with the provisions of Part 135 of the Federal Air Regulations entitled "Air Taxi Operators and Commercial Operators of Small Aircraft."

(3) Accidents involving aircraft operated by an air carrier authorized by certificate of public convenience and necessity to engage in air transportation.

(4) Accidents involving midair collisions.

(c) *Provided*, That the Board may, through the chiefs of its field offices, or their designees who receive the initial notifications, advise the Secretary, through his appropriate designee, that the Board will assume the full responsibility for the investigation of an accident included in this request in the same manner as an accident not so included; and *Provided further*, That the Board, through the chiefs of its field offices, or their designees who receive initial notifications may request the Secretary, through his appropriate designee, to investigate an accident not included in this request, which would normally be investigated by the Board under Section (b)(1) through (4) above, and in the same manner as an accident so included.

(d) *Provided*, That this authority shall not be construed to authorize the Secretary to hold public hearings or to determine the probable cause of the accident; and *Provided further*, That the Secretary will report to the Board in a form acceptable to the Board the facts, conditions, and circumstances surrounding each accident from which the Board may determine the probable cause.

(e) *And provided further*, That this request includes authority to conduct autopsies and such other tests of the remains of deceased persons aboard the aircraft at the time of the accident, who die as a result of the accident, necessary to the investigations requested hereunder and such authority may be delegated and redelegated to any official or employee of the Federal Aviation Administration (FAA). For the purpose of this provision, designated aviation examiners are not deemed to be official or employees of the FAA.

(f) Invoking the provisions of section 701(f) of the Federal Aviation Act of 1958, and section 304(a)(1) of the Independent Safety Board Act of 1974, is necessary inasmuch as sufficient funds have

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not been made available to the Board to provide adequate facilities and personnel to investigate all accidents involving civil aircraft. This request, therefore, is considered to be temporary in nature and may be modified or terminated by written notice to the Secretary.

Signed in Washington, DC on June 18, 1984.

Jim Burnett

Chairman

Original

**THOMAS BROOKS CHARTERED, a professional corporation,
Plaintiff-Appellee,**

v.

**James BURNETT, Norman Wiemeyer, and the National Transportation Safety Board,
Defendants-Appellants.**

No. 89-1378.

United States Court of Appeals,
Tenth Circuit.

Nov. 28, 1990.

Owner of crashed plane brought action alleging that National Transportation Safety Board (NTSB) abused its discretion and could not lawfully bar plane owner from being present at investigation concerning plane crash, that NTSB was arbitrary and capricious in refusing to allow owner to attend investigation, and that NTSB decision was taking of property without due process in violation of Fifth Amendment. The United States District Court for the District of Colorado, Zita L. Weinshienk, J., held that NTSB could not invite manufacturers of plane and its component parts to participate in NTSB investigation without also allowing representative of plane owner to participate as observer. NTSB appealed. The Court of Appeals, Brorby, Circuit Judge, held that: (1) district court could review NTSB decision that plane owner would not be allowed to participate in or observe official investigation into crash of plane; (2) NTSB was not arbitrary or capricious and did not abuse its discretion or act contrary to law by barring plane owner from official investigation; and (3) barring plane owner from official investigation did not constitute impermissible taking of property in violation of Fifth Amendment.

Judgment reversed; injunction vacated.

1. Aviation – 31

Although Secretary of Transportation or his representatives are to join with the National Transportation Safety Board (NTSB) in investigating air accidents, investigatory primacy remains with NTSB, and NTSB has exclusive authority to determine probable cause of accident. Transportation Safety Act of 1974, § 303(a)(1), as amended, 49 U.S.C.A.App. § 1903(a)(1); Federal Aviation Act of 1958, § 701(g), as amended, 49 U.S.C.A.App. § 1441(g).

2. Federal Courts – 776

Determination of district court's subject matter jurisdiction is question of law reviewable de novo on appeal.

Original

3. Administrative Law and Procedure – 651

In determining whether judicial review of agency action is precluded pursuant to the Administrative Procedure Act (APA), if there is no statute precluding judicial review, court then determines whether action is committed to agency discretion by law. 5 U.S.C.A. § 701(a)(1, 2).

4. Aviation – 35

Judicial review of National Transportation Safety Board's (NTSB's) actions was not precluded by statute or structure of statutory scheme. 5 U.S.C.A. § 701(a)(1); Transportation Safety Act of 1974, § 304(d), as amended, 40 U.S.C.A.App. § 1903(d).

5. Administrative Law and Procedure – 651

No judicial review of agency decision is available when there is no law for court to apply. 5 U.S.C.A. § 701(a)(2).

6. Administrative Law and Procedure – 651

Where Congress commands that agency act, there is law to apply and court pursuant to standards of the Administrative Procedure Act (APA) may review whether agency acted in accordance with congressional wishes. 5 U.S.C.A. § 701(a)(2).

7. Aviation – 35

District court could review National Transportation Safety Board's (NTSB's) decision affirmatively holding that owner of crashed plane would not be allowed to participate in, or even observe, official investigation into crash of plane; NTSB investigator in charge relied on statutes and NTSB rules for naming participants, designating observers, and denying plane owner permission to witness engine teardown, so district court had law to apply in reviewing NTSB decision. 5 U.S.C.A. § 701(a)(2).

8. Administrative Law and Procedure – 706

Affirmative agency action is reviewable where agency purports to act pursuant to its own rules rather than statute; failure of agency to follow its own regulations may be challenged under the Administrative Procedure Act (APA). 5 U.S.C.A. § 701(a)(2).

9. Aviation – 35

To extent that owner of crashed plane challenged constitutionality of National Transportation Safety Board's (NTSB's) decision excluding owner from participating in or observing official investigation into plane crash, NTSB decision was reviewable in court.

10. Aviation – 35

Statutory standard of whether National Transportation Safety Board's (NTSB's) decision precluding owner of crashed plane from participating in or observing official investigation into plane crash would be reviewed pursuant to statutory standard of arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law in determining whether agency action should be set aside. 5 U.S.C.A. § 706(2).

11. Administrative Law and Procedure – 754, 763

Informal agency action is reviewed by court using statutory standard of arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law in determining whether to set aside agency action. 5 U.S.C.A. § 706(2).

12. Administrative Law and Procedure – 754, 763

For agency action to be upheld by court, under statutory standard of arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law, all that agency need do is demonstrate that it considered relevant factors and alternatives after full ventilation of issues and that choice made was

reasonable based on those considerations; court did not substitute its judgment for agency's judgment, but was required to uphold the agency if there were rational basis for agency decision. 5 U.S.C.A. § 706(2).

13. Administrative Law and Procedure – 681

Although agency's action may have first been considered by district court, Court of Appeals accords district court's decision on whether to sustain agency action no particular deference on appeal, but rather, Court of Appeal's determination in reviewing agency action is independent one based on same administrative record that was before district court.

14. Aviation – 35

National Transportation Safety Board (NTSB) was not arbitrary or capricious and did not abuse its discretion or act contrary to law by barring owner of crashed plane from participating in or observing official investigation into plane crash.

15. Aviation – 31

Statute providing that copies of any communication, document, investigation, other report, or information received or sent by the National Transportation Safety Board (NTSB) shall be available for public to inspect and purchase at reasonable cost does not give any member of public right to be present when NTSB report is being written. Transportation Safety Act of 1974. § 306(a), as amended, 49 U.S.C.A. App. § 1905(a).

16. Eminent Domain – 2(1.1)

Barring owner of crashed plane from participating in or observing National Transportation Safety Board’s (NTSB’s) investigation into plane crash did not constitute impermissible taking of plane owner’s property in violation of Fifth Amendment; plane owner would get all of his property back after NTSB completed its inquiry, plane owner had at his disposal all sanctions available to punish those who wrongfully altered or destroyed evidence if something happened to owner’s property while NTSB was supervising testing by manufacturer, and NTSB was not denying plane owner chance to make claim against manufacturer by mere testing of plane. U.S.C.A. Const. Amend. 5.

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Before ANDERSON and BRORBY, Circuit Judges, and BRIMMER,^{*1} District Judge.

BRORBY, Circuit Judge.

The National Transportation Safety Board (“the NTSB” or “the Board”) appeals the district court’s award of summary judgment holding that the NTSB could not invite manufacturers of a plane and its component parts to participate in an NTSB investigation without also allowing a representative of the individual who was killed in the crash to participate as an observer. We reverse.

* The Honorable Clarence A. Brimmer, Chief Judge, United States District Court for the District of Wyoming, sitting by designation.

I. BACKGROUND

The NTSB is the independent federal agency charged with investigating, determining the cause, and making recommendations for future precautions with respect to aircraft accidents.² To fulfill this task the Board is given authority to “examine and test to the extent necessary any civil aircraft, aircraft engine, propeller, appliance, or property aboard an aircraft involved in an accident in air commerce.”³ 49 U.S.C. App. § 1441(c).

Under the applicable enabling statute, the NTSB is authorized to make “rules and regulations as may be necessary to the exercise of its functions.” 49 U.S.C.App. § 1903(b)(11). To that end, the Board promulgated a series of rules and regulations governing its investigation of aviation mishaps. Among them is the declaration that Board investigations are “fact-finding proceedings with no formal issues and no adverse parties . . .” 49 C.F.R. § 831.4.

Board inquiries “are not conducted for the purpose of determining the rights or liabilities of any person.” *Id.*

When an investigation commences an investigator-in-charge is selected to organize, conduct, and control the field phase. This individual assumes responsibility for supervising and coordinating all Board and non-Board personnel who are associated with the on-site probe. 49 C.F.R. § 831.8. Among the specific powers given to the investigator-in-charge is the authority to designate participating parties to the inquiry. The regulations provide, in relevant part:

Two statutes govern the operation of the Board. The Independent Safety Board Act, 49 U.S.C.App. § 1901 *et seq.* establishes the Board and requires it to:

investigate or cause to be investigated (in such detail as it shall prescribe), and determine the facts, conditions, and circumstances and the cause or probable cause or causes of any --

(A) aircraft accident . . . pursuant to title VII of the Federal Aviation Act of 1958, as amended; 49 U.S.C.App. § 1903(a)(1)(A) (1988).

The Federal Aviation Act states:

It shall be the duty of the National Transportation Safety Board to --

...

(2) Investigate [aircraft] accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;

(3) Make such recommendations to the Secretary of Transportation as, in its opinion, will tend to prevent similar accidents in the future;

(4) Make such reports public in such form and manner as may be deemed by it to be in the public interest; . . . 49 U.S.C. App. § 1441(a)(2)-(4) (1988).

The foundation for the present day NTSB was initially laid in 1958 when Congress passed the Federal Aviation Act, 72 Stat. 731, 782 authorizing “creation of special boards of inquiry to investigate accidents which involve substantial questions of public safety in air transportation.” H.R. Rep. No. 2360, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 3741, 3757. In 1966 the NTSB was designated as a subordinate agency within the Department of Transportation. It held that status until the mid 1970’s when Congress made it a “totally separate and independent agency.” S. Conf.Rep. 93-1347, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 7669, 7694. See 49 U.S.C.App. § 1902(a).

When Congress redesigned the Board it recognized its outstanding record of investigating aviation accidents. S.Conf.Rep. 93-1347, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 7669, 7698. That parties do not dispute that record in this case nor do we have any reason to doubt the independence and integrity of the Board.

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(a) The investigator-in-charge may, on behalf of the Director, Bureau of Accident Investigation, or the Director, Bureau of Field Operations, designate parties to participate in the field investigation. Parties to the field investigation shall be limited to those . . . government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident . . . and who can provide suitable qualified technical personnel to actively assist in the field investigation. 49 C.F.R. § 831.11(a).

The regulations contemplate active participation from designated parties to an investigation. However, parties remain accountable to the Board “and may be relieved from participation if they do not comply with their assigned duties or if they conduct themselves in a manner prejudicial to the investigation.” 49 C.F.R. § 831.11(b). Also, designated parties who exercise any of the broad investigatory powers of the Board - including the right to inspect, photograph, or copy accident-related documents and records under 49 C.F.R. § 831.9(a) - may not be “represented by any person who also represents claimants and insurers.” 49 C.F.R. § 831.11(c). Access to accident-related wreckage and records is restricted to NTSB personnel and investigation participants. 49 C.F.R. § 831.12(a).

The NTSB claims the investigator-in-charge may - as a condition of participation - require parties to waive any objection to civil discovery about their investigatory role in the event litigation commences. In this appeal, the NTSB asserted this waiver is uniformly required from a “product manufacturer designated as a party.” (Appellant’s Brief at 5.) However, the NTSB cites no authority for this proposition and at oral argument conceded the requirement is merely derived from the implicit authority that an investigator-in-charge possesses and, as such, is discretionary. The record indicates the parties to this investigation signed statements indicating they were not participating for purposes of litigation.⁴

[1] The only parties an investigator-in-charge is required to designate are other federal government representatives who are involved in regulating air commerce. Congress specifically calls for the Secretary of Transportation, or his representatives, to join with the NTSB in investigating air accidents.⁵

However, investigatory primacy remains with the Board and the Board has exclusive authority to determine the probable cause of an accident.⁶

The statement signed by the parties provided:

It is understood that a party representative to an investigation may not be a person who also represents claimants or insurers. The placement of a signature hereon constitutes a representation that participation in this investigation is not on behalf of either claimants or insurers and that, while any information obtained may ultimately be used in litigation, participation is not for the purposes of preparing for litigation.

By placing their signatures hereon all participants agree that they will neither assert nor permit to be asserted on their behalf, any privilege in litigation, with respect to information or documents obtained during the course of and as a result of participation in the NTSB investigation as described above. It is understood, however, that this form is not intended to prevent the undersigned from participating in litigation arising out of the accident referred to above or to require disclosure of the undersigned’s communications with counsel.

Under the specific provision of the Federal Aviation Act regarding NTSB investigations of air accidents, the Board is called upon to “provide for the appropriate participation of the Secretary of Transportation and his representatives in any investigations conducted . . .” 49 U.S.C.App. § 1441(g). A similar requirement is imposed by the Independent Safety Board Act establishing the Board. 49 U.S.C.App. § 1903(a)(1). *See, e.g.*, 49 C.F.R. § 831.11(d) (“[W]hen appropriate, other Federal agencies, will normally be a party to field investigations and will have the same rights and privileges and be subject to the same limitations as other parties.”).

“[T]he Secretary of Transportation or his representatives shall not participate in the determination of probable cause by the National Transportation Safety Board . . .” 49 U.S.C.App. § 1441(g). “Any investigation of an accident conducted by the Board . . . shall have priority over all other investigations of such accident conducted by other Federal agencies.” 49 U.S.C.App. § 1903(a)(1).

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In addition to parties, the investigator-in-charge has discretionary power to allow observers at select portions of an investigation; but admittance through this avenue is strictly limited. The NTSB observer policies are fashioned to allow “aeronautical organizations, current operators of like equipment, designated military personnel or representatives of a foreign government” to be on-hand for “initial organizational and final ‘wind up’ meetings” only. NTSB Investigation Manual - Aircraft Accidents and Incidents, at 4-12 (1980). The policies contain no clause permitting aircraft owners, representatives of deceased passengers, passengers, or others, to observe NTSB inquiries. *Id.* at 4-12. *See Miller v. Rich*, 723 F.Supp. 505, 508-09 (C.D.Cal. 1989) (*Miller II*) (no section in the current NTSB Investigation Manual grants aircraft owners the right to attend an accident investigation).

There is no provision in any other statute, regulation, or manual that either requires or expressly permits the investigator-in-charge to admit merely interested persons as participants or observers of an investigation. For example, the news media is typically not allowed to attend an NTSB inquiry. Of course, given the broad authority the NTSB contends it implicitly has, it is conceivable that an investigator-in-charge could open an investigation for viewing by an interested person.

Although access to the investigation itself is strictly limited, the work-product of the NTSB is ultimately public and available to anyone. 49 U.S.C.App. § 1903(a)(2); 49 C.F.R. § 845.50. The work-product encompasses the NTSB report including “all factual information concerning the accident.” 49 C.F.R. § 845.50(a). Moreover, the NTSB public docket on an accident is never “officially closed”; rather, it is kept open “for the submission of new and pertinent evidence by any interested person.” 49 C.F.R. § 845.51.

Because the NTSB book on an accident is never shut, it is conceivable the NTSB could alter its findings about the cause of an aviation mishap following development of new information by persons not permitted to attend the NTSB inquiry. Any interested person, in fact, may submit proposed findings to the Board regarding an accident’s probable cause. 49 C.F.R. § 831.14.

Also, anyone questioned by the NTSB during an investigation is entitled to have a representative, such as an attorney, present with them. 49 C.F.R. § 831.7. Thus, if an owner of a plane is deposed about its crash, or if a family member of a deceased pilot or passenger of a plane is questioned, they may be accompanied by their attorney.

Consistent with its fact-finding mission that is litigation neutral, NTSB reports are barred as evidence in court. 49 U.S.C.App. § 1441(e) (“No part of any report or reports of the National Transportation Safety 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.”). *See also* 49 U.S.C.App. § 1903(c). Board employees may give limited testimony concerning the “factual information they obtained during the course of the accident investigation, including factual evaluations embodied in their factual accident reports.” 49 C.F.R. § 835.3(b). When making these statements, Board employees may refer to their reports to refresh their recollection. 49 C.F.R. § 835.4. *See, e.g., Keen v. Detroit Diesel Allison*, 569 F.2d 547, 549-51 (10th Cir. 1978) (NTSB investigator and FAA maintenance supervisor may testify as to what they observed at an accident scene and the manner in which they conducted their investigations but may not testify as to the proximate cause of the crash).

The restrictions on testimony are limited to NTSB employees and former employees. *See* 49 C.F.R. §§ 835.3, 835.7. We assume without deciding that the restrictions do not apply to those designated as parties to an accident investigation who are not Board employees.

Finally, the NTSB does not forbid private investigations conducted with an eye toward civil litigation. In fact, after its inquiry the Board releases any wreckage or records it took custody of while conducting its inquiry. 49 C.F.R. § 831.12(b). This material is then available to litigants to use in preparing their cases.

II. FACTS

The sad facts underlying this action are undisputed. On August 2, 1988, Thomas W. Brooks was killed when the Beech Musketeer airplane he was piloting crashed on takeoff from the Philmont Scout Ranch near Cimarron, New Mexico. (Appellant’s Brief at 8; Appellee’s Brief at 3.) After the crash, the NTSB initiated its examination with Norman Wiemeyer of the Denver Field Office appointed investigator-in-charge.

At Wiemeyer’s direction the aircraft wreckage was taken to a repair station in Greeley, Colorado, for testing and parties to the investigation were named. The parties included the aircraft manufacturer, Beech Aircraft, along with the engine manufacturer, Avco-Lycoming. Philmont Scout Ranch was also designated as a party. Wiemeyer did not, however, designate the plane’s owner, Thomas Brooks, Chartered, a Colorado Professional Corporation

("Brooks"), as a party.

Wiemeyer made the decision not to include Brooks after reviewing pilot and aircraft records Brooks supplied. Wiemeyer determined Brooks' records were all that was needed for the NTSB study and there was no need for further contact with the owner of record in regard to the aircraft or pilot.

Thereafter, Wiemeyer was contacted by an attorney representing the deceased pilot's family. The attorney asked for permission to observe the aircraft evaluation. That request was subsequently rejected based on Wiemeyer's belief the attorney represented claimants and, as such, was barred from attending the investigation under NTSB rules. 49 C.F.R. § 831.11(c). Wiemeyer also denied the observation request based on his conclusion that the attorney had no technical expertise that would aide the investigation.

The NTSB General Counsel supported Wiemeyer's decision in a letter to the family attorney. Referring to the Board's enabling statutes, rules, and Investigator's Manual, the letter gives the reasons for declining the observation request by stating, in relevant part, that:

A determination has been made that the investigator in charge does not have a specific need for any additional expertise. Moreover, you did not make a showing to Mr. Wiemeyer [sic] that you could provide specialized expertise which he needed.

An agreement has been made that, at the completion of the teardown, the disassembled engine will be returned to the registered owner in accordance with Board Rule 831.12(b), formerly Rule 831.10(b).

In view of the foregoing and in light of the fact that the Board's procedures make no provision for observers to the teardown, the Board's determination is that neither you nor your representative may observe the teardown.

Within a reasonable length of time after the teardown, a public docket that contains all the documents that comprise the Board's factual investigation of this accident will be created and will be available to any interested person who requests a copy from the NTSB . . .

The letter concludes by referring to the opportunity the attorney will have to depose investigators following the NTSB accident review.

The instant case was commenced in the district court following receipt of the NTSB letter by Brooks. Brooks claimed: (1) the NTSB abused its discretion and could not lawfully bar the owner of a plane from being present at the investigation concerning its crash; (2) the NTSB was arbitrary and capricious in refusing to allow Brooks to attend the investigation; and, (3) the NTSB decision was a taking of property without due process in violation of the Fifth Amendment.

The district court granted a preliminary injunction forbidding any disassembly, dismantling, or destructive inspection of the plane unless a Brooks observer was present. The court further ordered that Brooks' observer should be a technically qualified FAA airframe and powerplant mechanic. The order allowed the observer to take notes, but provided he could not take photographs or speak unless spoken to. The order finally granted the investigator-in-charge the power to exclude the observer if any conditions of the order were violated.

The district court subsequently granted Brooks summary judgment and made its preliminary injunction permanent. In so doing, it read the Independent Safety Board Act, 49 U.S.C.App. §§ 1903(b)(2), 1905, and saw in it no hint of a Congressional desire to bar an owner's representative from watching the NTSB team work. The court held it was an abuse of discretion for the NTSB to include manufacturers as parties without also including the aircraft owner.⁷

The district court's decision was made in a ruling from the bench wherein the judge stated:

The Court will grant the motion for summary judgment and issue a permanent injunction in this case . . . I don't think we're talking about who is going to be part of the investigation team. We're talking very simply about whether a knowledgeable person may be an observer of what this team does in the fact situation where the owner is interested - in this case, the plaintiff - and where in this particular situation a representative of the manufacturer and the engine manufacturer, who certainly have stakes in the outcome of this investigation, are going to be part of this investigation team or observers.

I have looked at the statute; and for the record, we're talking more specifically about 49 United States Code section 1903(b)(2). There is nothing in 1903(b)(2) which would indicat[e or] even hint that Congress does not want a representative, a qualified representative of the owner to be an observer of what their team is doing. I've also looked

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The court's permanent injunction differed from the preliminary injunction in only one minor respect: the permanent injunction ordered that Brooks' observer could be either an FAA-certified airframe and powerplant mechanic, or other suitably qualified observer, whereas the preliminary injunction said the observer had to be an FAA-certified airframe and powerplant mechanic. NTSB now appeals from this order.⁸

III. ANALYSIS

NTSB makes two arguments. First, it contends that its decision to bar Brooks' representative from observing the accident investigation was neither arbitrary nor capricious, and was not an abuse of discretion. The Board secondly asserts that the decision on who may attend an investigation is committed, by statute, to the agency's discretion. The Board therefore reasons that its decision is unreviewable in the district court. Because the second argument implicates the jurisdiction of the lower court and, *ipso facto*, our review, we begin with it.

A.

[2] At the outset, we note that a determination of the district court's subject matter jurisdiction is a question of law reviewable de novo on appeal. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988), *cert. denied*, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989); *Madsen v. United States ex rel. United States Army, Corps of Eng'rs*, 841 F.2d 1011, 1012 (10th Cir.1987).

[3] We begin our analysis with the Administrative Procedure Act's ("the APA") provisions governing review of agency action. Judicial review of agency action is generally allowed except where "statutes preclude judicial review," or where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)-(2) (1988). These are two separate tests and must be taken in order. If there is no statute that precludes judicial review, § 701(a)(1), then we determine whether the action is committed to agency discretion by law, § 701(a)(2). *See Turner v. United States Parole Comm'n.*, 810 F.2d 612, 614 (7th Cir.1987); *Investment Co. Inst. v. FDIC*, 728 F.2d 518, 525 (D.C.Cir.1984).

[4] Congress has not expressly forbidden review of actions by the NTSB. In fact, in the NTSB enabling act Congress specifically provides that

at the other sections cited; and if anything, those sections lend weight to the position of the plaintiff and not the position of the defendant. For example, 1905 talks about public access to information.

...
Where we have this particular situation, where the amnufactuer'rs rep and the engine manufacturer's representatives are going to be there and are going to be participating or observing - I'm not sure if they're actually going to be participating, or observing - the free exchange of ideas certainly is going to be inhibited no more by having the owner present, where you already have these representatives present. If free interchange is going to be inhibited, it's going to be inhibited with these representatives present.

But in any case, in this particular situation where you do have these parties present and then you are saying we're not going to allow observer status - not team status, because we're not talking about them being a part of the team, but observer status to the owner's representatives - to me it's just rather obvious that it is an abuse of discretion; that it is arbitrary and capricious.

On appeal, the Board waives its contention made in the trial court that summary judgment is precluded because genuine issues of material fact are unresolved. *See Fed.R.Civ.P.* 56; Appellant's Brief at 11 n. 12. Appellant also waves any argument concerning whether Brooks' request was properly styled and whether he exhausted administrative remedies. Appellant's Brief at 10 n. 9.

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“[a]ny order, affirmative or negative, issued by the Board” is subject to review in the court of appeals. 49 U.S.C.App. § 1903(d). Review is in accordance with the APA. *Id.*

Reading this provision, we see that Congress has evinced no express statutory intent that decisions by the NTSB are precluded from judicial review under section 701(a)(1). See *Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10th Cir.1988) (in the absence of an express statutory prohibition of judicial review - which would invoke APA § 701(a)(1) - an agency bears a heavy burden in overcoming the presumption that Congress did not mean to prohibit all judicial review). Nor do we discern a limitation on judicial review in this instance from the “structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.” *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2454, 81 L.Ed.2d 270 (1984).

[5] The questions remains, however, whether some actions by the NTSB are committed to its discretion by virtue of APA section 701(a)(2). Under section 701(a)(2), there is no judicial review where “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985). “In such a case, the statute (‘law’) can be taken to have ‘committed’ the decisionmaking to the agency’s judgment absolutely.” *Chaney*, 470 U.S. at 830, 105 S.Ct. at 1655. In short, there is no judicial review of an agency decision where there is no law for the court to apply. *Id.* at 830, 105 S.Ct. at 1655. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971). However, this is a very narrow exception. *Id.* at 410, 91 S.Ct. at 820; *Hondros v. United States Civil Serv. Comm’n.*, 720 F.2d 278, 293 (3d Cir.1983); *Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383, 386 (10th Cir.1982); *Savin v. Butz*, 515 F.2d 1061, 1065 (10th Cir.1975).

[6] In *Chaney*, the Court was faced with a decision by the Food and Drug Administration wherein the agency declined to commence an enforcement action. The Court referred to the decision not to act as an example of a decision committed to agency discretion by law. The Court concluded an agency is free to refrain from acting absent a Congressional enactment withdrawing discretion and commanding performance. *Chaney*, 470 U.S. at 834-35, 105 S.Ct. at 1657. In a situation where Congress commands the agency act there is law to apply and a court, pursuant to the standards of the APA, may review whether the agency acted in accordance with Congress’ wishes. *Brock v. Pierce County*, 476 U.S. 253, 160 n. 7, 106 S.Ct. 1834, 1839 n. 7, 90 L.Ed.2d 248 (1986) (where the statutory command is that the agency shall act, a complainant adversely affected by the failure to act may bring an action in district court); *Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir.1990) (“Review of agency non-enforcement decisions is permissible only where statutory language sets constraints on the agency’s discretion.”).

[7] We, however, are not faced with a situation where the NTSB refuses to make a decision or take some action. The NTSB affirmatively decided that Brooks would not be allowed to participate in, or even observe, its official investigation into the crash of its plane. See majority op. at p. 640. And under *Chaney*, “when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.” 470 U.S. at 832, 105 S.Ct. at 1656 (emphasis in original).

[8] Affirmative agency action is also reviewable where the agency purports to act pursuant to its own rules, rather than a statute. The failure of an agency to follow its own regulations is challengeable under the APA. *Service v. Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 352 (10th Cir.1989) (substantive federal regulation is binding to the same extent as a statute and is reviewable). In this case the investigator-in-charge relied on both statutes and NTSB rules for naming participants, designating observers, and denying Brooks permission to witness the engine teardown.⁹

The investigator-in-charge states the following in his affidavit:

After my preliminary examination I selected parties to the investigation in accordance with the criteria set forth in Section 831.11 of the NTSB Accident Investigation Procedures (49 CFR 8341.11) on the basis of need for their active

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The regulations the investigator relied on set forth objective criteria that are easily susceptible to judicial review. For example, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident are eligible to be named parties if they can provide qualified technical personnel to assist. 49 C.F.R. § 831.11(a). Observers are likewise allowed if they are accredited members of aeronautical organizations, current operators of like equipment, designated military personnel, or representatives of a foreign government. NTSB Investigation Manual - Aircraft Accidents and Incidents at 4-12 (1980).

Thus, this case is readily distinguishable from our decision in *Laramie County*. In *Laramie County*, there were no objective guidelines for the federal agency to follow when it decided to end a federal grant that had been given to a local group. *Laramie County*, 866 F.2d at 353. Instead, the federal agency could terminate the grant based on its mere subjective belief that termination was more appropriate than a lesser sanction. Because discretion within the agency was so broad, we concluded the district court “has no standard against which to measure [the] exercise of discretion.” *Id.* The same conclusion is not appropriate here because of the presence of readily identifiable objective criteria that were expressly relied on by the NTSB. Therefore, we hold that the district court had law to apply and so could review the NTSB decision under the standards set forth in the APA.

[9] We further note that, to the extent Brooks challenges the constitutionality of the NTSB decision, the matter is also reviewable in court. *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 632 (1988) (serious constitutional question would arise if federal statute were construed to deny any judicial forum for a colorable constitutional claim); *Laramie County*, 866 F.2d at 352-53 (“[J]udicial review of colorable constitutional claims remains available unless Congress has made its intent to preclude review crystal clear.”).

B.

Having determined that the NTSB decision barring Brooks from the accident investigation is judicially cognizable, we proceed to the merits. NTSB argues it was neither arbitrary nor capricious, and that it did not abuse its discretion, when it made the decision to keep Brooks out. In response Brooks argues just the opposite. He further suggests the NTSB’s attempt to forbid his observation of the investigation violates the Fifth Amendment. In answering these contentions, we first stop to address the standard of review. *See, e.g., Overton Park*, 401 U.S. at 413, 91 S.Ct. at 822 (“[T]he existence of judicial review is only the start: the standard for review must also be determined.”).

[10-12] Both parties are correct in urging us to apply the statutory “arbitrary, capricious, an abuse and discretion, or otherwise not in accordance with law” standard of 5 U.S.C. § 706(2)(A) (1988) in determining whether to “hold unlawful and set aside [the] agency action.” 5 U.S.C. § 706(2). Informal agency action is reviewed utilizing this standard. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41, 103 S.Ct. 2856, 2865, 77 L.Ed.2d 443 (1983); *Overton Park*, 401 U.S. at 414, 91 S.Ct. at 822; *CF & I Steel Corp. v. Economic Dev. Admin.*, 624 F.2d 136, 139 (10th Cir.1980). Furthermore, it is well-settled that even though our inquiry is searching and careful, our ultimate standard of review is narrow. All the agency need do is demonstrate it considered relevant factors and alternatives after a full ventilation of the issues, and that the choice it made was reasonable based on those

assistance in the technical aspects of the crash investigation.

...

I focused upon my understanding of Section 304(c) of the Independent Safety Board Act (49 U.S.C. 1903(c)) as the provision had been explained to me, and used by me, on numerous occasions by both the NTSB Denver Office Regional Director and by the NTSB General Counsel.

...

I made a reasoned determination, *based on my understanding of the NTSB regulations, policy, and procedures* governing aviation accident investigations, that I would have no need for the presence of a representative of the deceased pilot, or the owner of record, to participate in the aircraft evaluation . . . (Emphasis added.)

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considerations. *American Mining Congress v. Marshall*, 671 F.2d 1251, 1255 (10th Cir.1982). We do not substitute our judgment for the agency's. Instead, we must uphold the agency if there is a rational basis for its decision. *Gallegos v. Lyng*, 891 F.2d 788, 790 (10th Cir.1989); *New Mexico Envtl. Improvement Div. v. Thomas*, 789 F.2d 825, 830 (10th Cir.1986); *Anderson v. United States Dep't of Hous. & Urban Dev.*, 701 F.2d 112, 115 (10th Cir.1983).

An agency's action will be set aside as unlawful if we are able to discern the agency "relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42, 103 S.Ct. at 2866. *Accord Thomas*, 789 F.2d at 829-30; *Bedford County Memorial Hosp. v. Health & Human Servs.*, 769 F.2d 1017, 1022 (4th Cir.1985).

[13] We further recognize that although the agency's action may have first been considered by the district court, we accord the district court's decision no particular deference on appeal. *Webb v. Hodel*, 878 F.2d 1252, 1254. *See, e.g., Washington Health Facilities Ass'n v. Washington Dep't of Social & Health Servs.*, 879 F.2d 677, 681 (9th Cir.1989) (standard in reviewing agency decisions is the same as used by the district court).

[14] Turning now to the NTSB's principal argument on appeal, the Board makes three points. It asserts that the district court: misread NTSB's governing statutes and regulations; ignored or misapplied relevant case law; and, finally, wrongfully imposed its own views of procedural fairness on the Board.

The NTSB believes a correct reading of the applicable statutes and regulations provide only for the federal government - namely the Federal Aviation Administration - to participate in an NTSB inquiry as a matter of right. Otherwise, it feels the Board acting through the investigator-in-charge has discretion on who will participate or observe. The NTSB says the decision on who to admit is, and must be, made on a case by case basis. The decision, it maintains, turns on whether the potential party is able to assist the investigation in a meaningful way.

The district court came to a different conclusion. It said 49 U.S.C.App. § 1903(b)(2) of the Independent Safety Board Act reveals no hint that Congress meant to ban a representative of the owner from observing. In addition, it said references to public access to information in § 1905 lend weight to Brooks' position. *See* majority op. at n. 6. The court relied on a Ninth Circuit case to support its holding. *Miller v. Rich*, 845 F.2d 190 (9th Cir.1987) (*Miller I*).

The plaintiff in *Miller I* was the owner of a single-engine plane that crashed, killing one of the two occupants. Miller requested that his representative be on-hand to observe the engine disassembly. But the NTSB refused and the district court subsequently denied Miller's application for an injunction. The Ninth Circuit, on appeal, reversed and remanded because it believed the NTSB abused its discretion by denying Miller's request without offering any explanation. It rejected the NTSB's position that no reason need be given for the denial when the NTSB argued it possessed absolute authority regarding who to admit to its inspections. *Miller I*, 845 F.2d at 191-93.

At the time of the circuit court's decision, the NTSB manual on conducting aircraft crash investigations specified that an owner should be allowed to participate. *Id.* at 192. However, by the time the case was heard on remand the NTSB had revised its manual, deleting the language that called for treating aircraft owners differently from others who seek party status. *Miller II*, 723 F.Supp. at 511. In *Miller II*, the district court determined the NTSB was not abusing its discretion in preventing the owner from attending the investigation. The NTSB explanations that the owner could not help the safety probe, might impede free discussions, and might hinder the flow of information among the parties because of his litigation-oriented personal interests were enough for the lower court. It concluded the NTSB had a rational basis for excluding the owner that was not an abuse of discretion. The injunction was again denied. *Id.* at 508, 511.

In this case, the district court distinguished the denial of an injunction in *Miller II* because that judge was not faced with a situation where the manufacturer's representatives were members of the team or parties to the exclusion of the owner. The lower court here felt that any NTSB fears concerning the potential adverse impact on free discussions due to the owner's presence were not applicable. We disagree and believe the rationale of *Miller II* is even more persuasive where an owner seeks to insinuate himself to an investigation that already includes a potential adversary in forthcoming civil litigation. The likelihood that the owner's presence would hinder the free exchange of ideas between the NTSB and manufacturer, thereby compromising the NTSB investigation, is plain.

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We do not concur with the district court's interpretation of the statutes. Section 1903(b)(2) is directed at employees of the Board, and authorizes them to "enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things therein necessary for a proper investigation . . ." 49 U.S.C.App. § 1903(b)(2). In conducting their accident tests, the provision requires NTSB employees to reduce interference with remaining transportation services and to preserve, to the maximum extent feasible, any evidence relating to the transportation accident "*consistent with the needs of the investigation* and with the cooperation of [the] owner or operator." *Id.* (emphasis added). Nothing in this provision expressly issues an owner an automatic admission ticket to an NTSB investigation.¹⁰

We further find the legislative history of section 1903 supports our view. The statute refers to evidence gathering by the NTSB and calls on the NTSB to cooperate with owners to the extent possible to avoid unnecessary litigation about uncovering evidence.

If, however, arrangements cannot be worked out, the NTSB

has the authority to secure an immediate court order as necessary to obtain evidence and conduct examinations or tests. Thus, consent of the owner is not a pre-condition to NTSB conducting examinations or tests consistent with the needs of the investigation.

H.R.Rep. No. 97-108, Part II, 97th Cong., 1st Sess., *reprinted in* 1981 U.S.Code Cong. & Admin. News 1736-37. In this case, the NTSB received the input it needed from Brooks when it asked for, and received, its aircraft records. Slip op. at p. 10. Assuming without deciding that section 1903(b)(2) applies to this investigation, slip op. at n. 9, both Brooks and the NTSB complied with the statute by cooperating with each other regarding the aircraft's records. We read no additional requirement into the statute about Brooks' attendance at the subsequent NTSB investigation except to stress again that the statute clearly focuses the Board's attention on the "needs of the investigation," and not on the desires of the owner. 49 U.S.C.App. § 1903(b)(2).

[15] Also, section 1905, which the district court referred to in its ruling, majority op. at n. 6, discusses public access to information. It provides that copies of any "communication, document, investigation, or other report, or information received or sent by the Board" shall be available for the public to inspect and purchase at a reasonable cost. 49 U.S.C.App. § 1905(a). The statute does not, however, give any member of the public the right to be present when the NTSB report is being written. In addition, the NTSB regulations, made pursuant to the statutes, further focus our attention on the fact-finding, litigation neutral aspect of the investigation. Whether parties are named is left to the discretion of the investigator-in-charge. When they are picked, they are identified according to "who can provide suitable qualified technical personnel to actively assist in the field investigation." 49 C.F.R. § 831.11(a). Likewise, observer status is granted only to "aeronautical organization, current operators of like equipment, designated military personnel or representatives of a foreign government" who possess a safety-related interest in the investigation that goes beyond the litigation-planning posture Brooks is in. NTSB Investigation Manual - Aircraft Accidents and Incidents, at 4-12 (1980).

Moreover, we believe the district court implicitly recognized Brooks would not help this investigation when it ordered he would have to be completely silent during any meeting he went to, and that he could only take notes and not speak unless spoken to. The district court apparently imposed its own

The Board further argues that § 1903(b)(2) does not even apply to aviation accidents because it only addresses examination and testing of a surface "vehicle, rolling stock, track, or pipeline component or any part of any such item when such examination or testing is determined to be required for the purposes of such investigation." 49 U.S.C.App. § 1903(b)(2). The Board says investigation into aircraft accidents is governed separately by § 1441 of Title 49. In support of this position the Board refers to the legislative history of § 1903 and the House Report that specifically says "examinations and tests for aviation safety is dealt with by section 701 of the Federal Aviation Act." H.R.Rep. No. 97-108, Part II, 97th Cong., 1st Sess., *reprinted in* 1981 U.S.Code Cong. & Admin. News 1729, 1737 n. 1. The Board surmises that even if § 1903(b)(2) can be read to allow an owner the right to participate in an NTSB investigation, the section does not apply here because this accident involves an airplane and not a surface vehicle. Brooks, in contrast, maintains that the word vehicle can be read to include aircraft. Because we believe § 1903 does not grant owners the right to attend an investigation in any event, we need not decide whether § 1903 governs NTSB conduct with respect to surface accidents only.

idea of proper conduct you would rightly expect to find in civil litigation that determines tort liability. But the district court's view is not consistent with the purpose of the NTSB probe. "Wherever the parties may stand with respect to each other under applicable tort law, they stand on much different footing vis-a-vis the NTSB's investigation." *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1389 (9th Cir.1986), *cert. denied*, 484 U.S. 815, 108 S.Ct. 67, 98 L.Ed.2d 31 (1987). "The NTSB's function is 'to promote transportation safety by conducting independent accident investigations and by formulating safety improvement recommendations.'" *Graham*, 805 F.2d at 1389 (quoting 49 U.S.C.App. § 1901(1)). Because the Board has no role in determining civil liability, it need not be forced to admit a plaintiff as a fly on the wall. Brooks' presence would compromise this investigation by hindering the NTSB as it works to zero in on the cause of the mishap. If Brooks attends, the Board will be prevented from fulfilling its statutory mission of formulating safety recommendations in a neutral, calm and scientific atmosphere. Furthermore, Brooks' attendance would certainly chill the give-and-take between the NTSB and any manufacturer. The incentive a manufacturer has in uncovering potential product defects by working with the NTSB will be frustrated the instant Brooks arrives to monitor discussions and take notes. An NTSB investigation is a forum for developing safety recommendations. It is not a show for an audience of silent note takers looking for someone to sue.

The district court's order will also, if taken to its logical boundaries, result in unwieldy NTSB investigations. In this case the court ordered a single observer to be present at every NTSB meeting concerning the crash. It is possible, however, the expert the court made room for will not be qualified to observe with understanding each aspect of the NTSB inquiry. If something comes up beyond the scope of the authorized observer's qualifications, the entire probe may be halted while the plaintiff attempts to find a suitable replacement. Additionally, the NTSB may elect to have certain tests conducted by outside experts while continuing to meet on the accident as a whole. In that event, a plaintiff could further complicate the investigation by insisting that a separate representative be present for each outside test while the first observer continues to watch the primary accident-related discussions. Finally, should the rule announced by the district court be extended to investigations of major aircraft accidents involving many individuals, it is conceivable the NTSB would be forced to make room for dozens of outside observers who would contribute nothing to the inquiry. Their only function would be to listen for potential theories of tort liability to benefit their clients. We could expect numerous petitions to the judiciary requesting observer status for each new expert.

In insisting he should attend, Brooks suggests - without providing any evidence - that having the manufacturer present without the owner compromises the integrity of the NTSB factual report. In making this suggestion, Brooks contends the manufacturers actually run the investigation while the NTSB takes a back seat. He sees the official investigation as little more than a cover-up by manufacturers. Under Brooks' scenario, a verdict pinning an accident's cause on pilot error instead of on a manufacturer's product is preordained whenever the owner does not go to the NTSB meetings. In making these charges, Brooks ignores the checks built into the statutes and NTSB rules that help ensure the investigation's credibility.

First, NTSB's reports are freely available to anyone. 49 U.S.C.App. § 1905(a). However, as a protection for plaintiffs Congress forbids an NTSB probable cause determination from being introduced as evidence in a related tort case. Only factual aspects of an NTSB report may be used. 49 U.S.C.App. §§ 1441(e), 1903(c). Second, after the NTSB investigation the aircraft and its component parts are returned to the owner so he may commence an independent investigation and compare his findings to those of the NTSB. 49 C.F.R. § 831.12(b). The owner may use the results of his independent inquiry in his tort case without any restriction. Third, the owner may depose NTSB employees about the "factual information they obtained during the course of the accident investigation, including factual evaluations embodied in their factual accident reports." 49 C.F.R. § 835.3(b). The owner may also depose parties to the investigation who are not NTSB employees and may utilize their direct testimony in court. In this case, we note that Brooks has the added protection of knowing that all parties, including the manufacturers, signed discovery waivers as a condition of their party status. They therefore gave up discovery privileges potentially assertable in a tort liability case. Slip op. at n. 3. Finally, NTSB rules prohibit any party to the investigation from being represented by "any person who also represents claimants or insurers." 49 C.F.R. 831.11(c).

The NTSB explained its reasons for denying Brooks admission, slip op. at 11, and reiterated those justifications to the district court. Reviewing the Board's explanation, we do not believe it relied on factors that Congress did not intend it to consider, or that it entirely failed to consider an important aspect of the problem. The proffered explanation does not run counter to the evidence in the record and is certainly not implausible. Accordingly, we hold the NTSB was neither arbitrary nor capricious, and did not abuse its discretion or act contrary to law when it barred Brooks from its official investigation. We find our holding is supported by *Graham*, wherein the court was faced with a similar case of a deceased pilot's representative seeking admission to an NTSB engine teardown. The court determined the pilot's representative could add "nothing unique" to the investigation, and upheld the

NTSB decision keeping the representative out. *Graham*, 805 F.2d at 1389. As for Brooks' suggestions of impropriety by the NTSB, we believe Brooks performs a disservice to the dedicated investigators by implying all NTSB investigations are compromised when a manufacturer is a party.

[16] Finally, Brooks also asserts that barring him from the investigation constitutes an impermissible taking of property in violation of the Fifth Amendment. We find no merit to this claim. As we have noted, Brooks gets all of his property back after the NTSB completes its inquiry. In the unlikely event that something happens to the property while the NTSB is supervising its testing by the manufacturer, he has at his disposal all the "sanctions available to punish those who [wrongfully] alter or destroy evidence." *Graham*, 805 F.2d at 1390 n. 9. By its mere testing of the plane, the NTSB is not denying Brooks the chance to make a claim against a manufacturer. For these reasons, we find that Brooks cannot validly claim that the NTSB investigation is unconstitutional.

IV. CONCLUSION

The decision of the NTSB denying Brooks admission to the official investigation concerning the crash of his plane was not a decision the district court was prevented from reviewing either by statute, or by virtue of the decision being committed to the NTSB's discretion by law. To the extent the NTSB decision implicated the Constitution, the district court also had the power to review it. Having so held, we further conclude that the NTSB decision barring Brooks from the investigation was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Therefore, the judgment of the district court is REVERSED and its permanent injunction is VACATED.

REORGANIZATION PLAN NO. 13 OF 1950¹¹¹

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949.

CIVIL AERONAUTICS BOARD

SECTION 1. *Transfer of functions to the Chairman.* - (a) Subject to the provisions of subsection (b) of this section, there are hereby transferred from the Civil Aeronautics Board, hereinafter referred to as the Board, to the Chairman of the Board, hereinafter referred to as the Chairman, the executive and administrative functions of the Board, including functions of the Board with respect to (1) the appointment and supervision of personnel employed under the Board, (2) the distribution of business among such personnel and among administrative units of the Board, and (3) the use and expenditure of funds.

(b) (1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Board and by such regulatory decisions, findings, and determinations as the Board may by law be authorized to make.

(2) The appointment by the Chairman of the heads of major administrative units under the Board shall be subject to the approval of the Board.

(3) Personnel employed regularly and full time in the immediate offices of members of the Board other than the Chairman shall not be affected by the provisions of this reorganization plan.

(4) There are hereby reserved to the Board its functions with respect to revising budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

SEC. 2. *Performance of transferred functions.* - The Chairman may from time to time make such provisions as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any function transferred to the Chairman by the provisions of this reorganization plan.

¹ Effective May 24, 1950, 64 Stat. 1266, 5 U.S.C. Appendix.

REORGANIZATION PLAN NO. 3 OF 1961¹¹²

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, May 3, 1961, pursuant to the provisions of the Reorganization Act of 1949, as amended.

CIVIL AERONAUTICS BOARD

SECTION 1. *Authority to delegate.* (a) In addition, to its existing authority, the Civil Aeronautics Board, hereinafter referred to as the "Board", shall have the authority to delegate, by published order or rule, any of its functions to a division of the Board, an individual Board member, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determination, ordering, certifying, reporting or otherwise acting as to any work, business, or matter: *Provided, however,* That nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended.

(b) With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Board shall retain a discretionary right to review the action of any such division of the Board, individual Board member, hearing examiner, employee or employee board, upon its own initiative or upon petition of a party to or an intervenor in such action, within such time, and in such manner as the Board shall by rule prescribe: *Provided, however,* That the vote of a majority of the Board less one member thereof shall be sufficient to bring any such action before the Board for review.

(c) Should the right to exercise such discretionary review be declined, or should no such review be sought within the time stated in the rules promulgated by the Board, then the action of any such division of the Board, individual Board member, hearing examiner, employee or employee board, shall, for all purposes, including appeal or review thereof, be deemed to be the action of the Board.

SEC. 2. *Transfer of functions to the Chairman.* In addition to the functions transferred by the provisions of Reorganization Plan No. 13 of 1950 (64 Stat. 1266), there are hereby transferred from the Board to the Chairman of the Board the functions of the Board with respect to the assignment of Board personnel, including Board members, to perform such functions as may have been delegated by the Board to Board personnel, including Board members, pursuant to section 1 of this reorganization plan.

¹ Effective July 3, 1961, 75 Stat. 837, 5 U.S.C. Appendix.

DEPARTMENT OF TRANSPORTATION ACT

[Act of October 15, 1966, 80 Stat. 931; as amended by Act of September 11, 1967, 81 Stat. 224; Act of August 23, 1968, 82 Stat. 824, Act of August 22, 1972, 86 Stat. 617, and Act of January 3, 1975, 88 Stat. 2156.]

AN ACT

To establish a Department of Transportation and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Department of Transportation Act".

DECLARATION OF PURPOSE

SEC. 2. [80 Stat. 931, 49 U.S.C. 1651] (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.

(b) (1) The Congress therefore finds that the establishment of a Department of Transportation is necessary in the public interest and to assure the coordinated, effective administration of the transportation programs of the Federal Government; to facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible; to encourage cooperation of Federal, State, and local governments, carriers, labor, and other interested parties toward the achievement of national transportation objectives; to stimulate technological advances in transportation; to provide general leadership in the identification and solution of transportation problems; and to develop and recommend to the President and the Congress for approval national transportation policies and programs to accomplish these objectives with full and appropriate consideration of the needs of the public, users, carriers, industry, labor, and the national defense.

(2) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

ESTABLISHMENT OF DEPARTMENT

SEC. 3. [80 Stat. 931, as amended by 81 Stat. 224, 49 U.S.C. 1652] (a) There is hereby established at the seat of government an executive department to be known as the Department of Transportation (hereinafter referred to in this Act as the "Department"). There shall be at the head of the Department a Secretary of Transportation (hereinafter referred to in this Act as the "Secretary"), who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) There shall be in the Department an Under Secretary, who shall be appointed by the President, by and with the advice and consent of the Senate. The Under Secretary (or, during the absence or disability of the Under Secretary, or in the event of a vacancy in the office of Under Secretary, an Assistant Secretary or the General Counsel, determined according to such order as the Secretary shall prescribe) shall act for, and exercise the powers of the Secretary, during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary. The Under Secretary shall perform such functions, powers, and duties as the Secretary shall prescribe from time to time.

(c) There shall be in the Department four Assistant Secretaries and a General Counsel, who shall be appointed by the President, by and with the advice

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and consent of the Senate, and who shall perform such functions, powers, and duties as the Secretary shall prescribe from time to time.

(d) There shall be in the Department an Assistant Secretary for Administration, who shall be appointed, with the approval of the President, by the Secretary under the classified civil service who shall perform such functions, powers, and duties as the Secretary shall prescribe from time to time.

(e) (1) There is hereby established within the Department a Federal Highway Administration; a Federal Railroad Administration; and a Federal Aviation Administration. Each of these components shall be headed by an Administrator, and in the case of the Federal Aviation Administration there shall also be a Deputy Administrator. The Administrators and the Deputy Federal Aviation Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

(2) The qualifications of the Administrator of the Federal Aviation Agency specified in section 301(b) of the Federal Aviation Act of 1958, as amended (72 Stat. 744; 49 U.S.C. 1341), and the qualifications and status of the Deputy Administrator specified in section 302(b) of the Federal Aviation Act of 1958, as amended (72 Stat. 744; 49 U.S.C. 1342), shall apply, respectively, to the Administrator and Deputy Administrator of the Federal Aviation Administration. However, nothing in this Act shall be construed to preclude the appointment of the present Administrator of the Federal Aviation Agency as Administrator of the Federal Aviation Administration in accordance with the provisions of the Act of June 22, 1965, as amended (79 Stat. 171).

(3) In addition to such functions, powers, and duties as are specified in this Act to be carried out by the Administrators, the Administrators and the Commandant of the Coast Guard shall carry out such additional functions, powers, and duties as the Secretary may prescribe. The Administrators and the Commandant of the Coast Guard shall report directly to the Secretary.

(4) The functions, powers, and duties specified in this Act to be carried out by each Administrator shall not be transferred elsewhere in the Department unless specifically provided for by reorganization plan submitted pursuant to provisions of chapter 9 of title 5, United States Code, or by statute.

(f) (1) The Secretary shall carry out the provisions of the National Traffic and Motor Vehicle Safety Act of 1966 (80 Stat. 718) through a National Traffic Safety Bureau (hereafter referred to in this paragraph as "Bureau"), which he shall establish in the Department of Transportation. The Bureau shall be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate. All other provisions of the National Traffic and Motor Vehicle Safety Act of 1966 shall apply.

(2) The Secretary shall carry out the provisions of the Highway Safety Act of 1966 (80 Stat. 731) (including chapter 4 of title 23 of the United States Code) through a National Highway Safety Bureau (hereafter referred to in this paragraph as "Bureau"), which he shall establish in the Department of Transportation. The Bureau shall be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate. All other provisions of the Highway Safety Act of 1966 shall apply.

(3) The President is authorized, as provided in section 201 of the Highway Safety Act of 1966, to carry out the provisions of the National Traffic and Motor Vehicle Safety Act of 1966 through the Bureau and Director authorized by section 201 of the Highway Safety Act of 1966.

(4) The office of Federal Highway Administrator, created by section 303 of title 23, United States Code, is hereby transferred to and continued within the Department under the title Director of Public Roads. The Director shall be the operating head of the Bureau of Public Roads, or any other agency created within the Department to carry out the primary functions carried out immediately before the effective date of this Act by the Bureau of Public Roads.

GENERAL PROVISIONS

SEC. 4 [80 Stat. 933, as amended by 82 Stat. 824, 88 Stat. 2173, 49 U.S.C. 1653] (a) The Secretary in carrying out the purposes of this Act shall, among his responsibilities, exercise leadership under the direction of the President in transportation matters, including those effecting the national defense and those involving national or regional emergencies; provide leadership in the development of national transportation policies and programs, and make recommendations to the President and the Congress for their consideration and implementation; promote and undertake development, collection, and dissemination of technological, statistical, economic, and other information relevant to domestic and international transportation; consult and cooperate with the Secretary of Labor in gathering information regarding the status of labor-management contracts and other labor-management problems and in promoting industrial harmony and stable employment conditions in all modes of transportation; promote and undertake research and development relating to transportation, including noise abatement, with particular attention to aircraft noise; consult with the heads of other Federal departments and agencies on the transportation requirements of the Government, including the procurement of transportation or the operation of their own transport services in order to

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encourage them to establish and observe policies consistent with the maintenance of a coordinated transportation system; and consult and cooperate with State and local governments, carriers, labor, and other interested parties, including, when appropriate, holding informal public hearings.

(b) (1) In carrying out his duties and responsibilities under this Act, the Secretary shall be governed by all applicable statutes including the policy standards set forth in the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 et seq.); the national transportation policy of the Interstate Commerce Act, as amended (49 U.S.C., preceding §§ 1, 301, 901, and 1001); title 23, United States Code, relating to Federal-aid highways; and title 14 U.S.C., titles LII and LIII of the Revised Statutes (46 U.S.C., chs. 2A, 7, 11, 14, 15, and 18), the Act of April 25, 1940, as amended (54 Stat. 163; 46 U.S.C. 526-526u), and the Act of September 2, 1958, as amended (72 Stat. 1754; 46 U.S.C. 527-527h), relating to the United States Coast Guard.

(2) Nothing in this Act shall be construed to authorize, without appropriate action by Congress, the adoption, revision, or implementation of -

(A) any transportation policy, or

(B) any investment standards or criteria.

(3) In exercising the functions, powers, and duties conferred on and transferred to the Secretary by this Act, the Secretary shall give full consideration to the need for operational continuity of the functions transferred, to the need for effectiveness and safety in transportation systems, and to the needs of the national defense.

(c) Orders and actions of the Secretary in the exercise of functions, powers, and duties transferred under this Act, and orders and actions of the Administrators pursuant to the functions, powers, and duties specifically assigned to them by this Act, shall be subject to judicial review to the same extent and in the same manner as if such orders and actions had been by the department or agency exercising such functions, powers, and duties immediately preceding their transfer. Any statutory requirements relating to notice, hearings, action upon the record, or administrative review that apply to any functions transferred by this Act shall apply to the exercise of such functions by the Secretary and the Administrators.

(d) In the exercise of the functions, powers, and duties transferred under this Act, the Secretary and the Administrators shall have the same authority as that vested in the department or agency exercising such functions, powers, and duties immediately preceding their transfer, and their actions in exercising such functions, powers, and duties shall have the same force and effect as when exercised by such department or agency.

(e) It shall be the duty of the Secretary -

(1) to promptly investigate the safety compliance records in the Department of each applicant seeking operating authority from the Interstate Commerce Commission (referred to in this subsection as the "Commission") and to report his findings to the Commission;

(2) when the safety record of an applicant for permanent operating authority, or for approval of a proposed transaction involving transfer of operating authority, fails to satisfy the Secretary, to intervene and present evidence of such applicant's fitness in Commission proceedings;

(3) to furnish promptly upon request of the Commission a statement regarding the safety record of any applicant seeking temporary operating authority from the Commission; and

(4) (A) to furnish upon request of the Commission a complete report of the safety compliance of any carrier, (b) to have made such additional inspections or safety compliance surveys which the Commission deems necessary or desirable in order to process an application or to determine the fitness of a carrier, and (C) if the Commission so requests, to intervene and present evidence in any proceeding in which a determination of fitness is required.

(f) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, after the effective date of the Federal-Aid Highway Act of 1968.

(g) The Secretary and the Secretary of Housing and Urban Development shall consult and exchange information regarding their respective transportation policies and activities; carry on joint planning, research and other activities; and coordinate assistance for local transportation projects. They shall jointly study how Federal policies and programs can assure that urban transportation systems most effectively serve both national needs and the comprehensively planned development of urban areas. They shall jointly study how Federal policies and programs can assure that urban transportation needs and the comprehensively planned development of urban areas. They shall, within one year after the effective date of this Act, and annually thereafter, report to the President, for submission to the Congress, on their studies and other activities under this subsection, including any legislative recommendations which they determine to be desirable. The Secretary and the Secretary of Housing and Urban Development shall study and report within one year after the

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effective date of this Act to the President and the Congress on the logical and efficient organization and location of urban mass transportation functions in the Executive Branch.

SEC. 5 [Deleted by Act of January 3, 1975, 88 Stat. 2173]

TRANSFER TO DEPARTMENT

SEC. 6. [80 Stat. 937, as amended by 86 Stat. 617, 88 Stat 2163, 49 U.S.C. 1655] (a) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Secretary of Commerce and other offices and officers of the Department of Commerce under-

(1) the following laws and provisions of law relating generally to highways:

- (A) Title 23, United States Code, as amended.
- (B) The Federal-Aid Highway Act of 1966 (80 Stat. 766).
- (C) The Federal-Aid Highway Act of 1962, as amended (76 Stat. 1145; 23 U.S.C. 307 note).
- (D) The Act of July 14, 1960, as amended (74 Stat. 526; 23 U.S.C. 313 note).
- (E) The Federal-Aid Highway Act of 1954, as amended (68 Stat. 70).
- (F) The Act of September 26, 1961, as amended (75 Stat. 670).
- (G) The Highway Revenue Act of 1956, as amended (70 Stat. 387; 23 U.S.C. 120 note).
- (H) The Highway Beautification Act of 1965, as amended (79 Stat. 1028; 23 U.S.C. 131 et seq. notes).
- (I) The Alaska Omnibus Act, as amended (73 Stat. 141; 48 U.S.C. 21 note prec.).
- (J) The Joint Resolution of August 28, 1965, as amended (79 Stat. 578; 23 U.S.C. 101 et seq. notes).
- (K) Section 502(c) of the General Bridge Act of 1946, as amended (60 Stat. 847; 33 U.S.C. 525(c)).
- (L) The Act of April 27, 1962, as amended (76 Stat. 59).
- (M) Reorganization Plan No. 7 of 1949 (63 Stat. 1070; 5 U.S.C. 133z-15 note).

(2) the following laws and provisions of law relating generally to ground transportation:

- (A) The Act of September 30, 1965, as amended (79 Stat. 893; 49 U.S.C. 1631 et seq.).
- (B) The Urban Mass Transportation Act of 1964, as amended (78 Stat. 306, 49 U.S.C. 1607).

(3) the following laws and provisions of law relating generally to aircraft:

- (A) The Act of September 7, 1957, as amended (71 Stat. 629; 49 U.S.C. 1324 note).
- (B) Section 410 of the Federal Aviation Act of 1958, as amended (72 Stat. 769; 49 U.S.C. 1380).
- (C) Title XIII of the Federal Aviation Act of 1958, as amended (72 Stat. 800; 49 U.S.C. 1531 et seq.).

(4) the following law relating generally to pilotage: The Great Lakes Pilotage Act of 1960, as amended (74 Stat. 259; 46 U.S.C. 216 et seq.).

(5) the following law to the extent it authorizes scientific and professional positions which relate primarily to functions transferred by this subsection: The Act of August 1, 1947, as amended (61 Stat. 715; 5 U.S.C. 1161).

(6) the following laws relating generally to traffic and highway safety:

- (A) The National Traffic and Motor Vehicle Safety Act of 1966 (80 Stat. 718).
- (B) The Highway Safety Act of 1966 (80 Stat. 731).

(b) (1) The Coast Guard is hereby transferred to the Department, and there are hereby transferred to and vested in the Secretary all functions, powers, and duties, relating to the Coast Guard, of the Secretary of the Treasury and of other officers and offices of the Department of the Treasury.

(2) Notwithstanding the transfer of the Coast Guard to the Department and the transfer to the Secretary of the functions, powers, and duties relating to the Coast Guard, of the Secretary of the Treasury and of other officers and offices of the Department of the Treasury, effected by the provisions of paragraph (1) of this subsection, the Coast Guard, together with the functions, powers, and duties relating thereto, shall operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct, as provided in section 3 of title 14, United States Code, as amended.

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(3) Notwithstanding any other provision of this Act, the functions, powers, and duties of the General Counsel of the Department of the Treasury set out in chapter 47 of title 10, United States Code, as amended (Uniform Code of Military Justice), are hereby transferred to and vested in the General Counsel of the Department.

(c) (1) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Federal Aviation Agency, and of the Administrator and other officers and offices thereof, including the development and construction of a civil supersonic aircraft: *Provided, however,* That there are hereby transferred to the Federal Aviation Administrator, and it shall be his duty to exercise the functions, powers, and duties of the Secretary pertaining to aviation safety (other than those relating to the transportation, packing, marking, or description of hazardous materials) as set forth in sections 306, 307, 308, 309, 312, 313, 314, 1101, 1105, and 1111, and titles VI, VII, IX, and XII of the Federal Aviation Act of 1958, as amended. In exercising these enumerated functions, powers, and duties, the Administrator shall be guided by the declaration of policy in section 103 of the Federal Aviation Act of 1958, as amended. Decisions of the Federal Aviation Administrator shall be administratively final, and appeals as authorized by law or this Act shall be taken directly to the National Transportation Safety Board or to the courts, as appropriate.

(2) Nothing in this Act shall affect the power of the President under section 302(e) of the Federal Aviation Act of 1958 (72 Stat. 746, 49 U.S.C. 1343(e)) to transfer, to the Department of Defense in the event of war, any functions transferred by this Act from the Federal Aviation Agency.

(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; 5 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. Decisions of 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 Act shall be taken directly to the courts.

(e) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers, and offices thereof, under -

(1) the following law relating generally to safety appliances and equipment on railroad engines and cars, and protection of employees and travelers:

- (A) The Act of March 2, 1893, as amended (27 Stat. 531; 45 U.S.C. 1 et seq.).
- (B) The Act of March 2, 1903, as amended (32 Stat. 943; 45 U.S.C. 8 et seq.).
- (C) The Act of April 14, 1910, as amended (36 Stat. 298; 45 U.S.C. 11 et seq.).
- (D) The Act of May 30, 1908, as amended (35 Stat. 476; 45 U.S.C. 17 et seq.).
- (E) The Act of February 17, 1911, as amended (36 Stat. 913; 45 U.S.C. 22 et seq.).
- (F) The Act of March 4, 1915, as amended (38 Stat. 1192; 45 U.S.C. 30).
- (G) Reorganization Plan No. 3 of 1965 (79 Stat. 1320).
- (H) Joint Resolution of June 30, 1906, as amended (34 Stat. 838; 45 U.S.C. 35).
- (I) The Act of May 27, 1908, as amended (35 Stat. 965; 45 U.S.C. 36 et seq.).
- (J) The Act of March 4, 1909, as amended (35 Stat. 965; 45 U.S.C. 37).
- (K) The Act of May 6, 1910, as amended (36 Stat. 350; 45 U.S.C. 38 et seq.).

(2) the following law relating generally to hours of service of employees: The Act of March 4, 1907, as amended (34 Stat. 1415; 45 U.S.C. 61 et seq.).

(3) the following law relating generally to medals for heroism: The Act of February 23, 1905, as amended (33 Stat. 743; 49 U.S.C. 1201 et seq.).

(4) the following provisions of law relating generally to explosives and other dangerous articles: Sections 831-835 of title 18, United States Code, as amended.

(5) the following laws relating generally to standard time zones and daylight saving time:

- (A) The Act of March 19, 1918, as amended (40 Stat. 450; 15 U.S.C. 261 et seq.).
- (B) The Act of March 4, 1921, as amended (41 Stat. 1446; 15 U.S.C. 265).
- (C) The Uniform Time Act of 1966, as amended (80 Stat. 107).

(6) the following provisions of the Interstate Commerce Act, as amended -

- (A) relating generally to safety appliances methods and systems: Section 25 (49 U.S.C. 26).

(B) relating generally to investigation of motor vehicle sizes, weights, and service of employees: Section 226 (49 U.S.C. 325).

(C) relating generally to qualifications and maximum hours of service of employees and safety of operation and equipment: Sections 204(a) (1) and (2), to the extent that they relate to qualifications and maximum hours of service of employees and safety of operation and equipment; and sections 204(a) (3), (3a), and (5) (49 U.S.C. 304).

(D) to the extent they relate to private carriers of property by motor vehicle and carriers of migrant workers by motor vehicle other than contract carriers: Sections 221(a), 221(c), and 224 (49 U.S.C. 321 et seq.).

(f) (1) Nothing in subsection (e) shall diminish the functions, powers, and duties of the Interstate Commerce Commission under sections 1(6), 206, 207, 209, 210a, 212, and 216 of the Interstate Commerce Act, as amended (49 U.S.C. 1(6), 306 et seq.), or under any other section of that Act not specifically referred to in subsection (e).

(2) (A) With respect to any function which is transferred to the Secretary by subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act as the Commission had before such transfer with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by subsection (e).

(B) For purposes of this paragraph -

- (i) the term "function" includes power and duty, and
- (ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: Sections 12, 13(1), 13(2), 14, 16(12), the last sentence of 18(1), sections 20 (except clauses (3), (4), (11), and (12) thereof), 204(a) (6) and (7), 204(c), 204(d), 205(f), 220 (except subsection (c) and the proviso of subsection (a) thereof), 222 (except subsections (b) (2) and (b) (3) thereof, and 417(b) (1) (49 U.S.C. 12 et seq., 304 et seq., and 1017).

(3) (A) The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary pertaining to railroad safety as set forth in the statutes transferred to the Secretary by subsection (e) of this section (other than subsection (e) (4)).

(B) The Federal Highway Administrator shall carry out the functions, powers, and duties of the Secretary pertaining to motor carrier safety as set forth in the statutes transferred to the Secretary by subsection (e) of this section (other than subsection (e) (4)).

(C) Decisions of the Federal Railroad Administrator and the Federal Highway Administrator (i) which are made pursuant to the exercise of the functions, powers, and duties enumerated in subparagraphs (A) and (B) of this paragraph to be carried out by the Administrators, and (ii) which involve notice and hearing required by law, shall be administratively final, and appeals as authorized by law or this Act shall be taken directly to the National Transportation Safety Board or the courts, as appropriate.

(g) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Secretary of the Army and other officers and offices of the Department of the Army under -

(1) the following law and provisions of law relating generally to water vessel anchorages:

- (A) Section 7 of the Act of March 4, 1915, as amended (38 Stat. 1053; 33 U.S.C. 471).
- (B) Article 11 of section 1 of the Act of June 7, 1897, as amended (30 Stat. 98; 33 U.S.C. 180).
- (C) Rule 9 of section 1 of the Act of February 8, 1895, as amended (28 Stat. 647; 33 U.S.C. 258).
- (D) Rule numbered 13 of section 4233 of the Revised Statutes, as amended (33 U.S.C. 322).

(2) the following provision of law relating generally to drawbridge operating regulations: Section 5 of the Act of August 18, 1894, as amended (28 Stat. 362; 33 U.S.C. 499).

(3) the following law relating generally to obstructive bridges: The Act of June 21, 1940, as amended (54 Stat. 497; 33 U.S.C. 511 et seq.).

(4) the following laws and provisions of law relating generally to the reasonableness of tolls:

- (A) Section 4 of the Act of March 23, 1906, as amended (34 Stat. 85; 33 U.S.C. 494).
- (B) Section 503 of the General Bridge Act of 1946, as amended (60 Stat. 847; 33 U.S.C. 526).
- (C) Section 17 of the Act of June 10, 1930, as amended (46 Stat. 552; 33 U.S.C. 498a).
- (D) The Act of June 27, 1930, as amended (46 Stat. 821; 33 U.S.C. 498b).

(E) The Act of August 21, 1935, as amended (49 Stat. 670; 33 U.S.C. 503 et. seq.).

(5) the following law relating to prevention of pollution of the sea by oil: The Oil Pollution Act, 1961, as amended (75 Stat. 402; 33 U.S.C. 1001 et. seq.).

(6) the following laws and provisions of law to the extent that they relate generally to the location and clearances of bridges and causeways in the navigable waters of the United States:

(A) Section 9 of the Act of March 3, 1899, as amended, (30 Stat. 1151; 33 U.S.C. 401).

(B) The Act of March 23, 1906, as amended (34 Stat. 84; 33 U.S.C. 491 et seq.)

(C) The General Bridge Act of 1946; as amended (60 Stat. 847; 33 U.S.C. 525 et. seq.).

(h) The provisions of subchapter II of chapter 5 and of chapter 7 of title 5, United States Code, shall be applicable to proceedings by the Department and any of the administrations or boards within the Department established by this Act except that notwithstanding this or any other provision of this Act, the transfer of functions, powers, and duties to the Secretary or any other officer in the Department shall not include functions vested by subchapter II of chapter 5 of title 5, United States Code, in hearing examiners employed by any department, agency, or component thereof whose functions are transferred under the provisions of this Act.

(i) The administration of the Alaska Railroad, established pursuant to the Act of March 12, 1914, as amended (38 Stat. 308), and all of the functions authorized to be carried out by the Secretary of the Interior pursuant to Executive Order Numbered 11107, April 25, 1963 (28 F.R. 4225), relative to the operation of said Railroad, are hereby transferred to and vested in the Secretary of Transportation who shall exercise the same authority with respect thereto as is now exercised by the Secretary of the Interior pursuant to said Executive order.

TRANSPORTATION INVESTMENT STANDARDS

SEC. 7. [80 Stat. 941, 49 U.S.C. 1656] (a) The Secretary, subject to the provisions of section 4 of this Act, shall develop and from time to time in the light of experience revise standards and criteria consistent with national transportation policies, for the formulation and economic evaluation of all proposals for the investment of Federal funds in transportation facilities or equipment, except such proposals as are concerned with (1) the acquisition of transportation facilities or equipment by Federal agencies in providing transportation facilities or equipment by Federal agencies in providing transportation services for their own use; (2) an interoceanic canal located outside the contiguous United States; (3) defense features included at the direction of the Department of Defense in the design and construction of civil air, sea, and land transportation; (4) programs of foreign assistance; (5) water resource projects; or (6) grant-in-aid programs authorized by law. The standards and criteria developed or revised pursuant to this subsection shall be promulgated by the Secretary upon their approval by the Congress.

The standards and criteria for economic evaluation of water resource projects shall be developed by the Water Resources Council established by Public Law 89-80. For the purpose of such standards and criteria, the primary direct navigation benefits of a water resource project are defined as the product of the savings to shippers using the waterway and the estimated traffic that would use the waterway; where the savings to shippers shall be construed to mean the difference between (a) the freight rates or charges prevailing at the time of the study for the movement by the alternative means and (b) those which would be charged on the proposed waterway; and where the estimate of traffic that would use the waterway will be based on such freight rates, taking into account projections of the economic growth of the area.

The Water Resources Council established under section 101 of Public Law 89-80 is hereby expanded to include the Secretary of Transportation on matters pertaining to navigation features of water resource projects.

(b) Every survey, plan, or report formulated by a Federal agency which includes a proposal as to which the Secretary has promulgated standards and criteria pursuant to subsection (a) shall be (1) prepared in accord with such standards and criteria and upon the basis of information furnished by the Secretary with respect to projected growth of transportation needs and traffic in the affected area, the relative efficiency of various modes of transport, the available transportation services in the area, and the general effect of the proposed investment on existing modes, and on the regional and national economy; (2) coordinated by the proposing agency with the Secretary and, as appropriate, with other Federal agencies, States, and local units of government for inclusion of his and their views and comments; and (3) transmitted thereafter by the proposing agency to the President for disposition in accord with law

and procedures established by him.

AMENDMENTS TO OTHER LAWS

SEC. 8. [80 Stat. 942] (a) Section 406(b) of the Federal Aviation Act of 1958, as amended (72 Stat. 763; 49 U.S.C. 1376(b)), is amended by adding the following sentence at the end thereof: "In applying clause (3) of this subsection, the Board shall take into consideration any standards and criteria prescribed by the Secretary of Transportation, for determining the character and quality of transportation required for the commerce of the United States and the national defense."

(b) Section 201 of the Appalachian Regional Development Act of 1965, as amended (79 Stat. 10; 40 U.S.C.App. 206) is amended as follows:

(1) The first sentence of subsection (a) of that section is amended by striking the words "Commerce (hereafter in this section referred to as the 'Secretary', the words "of Transportation".

(3) Subsection (b) of that section is amended by inserting after the word "Secretary", the words "of Commerce".

(4) Subsection (c) of that section is amended by striking the first sentence and inserting in lieu thereof the following sentence: "Such recommendations as are approved by the Secretary of Commerce shall be transmitted to the Secretary of Transportation for his approval."

(5) The second sentence of subsection (c) of that section is amended by inserting after the word "Secretary" the words "of Transportation".

(6) Subsection (e) of that section is amended by inserting after the word "Secretary" the words "of Transportation".

(7) Subsection (f) of that section is amended by inserting after the word "Secretary", the words "of Commerce and the Secretary of Transportation". Subsection (f) of that section is further amended by striking the word "determines" and inserting in lieu thereof "determine".

(8) Subsection (g) of that section is amended by striking the period at the end thereof and adding the following: "to the Secretary of Commerce, who shall transfer funds to the Secretary of Transportation for administration of projects approved by both Secretaries."

(c) Section 206(c) of the Appalachian Regional Development Act of 1965, as amended (79 Stat. 15; 40 U.S.C. App. 206), is amended by inserting after "Interior," the words "Secretary of Transportation."

(d) Section 212(a) of the Interstate Commerce Act, as amended (49 Stat. 555), is amended by striking "of the Commission" the second, third, and fourth times those words occur.

(e) Section 13(b)(1) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1067), is amended by striking the words "Interstate Commerce Commission" and inserting in lieu thereof "Secretary of Transportation".

(f) The second sentence of section 3 of the Federal Explosives Act, as amended (40 Stat. 386; 50 U.S.C. 123) is amended to read as follows: "This Act shall not apply to explosives or ingredients which are in transit upon vessels, railroad cars, aircraft, or other conveyances in conformity with statutory law or with the rules and regulations of the Secretary of Transportation."

(g) (1) Section 1 of the Act of May 13, 1954, as amended (68 Stat. 93; 33 U.S.C. 981), is amended to read as follows:

SECTION 1. There is hereby created, subject to the direction and supervision of the Secretary of Transportation, a body corporate to be known as the Saint Lawrence Seaway Development Corporation (hereinafter referred to as the "Corporation").

(2) Notwithstanding any other provision of this Act, the Administrator of the Saint Lawrence Seaway Development Corporation shall report directly to the Secretary.

(h) Section 201 of the Highway Safety Act of 1966 (80 Stat. 731) is amended by striking the words "Federal Highway Administrator" and inserting in lieu thereof the words "Director of Public Roads", by striking the word "Agency" wherever it occurs in such section and inserting in lieu thereof the word "Bureau", and by striking "an Administrator" or "Administrator", wherever appearing therein, and inserting in lieu thereof "a Director" or "Director", respectively.

(i) Section 115 of the National Traffic and Motor Vehicle Safety Act of 1966 (80 Stat. 718) is amended by striking the word "Agency" wherever it occurs in such section and inserting in lieu thereof the word "Bureau", and by striking the word "Administrator" wherever it occurs in such section and inserting in lieu thereof the word "Director".

(j) Section 3(a) of the Marine Resources and Engineering Development Act of 1966 (80 Stat. 204) is amended by striking the words "the Treasury" and

inserting in lieu thereof "Transportation".

(k) Section 2(e) of the Act of September 22, 1966, Public Law 89-599, is amended by striking the words "of Commerce" and inserting in lieu thereof the words "of Transportation".

ADMINISTRATIVE PROVISIONS

SEC. 9. [80 Stat. 944, 49 U.S.C. 1657] (a) In addition to the authority contained in any other Act which is transferred to and vested in Secretary, the National Transportation Safety Board, or any other officer in the Department, the Secretary is authorized, subject to the civil service and classification laws, to select, appoint, employ, and fix the compensation of such officers and employees, including investigators, attorneys, and hearing examiners, as are necessary to carry out the provisions of this Act and to prescribe their authority and duties.

(b) The Secretary may obtain services as authorized by section 3109 of title 5 of the United States Code, but at rates not to exceed \$100 per diem for individuals unless otherwise specified in an appropriation Act.

(c) The Secretary is authorized to provide for participation of military personnel in carrying out the functions of the Department. Members of the Army, the Navy, the Air Force, or the Marine Corps may be detailed for service in the Department by the appropriate Secretary, pursuant to cooperative agreements with the Secretary of Transportation.

(d) (1) Appointment, detail, or assignment to, acceptance of, and service in any appointive or other position in the Department under the authority of section 9(c) and section 9(p) shall in no way affect status, office, rank, or grade which officers or enlisted men may occupy or hold or any emolument, perquisite, right, privilege, or benefit incident to or arising out of any such status, office, rank, or grade, nor shall any member so appointed, detailed, or assigned be charged against any statutory limitation on grades or strengths applicable to the Armed Forces. A person so appointed, detailed, or assigned shall not be subject to direction by or control by his armed force or any officer thereof directly or indirectly with respect to the responsibilities exercised in the position to which appointed, detailed, or assigned.

(2) The Secretary shall report annually in writing to the appropriate committees of the Congress on personnel appointed and agreements entered into under subsection (c) of this section, including the number, rank, and positions of members of the armed services detailed pursuant thereto.

(e) (1) Except where this Act vests in any administration, agency or board, specific functions, powers, and duties, the Secretary may, in addition to the authority to delegate and redelegate contained in any other Act in the exercise of the functions transferred to or vested in the Secretary in this Act, delegate any of his residual functions, powers and duties to such officers and employees of the Department as he may designate, may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers, and duties.

(2) In addition to the authority to delegate and redelegate contained in any other Act, in the exercise of the functions transferred to or specified by this Act to be carried out by any officer in the Department, such officer may delegate any of such functions, powers, and duties to such other officers and employees of the Department as he may designate; may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable; and may make such rules and regulations as may be necessary to carry out such functions, powers, and duties.

(3) The Administrators established by section 3(e) of this Act may not delegate any of the statutory duties and responsibilities specifically assigned to them by this Act outside of their respective administrations.

(f) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, of the Federal Aviation Agency, and of the head and other officers and offices thereof, are hereby transferred to the Secretary: *Provided, however,* That the personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available, or to be made available in carrying out the duties and functions transferred by this Act to the Secretary which are specified by this Act to be carried out by the Federal Aviation Administrator shall be assigned by the Secretary to the Federal Aviation Administrator for these purposes.

(g) So much of the positions, personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available in connection with the functions, powers, and duties

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transferred by sections 6 (except section 6(c)) and 8(d) and (e) of this Act as the Director of the Bureau of the Budget shall determine shall be transferred to the Secretary: *Provided, however,* That the positions, personnel, assets, liabilities, contracts, property, records, and unexpected balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available, or to be made available, by the Civil Aeronautics Board in carrying out the duties transferred by this Act to be exercised by the National Transportation Safety Board shall be transferred to the National Transportation Safety Board. Except as provided in subsection (h), personnel engaged in functions, powers, and duties transferred under this Act shall be transferred in accordance with applicable laws and regulations relating to transfer of functions.

(h) The transfer of personnel pursuant to subsections (f) and (g) of this section shall be without reduction in classification or compensation for one year after such transfer.

(i) In any case where all of the functions, powers, and duties of any office or agency, other than the Coast Guard, are transferred pursuant to this Act, such office or agency shall lapse. Any person who, on the effective date of this Act, held a position compensated in accordance with the Executive Schedule, and who, without a break in service, is appointed in the Department to a position having duties comparable to those performed immediately preceding his appointment shall continue to be compensated in his new position at not less than the rate provided for his previous position, for the duration of his service in his new position.

(j) The Secretary is authorized to establish a working capital fund, to be available without fiscal year limitation, for expenses necessary for the maintenance and operation of such common administrative services as he shall find to be desirable in the interest of economy and efficiency in the Department, including such services as a central supply service for stationery and other supplies and equipment for which adequate stocks may be maintained to meet in whole or in part the requirements of the Department and its agencies; central messenger, mail, telephone, and other communications services; office space, central services for document reproduction, and for graphics and visual aids; and a central library service. The capital of the fund shall consist of any appropriations made for the purpose of providing capital (which appropriations are hereby authorized) and the fair and reasonable value of such stocks of supplies, equipment, and other assets and inventories on order as the Secretary may transfer to the fund, less the related liabilities and unpaid obligations. Such funds shall be reimbursed in advance from available funds of agencies and offices in the Department, or from other sources, for supplies and services at rates which will approximate the expense of operation, including the accrual of annual leave and the depreciation of equipment. The fund shall also be credited with receipts from sale or exchange of property and receipts in payment for loss or damage to property owned by the fund. There shall be covered into the United States Treasury as miscellaneous receipts any surplus found in the fund (all assets, liabilities, and prior losses considered) above the amounts transferred or appropriated to establish and maintain said fund.

(k) The Secretary shall cause a seal of office to be made for the Department of such device as he shall approve, and judicial notice shall be taken of such seal.

(l) In addition to the authority contained in any other Act which is transferred to and vested in the Secretary, the National Transportation Safety Board, or other officer in the Department, as necessary, and when not otherwise available, the Secretary is authorized to provide for, construct, or maintain the following for employees and their dependents stationed at remote localities:

- (1) Emergency medical services and supplies;
- (2) Food and other subsistence supplies;
- (3) Messing facilities;
- (4) Motion picture equipment and film for recreation and training;
- (5) Reimbursement for food, clothing, medicine, and other supplies furnished by such employees in emergencies for the temporary relief of distressed persons; and
- (6) Living and working quarters and facilities.

The furnishing of medical treatment under paragraph (1) and the furnishing of services and supplies under paragraphs (2) and (3) of this subsection shall be at prices reflecting reasonable value as determined by the Secretary, and the proceeds therefrom shall be credited to the appropriation from which the expenditure was made.

(m) (1) The Secretary is authorized to accept, hold, administer, and utilize gifts and bequests of property, both real and personal, for the purpose of aiding or facilitating the work of the Department. Gifts and bequests of money and those proceeds from sales of other property received as gifts or bequests

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shall be deposited in the Treasury in a separate fund and shall be disbursed upon order of the Secretary. Property accepted pursuant to this paragraph, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gift or bequest.

(2) For the purpose of Federal income, estate, and gift taxes, property accepted under paragraph (1) shall be considered as a gift or bequest to or for use of the United States.

(3) Upon the request of the Secretary, the Secretary of the Treasury may invest and reinvest in securities of the United States or in securities guaranteed as to principal and interest by the United States any moneys contained in the fund provided for in paragraph (1). Income accruing from such securities, and from any other property held by the Secretary pursuant to paragraph (1) shall be deposited to the credit of the fund, and shall be disbursed upon order of the Secretary.

(n) (1) The Secretary is authorized, upon the written request of any person, or any State, territory, possession, or political subdivision thereof, to make special statistical studies relating to foreign and domestic transportation, and special studies relating to other matters falling within the province of the Department, to prepare from its records special statistical compilations, and to furnish transcripts of its studies, tables, and other records upon the payment of the actual cost of such work by the person or body requesting it.

(2) All moneys received by the Department in payment of the cost of work under paragraph (1) shall be deposited in a separate account to be administered under the direction of the Secretary. These moneys may be used, in the discretion of the Secretary, for the ordinary expenses incidental to the work and/or to secure in connection therewith the special services of persons who are neither officers nor employees of the United States.

(o) The Secretary is authorized to appoint, without regard to the civil service laws, such advisory committees as shall be appropriate for the purposes of consultation with and advice to the Department in performance of its functions. Members of such committees, other than those regularly employed by the Federal Government, while attending meetings of such committee or otherwise serving at the request of the Secretary, may be paid compensation at rates not exceeding those authorized for individuals under subsection (b) of this section, and while so serving away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(p) (1) Notwithstanding any provision of this Act or other law, a member of the Coast Guard on active duty may be appointed, detailed, or assigned to any position in the Department other than Secretary, Under Secretary, and Assistant Secretary for Administration.

(2) Subject to the provisions of title 5, United States Code, a retired member of the Coast Guard may be appointed to any position in the Department.

(q) (1) The Secretary is authorized to enter into contracts with educational institutions, public or private agencies or organizations, or persons for the conduct of scientific or technological research into any aspect of the problems related to the programs of the Department which are authorized by statute.

(2) The Secretary shall require a showing that the institutions, agencies, organizations, or persons with which he expects to enter into contracts pursuant to this subsection have the capability of doing effective work. He shall furnish such advice and assistance as he believes will best carry out the mission of the Department, participate in coordinating all research initiated under this subsection, indicate the lines of inquiry which seem to him most important, and encourage and assist in the establishment and maintenance of cooperation by and between the institutions, agencies, organizations, or persons and between them and other research organizations, the Department, and other Federal agencies.

(3) The Secretary may from time to time disseminate in the form of reports or publications to public or private agencies or organizations, or individuals such information as he deems pertinent on the research carried out pursuant to this section.

(4) Nothing contained in this subsection is intended to amend, modify, or repeal any provisions of law administered by the Department which authorize the making of contracts for research.

CONFORMING AMENDMENTS TO OTHER LAWS

SEC. 10 [80 Stat. 948] (a) Section 19(d) (1) of title 3, United States Code, as amended, is hereby amended by striking out the period at the end thereof and inserting a comma and the following: "Secretary of Transportation."

(b) Section 101 of title 5 of the United States Code is amended by inserting at the end thereof the following:

"The Department of Housing and Urban Development.

“The Department of Transportation”.

(c) The amendment made by subsection (b) of this section shall not be construed to make applicable to the Department any provision of law inconsistent with this Act.

(d) Subchapter II (relating to executive schedule pay rates) of chapter 53 of title V of the United States Code is amended as follows:

(1) Section 5312 is amended by adding at the end thereof the following:

“(11) Secretary of Housing and Urban Development.

“(12) Secretary of Transportation.”

(2) Section 5313 is amended by striking out “(7) Administrator of the Federal Aviation Agency” and inserting in lieu thereof “(7) Under Secretary of Transportation”, and by adding at the end thereof the following:

“(19) Administrator, Federal Aviation Administration.”

(3) Section 5314 is amended by adding at the end thereof the following:

“(46) Administrator, Federal Highway Administration.

“(47) Administrator, Federal Railroad Administration.

“(48) Chairman, National Transportation Safety Board.”

(4) Section 5315 is amended by adding at the end thereof the following:

“(78) Members, National Transportation Safety Board.

“(79) General Counsel, Department of Transportation.

“(80) Deputy Administrator, Federal Aviation Administration.

“(81) Assistant Secretaries of Transportation (4).

“(82) Director of Public Roads.

“(83) Administrator of the St. Lawrence Seaway Development Corporation.”

(5) Section 5316 is amended by adding at the end thereof the following:

“(117) Assistant Secretary for Administration, Department of Transportation.”

(6) Section 5317 is amended by striking out “thirty” and inserting in lieu thereof “thirty-four”.

(e) Subsections 5314(6), 5315(2), and 5316(10), (12), (13), (14), (76), and (82) of title 5 of the United States Code are repealed, subject to the provisions of section 9 of this Act.

(f) Title 18, United States Code, section 1020, as amended, is amended by striking the words “Secretary of Commerce” where they appear therein and inserting in lieu thereof “Secretary of Transportation”.

(g) Subsection (1) of section 801, title 10, United States Code, as amended, is amended by striking out “the General Counsel of the Department of the Treasury” and inserting in lieu thereof “the General Counsel of the Department of Transportation”.

ANNUAL REPORT

SEC. 11. [80 Stat. 949, 49 U.S.C. 1658] The Secretary shall, as soon as practicable after the end of each fiscal year, make a report in writing to the President for submission to the Congress on the activities of the Department during the preceding fiscal year.

SAVINGS PROVISIONS

SEC. 12. [80 Stat. 949, 49 U.S.C. 1651 note] (a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges

(1) which have been issued, made, granted, or allowed to become effective -

(A) under any provision of law amended by this Act, or

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(B) in the exercise of duties, powers, or functions which are transferred under this Act, by (i) any department or agency, any functions of which are transferred by this Act, or (ii) any court of competent jurisdiction, and (2) which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Secretary, Administrators, Board, or General Counsel (in the exercise of any authority respectively vested in them by this Act), by any court of competent jurisdiction, or by operation of law.

(b) The provisions of this Act shall not affect any proceedings pending at the time this section takes effect before any department or agency (or component thereof), functions of which are transferred by this Act; but such proceedings, to the extent that they relate to functions so transferred, shall be continued before the Department. Such proceedings, to the extent they do not relate to functions so transferred, shall be continued before the department or agency before which they were pending at the time of such transfer. In either case orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or repealed by the Secretary, Administrators, Board, or General Counsel (in the exercise of any authority respectively vested in them by this Act), by a court of competent jurisdiction, or by operation of law.

(c) (1) Except as provided in paragraph (2) -

(A) the provisions of this Act shall not affect suits commenced prior to the date this section takes effect, and

(B) in all such suits proceedings shall be had, appeals taken, and judgments rendered, in the same manner and effect as if this Act had not been enacted.

No suit, action, or other proceeding commenced by or against any officer in his official capacity as an officer of any department or agency, functions of which are transferred by this Act, shall abate by reason of the enactment of this Act. No cause of action by or against any department or agency, functions of which are transferred by this Act, or by or against any officer thereof in his official capacity shall abate by reason of the enactment of this Act. Causes of action, suits, actions, or other proceedings may be asserted by or against the United States or such official of the Department as may be appropriate and, in any litigation pending when this section takes effect, the court may at any time, on its own motion or that of any party, enter an order which will give effect to the provisions of this subsection.

(2) If before the date on which this Act takes effect, any department or agency, or officer thereof in his official capacity, is a party to a suit, and under this Act -

(A) such department or agency is transferred to the Secretary, or

(B) any function of such department, agency, or officer is transferred to the Secretary,

then such suit shall be continued by the Secretary (except in the case of a suit not involving functions transferred to the Secretary, in which case the suit shall be continued by the department, agency, or officer which was a party to the suit prior to the effective date of this Act).

(d) With respect to any function, power, or duty transferred by this Act and exercised after the effective date of this Act, reference in any other Federal law to any department or agency, officer or office so transferred or functions of which are so transferred shall be deemed to mean the officer or agency in which this Act vests such function after such transfer.

SEPARABILITY

SEC. 13. [80 Stat. 950, 49 U.S.C. 1659] If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

CODIFICATION

SEC. 14. [80 Stat. 950, 49 U.S.C. 1651 note] The Secretary is directed to submit to the Congress within two years from the effective date of this Act, a proposed codification of all laws that contain the powers, duties, and functions transferred to or vested in the Secretary of the Department by this Act.

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EFFECTIVE DATE: INITIAL APPOINTMENT OF OFFICERS

SEC. 15. [80 Stat. 950, 49 U.S.C. 1951 note] (a) This Act shall take effect ninety days after the Secretary first takes office, or on such prior date after enactment of this Act as the President shall prescribe and publish in the Federal Register.

(b) Any of the officers provided for in this Act may (notwithstanding subsection (a)) be appointed in the manner provided for in this Act, at any time after the date of enactment of this Act. Such officers shall be compensated from the date they first take office, at the rates provided for in this Act. Such compensation and related expenses of their offices shall be paid from funds available for the functions to be transferred to the Department pursuant to this Act.

**INTERNATIONAL AIR TRANSPORTATION FAIR
COMPETITIVE PRACTICES ACT OF 1974**

[Act of January 3, 1975, 88 Stat. 2102]

AN ACT

To amend the Federal Aviation Act of 1958 to deal with discriminatory and unfair competitive practices in international air transportation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. [88 Stat. 2102, 49 U.S.C. 1159a note] This Act may be cited as the "International Air Transportation Fair Competitive Practices Act of 1974".

DISCRIMINATORY AND UNFAIR COMPETITIVE PRACTICES

SEC. 2. [88 Stat. 2102, 49 U.S.C. 1159b] (a) United States air carriers operating in foreign air transportation perform services of vital importance to the foreign commerce of the United States including its balance of payments, to the Postal Service, and to the national defense. Such carriers have become subject to a variety of discriminatory and unfair competitive practices in their competition with foreign air carriers. The Department of State, the Department of the Treasury, the Department of Transportation, the Civil Aeronautics Board, and other departments or agencies, therefore, each shall keep under review, to the extent of their respective functions, all forms of discrimination or unfair competitive practices to which United States air carriers are subject in providing foreign air transportation services and each shall take all appropriate actions within its jurisdiction to eliminate such forms of discrimination or unfair competitive practices found to exist.

(b) Each of these departments and agencies of Government shall request from Congress such additional legislation as may be deemed necessary at any time it is determined there is inadequate legal authority for dealing with any form of discrimination or unfair competitive practice found to exist.

(c) The Civil Aeronautics Board shall report annually to Congress on the actions that have been taken under subsection 9a) and on the continuing program to eliminate discriminations and unfair competitive practices faced by United States carriers in foreign air transportation. The Secretaries of State, Treasury, and Transportation shall furnish to the Civil Aeronautics Board such information as may be necessary to prepare the report required by this subsection.

PUBLIC LAW 101-641 [S. 3012]; November 28, 1990

**INDEPENDENT SAFETY BOARD ACT
AMENDMENTS OF 1990**

An Act to amend the Independent Safety Board Act of 1974 to authorize appropriations for fiscal years 1991, 1992, and 1993, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Independent Safety Board Act Amendments of 1990".

AUTHORIZATION OF APPROPRIATIONS

SEC. 2. Section 309(a) of the Independent Safety Board Act of 1974 (49 App. U.S.C. 1907(a)) is amended by adding at the end the following: "There are authorized to be appropriated for the purposes of this Act not to exceed \$32,000,000 for the fiscal year ending September 30, 1991; \$38,600,000 for the fiscal year ending September 30, 1992; and \$38,800,000 for the fiscal year ending September 30, 1993, such sums to remain available until expended."

EXAMINATION AND TESTING

SEC. 3. (a) Section 304(b)(2) of the Independent Safety Board Act of 1974 (49 App. U.S.C. 1903(b)(2)) is amended by inserting "vessel," immediately before "vehicle" each place it appears.

(b) Section 304(b)(2) of the Independent Safety Board Act of 1974 (49 App. U.S.C. 1903(b)(2)) is amended by adding at the end the following new sentences: "The Board shall have sole authority to determine the manner in which testing will be carried out under this paragraph and under section 701(c) of the Federal Aviation Act of 1958, including determining the person who will conduct the test, the type of test which will be conducted, and the persons who will witness the test. Such determinations are committed to the discretion of the Board and shall be made on the basis of the needs of the investigation being conducted by the Board and, where applicable, the provisions of this paragraph."

COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS

SEC. 4. Section 306 of the Independent Safety Board Act of 1974 (49 App. U.S.C. 1905) is amended by striking subsection (c) and inserting in lieu thereof the following:

"(c) **PUBLIC DISCLOSURE OF COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS.** - (1) Notwithstanding any other provision of law, the Board shall withhold from public disclosure cockpit voice recorder recordings and transcriptions, in whole or in part, of oral communications by and between flight crew members and ground stations, that are associated with accidents or incidents investigated by the Board.

"(2) Portions of a transcription of oral communications described in paragraph (1) which the Board determines relevant and pertinent to the accident or incident under investigation shall be made available to the public by the Board -

"(A) if the Board conducts a public hearing with respect to such accident or incident, at the time of such hearing; and

"(B) if the Board does not conduct such a public hearing, at the time when a majority of other factual reports regarding the accident or

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incident is placed in the public docket.

“(3) Nothing in this section shall restrict the Board at any time from referring to cockpit voice recorder information in making safety recommendations.

“(d) USE OF COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS IN JUDICIAL PROCEEDINGS. - (1) Except as provided in this subsection, in a judicial proceeding, there shall not be discovery by a party -

“(A) of portions of cockpit voice recorder transcriptions other than such portions made available to the public by the Board under subsection (c)(2); and

“(B) of cockpit voice recorder recordings.

“(2) Subject to paragraph (4), a court may permit discovery of cockpit voice recorder transcriptions by a party if the court, after an in camera review of such transcriptions, finds that -

“(A) the portions of the transcriptions made available to the public under subsection (c) do not provide the party with sufficient information for the party to receive a fair trial; and

“(B) discovery of additional portions of transcriptions is necessary to provide the party with sufficient information for the party to receive a fair trial.

No cockpit voice recorder transcriptions prepared by or under the direction of the Board, other than portions made available by the Board under subsection (c), shall be required to be produced for an in camera review, or shall be subject to discovery, unless the cockpit voice recorder recordings are not available.

“(3) Subject to paragraph (4), a court may permit discovery of cockpit voice recorder recordings by a party if the court, after an in camera review of such recordings, finds that -

“(A) the portions of transcriptions made available to the public under subsection (c) and to the party through discovery under paragraph (2) do not provide the party with sufficient information for the party to receive a fair trial; and

“(B) discovery of cockpit voice recorder recordings is necessary to provide the party with sufficient information for the party to receive a fair trial.

“(4) If, under paragraph (2) or (3), there is discovery in a judicial proceeding of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under subsection (c)(2), the court shall issue a protective order to limit the use of such recording or portion to the judicial proceeding and to prohibit dissemination of such recording or portion to any person who does not need access to such recording or portion for such proceeding.

“(5) A court may permit admission of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under subsection (c)(2) into evidence in a judicial proceeding, only if the court places such recording or portion under seal to preclude the use of such recording or portion for purposes other than for such proceeding.”.

TOXICOLOGICAL TESTING OF TRANSPORTATION DEPARTMENT EMPLOYEES

SEC. 5. (a) When the Department of Transportation, including any of its agencies, conducts post-accident or post-incident toxicological testing of an employee of the Department, specimen collection shall be accomplished as soon as practicable after the accident or incident, and the Department shall endeavor when feasible to complete such collection within four hours after the accident or incident.

(b) The head of each agency within the Department of Transportation shall send to the Office of the Secretary of Transportation a report on the circumstances concerning the amount of time required to complete specimen collection related to a toxicological test which is conducted on an employee within that agency who is reasonably associated with the circumstances of an accident or incident within the investigative jurisdiction of the National Transportation Safety Board.

(c) Any failure to comply with the requirements of this section may not be asserted, by the subject of such testing, as a claim, cause of action, or defense in any administrative or judicial proceeding.

BOARD ACCESS TO TOXICOLOGICAL TESTING RECORDS

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SEC. 6. Section 304(b) of the Independent Safety Board Act of 1974 (49 App. U.S.C. 1903(b)), is amended by redesignating paragraph (11) as paragraph (12) and by inserting immediately after paragraph (10) the following new paragraph:

“(11)(A) Notwithstanding section 503(e) of the Act entitled ‘An Act making supplemental appropriations for the fiscal year ending September 30, 1987, and for other purposes’, approved July 11, 1987 (5 U.S.C.7301 note), the Board is authorized to obtain from the Secretary of Transportation, by written request, and shall be furnished -

“(i) any report of a confirmed positive toxicological test, verified as positive by a medical review officer, which is conducted on an employee of the Department of Transportation, including any of its agencies, pursuant to post-accident, unsafe practice, or reasonable suspicion toxicological testing requirements of the Department, when that employee is reasonably associated with the circumstances of an accident or incident within the investigative jurisdiction of the Board; and

“(ii) any laboratory record providing documentation that such test is confirmed positive.

“(B) Except as provided in subparagraph (C), the Board shall maintain in confidence and exempt from public disclosure in accordance with section 552(b)(3) of title 5, United States Code -

“(i) any laboratory record, made available under subparagraph (A), of a confirmed and verified toxicological test which reveals medical use of a drug permitted under applicable regulations; and

“(ii) any medical information provided by the tested employee in connection with such test or in connection with a review of such test.

“(C) The Board may use such a laboratory record for development of any evidentiary record in an investigation by the Board of an accident or incident if -

“(i) the fitness of the employee who is the subject of the toxicological testing is at issue in the investigation; and

“(ii) the use of that record is necessary in the development of such evidentiary record.”.

TITLE III - INDEPENDENT SAFETY BOARD

SHORT TITLE

Sec. 301. This title may be cited as the "Independent Safety Board Act of 1974".

FINDINGS

SEC. 302. THE CONGRESS FINDS AND DECLARES:

(1) THE NATIONAL TRANSPORTATION SAFETY BOARD WAS ESTABLISHED BY STATUTE IN 1966 (PUBLIC LAW 89-670; 80 Stat. 935) as an independent Government agency, located within the Department of Transportation, to promote transportation safety by conducting independent accident investigations and by formulating safety improvement recommendations.

(2) Proper conduct of the responsibilities assigned to this Board requires vigorous investigation of accidents involving transportation modes regulated by other agencies of Government; demands continual review, appraisal, and assessment of the operating practices and regulations of all such agencies; and calls for the making of conclusions and recommendations that may be critical of or adverse to any such agency or its officials. No Federal agency can properly perform such functions unless it is totally separate and independent from any other department, bureau, commission, or agency of the United States.

NATIONAL TRANSPORTATION SAFETY BOARD

SEC. 303. (a) ESTABLISHMENT. - The National Transportation Safety Board (hereinafter in this title referred to as the "Board"), previously established within the Department of Transportation, shall be an independent agency of the United States, in accordance with this section, on and after April 1, 1975.

(b) **ORGANIZATION.** - (1) The Board shall consist of five members, including a Chairman. Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate. No more than three members of the Board shall be of the same political party. At any given time, no less than three members of the Board shall be individuals who have been appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, transportation safety, or transportation regulation.

(2) The terms of office of members of the Board shall be 5 years, except as otherwise provided in this paragraph. Any individual appointed to fill a vacancy occurring on the Board prior to the expiration of the term of office for which his predecessor was appointed shall be appointed for the remainder of that term. Upon the expiration of his term of office, a member shall continue to serve until his successor is appointed and shall have qualified. Individuals serving as members of the National Transportation Safety Board on the date of enactment of this title shall continue to serve as members of the Board until the expiration of their then current term of office. Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(3) On or before January 1, 1976, (and thereafter as required), the President shall -

(A) designate, by and with the advice and consent of the Senate, an individual to serve as the Chairman of the Board (hereafter in this title referred to as the "Chairman"); and

(B) an individual to serve as Vice Chairman.

The Chairman and Vice Chairman each shall serve for a term of 2 years. The Chairman shall be the chief executive officer of the Board and shall exercise the executive and administrative functions of the Board with respect to the appointment and supervision of personnel employed by the Board; the distribution of business among such personnel and among any administrative units of the Board; and the use and expenditure of funds. The Vice Chairman shall act as Chairman in the event of the absence or incapacity of the Chairman or in case of a vacancy in the office of Chairman. The Chairman or Acting Chairman shall be governed by the general policies established by the Board, including an decisions, findings, determinations, rules, regulations, and

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formal resolutions.

(4) Three members of the Board shall constitute a quorum for the transaction of any function of the Board.

(5) The Board shall establish and maintain distinct and appropriately staffed bureaus, divisions, or offices to investigate and report on accidents involving each of the following modes of transportation: (A) aviation; (B) highway and motor vehicle; (C) railroad and tracked vehicle; and (D) pipeline. The Board shall, in addition, establish and maintain any other such office as is needed, including an office to investigate and report on the safe transportation of hazardous materials.

(c) GENERAL. - (1) The General Services Administration shall furnish the Board with such offices, equipment, supplies, and services as it is authorized to furnish to any other agency or instrumentality of the United States.

(2) The Board shall have a seal which shall be judicially recognized.

(3) Subject to the civil service and classification laws, the Board is authorized to select, appoint, employ, and fix the compensation of such officers and employees, including investigators, attorneys, and administrative law judges, as shall be necessary to carry out its powers and duties under this title.

SEC. 304. (a) DUTIES OF BOARD. - The Board shall -

(1) investigate or cause to be investigated (in such detail as it shall prescribe), and determine the facts, conditions, and circumstances and the cause or probable cause or causes of any -

(A) aircraft accident which is within the scope of the functions, powers, and duties transferred from the Civil Aeronautics Board under section 6(d) of the Department of Transportation Act (49 U.S.C. 4655(d)) pursuant to title VII of the Federal Aviation Act of 1958, as amended, (49 U.S.C. 1441);

(B) highway accident, including any railroad grade crossing accident, that it selects in cooperation with the States;

(C) railroad accident in which there is a fatality, substantial property damage, or which involves a passenger train;

(D) pipeline accident in which there is a fatality or substantial property damage;

(E) major marine casualty, except one involving only public vessels, occurring on the navigable waters or territorial seas of the United States, or involving a vessel of the United States, in accordance with regulations to be prescribed jointly by the Board and the Secretary of the department in which the Coast Guard is operating. Nothing in this subparagraph shall be construed to eliminate or diminish any responsibility under any other Federal statute of the Secretary of the department in which the Coast Guard is operating: *Provided*, That any marine accident involving a public vessel and any other vessel shall be investigated and the facts, conditions, and circumstances, and the cause or probable cause determined and made available to the public by either the Board or the Secretary of the Department in which the Coast Guard is operating; and

(F) other accident which occurs in connection with the transportation of people or property which, in the judgment of the Board, is catastrophic, involves problems of a recurring character, or would otherwise carry out the policy of this title.

Any investigation of an accident conducted by the Board under this paragraph (other than subparagraph (E)) shall have priority over all other investigations of such accident conducted by other Federal agencies. The Board shall provide for the appropriate participation by other Federal agencies in any such investigation, except that such agencies may not participate in the Board's determination of the probable cause of the accident. Nothing in this section impairs the authority of other Federal agencies to conduct investigations of an accident under applicable provisions of law or to obtain information directly from parties involved in, and witnesses to, the transportation accident. The Board and other Federal agencies shall assure that appropriate information obtained or developed in the course of their investigations is exchanged in a timely manner. The Board may request the Secretary of Transportation (hereafter in this title referred to as the "Secretary") to make investigations with regard to such accidents and to report to the Board the facts, conditions and circumstances thereof (except in accidents where misfeasance or nonfeasance by the Federal Government is alleged), and the Secretary or his designees are authorized to make such investigations. Thereafter, the Board, utilizing such reports, shall make its determination of cause or probable cause under this paragraph;

(2) report in writing on the facts, conditions, and circumstances of each accident investigated pursuant to paragraph (1) of this subsection and cause such reports to be made available to the public at reasonable cost;

(3) issue periodic reports to the Congress, Federal, State, and local agencies concerned with transportation safety, and other interested persons

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recommending and advocating meaningful responses to reduce the likelihood of recurrence of transportation accidents similar to those investigated by the Board and proposing corrective steps to make the transportation of persons as safe and free from risk of injury as is possible, including steps to minimize human injuries from transportation accidents;

(4) initiate and conduct special studies and special investigations on matters pertaining to safety in transportation including human injury avoidance;

(5) assess and reassess techniques and methods of accident investigation and prepare and publish from time to time recommended procedures for accident investigations;

(6) establish by regulation requirements binding on persons reporting (A) accidents and aviation incidents subject to the Board's investigatory jurisdiction under this subsection, and (B) accidents and aviation incidents involving public aircraft other than aircraft of the Armed Forces and the Intelligence Agencies;

(7) evaluate, assess the effectiveness, and publish the findings of the Board with respect to the transportation safety consciousness and efficacy in preventing accidents of other Government agencies;

(8) evaluate the adequacy of safeguards and procedures concerning the transportation of hazardous materials and the performance of other Government agencies charged with assuring the safe transportation of such materials; and

(9) review on appeal (A) the suspension, amendment, modification, revocation, or denial of any operating certificate or license issued by the Secretary of Transportation under sections 602, 609, or 611(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1422, 1429, or 1431(c)) and the revocation of any certificate of registration under section 501(e)(2) of such Act; and (B) the decisions of the Commandant of the Coast Guard, on appeals from the orders of any administrative law judge revoking, suspending, or denying a license, certificate, document, or register in proceedings under section 4450 of the Revised Statutes of the United States (46 U.S.C. 239); the Act of July 15, 1954 (46 U.S.C. 239(a) and (b)); or section 4 of the Great Lakes Pilotage Act (46 U.S.C. 216(b)).

(b) POWERS OF BOARD. - (1) The Board, or upon the authority of the Board, any member thereof, any administrative law judge employed by or assigned to the Board, or any officer or employee duly designated by the Chairman, may, for the purpose of carrying out this title, hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise the attendance and testimony of such witnesses and the production of such evidence as the Board or such officer or employee deems advisable. Subpoenas shall be issued under the signature of the Chairman, or his delegate, and may be served by any person designated by the Chairman. Witnesses summoned to appear before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Such attendance of witnesses and production of evidence may be required from any place in the United States to any designated place of such hearing in the United States.

(2) Any employee of the Board, upon presenting appropriate credentials and a written notice of inspection authority, is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things therein necessary for a proper investigation, including examination or testing of any vehicle, rolling stock, track, or pipeline component or any part of any such item when such examination or testing is determined to be required for purposes of such investigation. Any examination or testing shall be conducted in such manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator of such vehicle, rolling stock, track, or pipeline component, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation accidents, consistent with the needs of the investigation and with the cooperation of such owner or operator. The employee may inspect, at reasonable times, records, files, papers, processes, controls, and facilities relevant to the investigation of such accident. Each inspection, examination, or test shall be commenced and completed with reasonable promptness and the results of such inspection, examination, or test made available.

(3) In case of contumacy or refusal to obey a subpoena, an order, or an inspection notice of the Board, or of any duly designated employee thereof, by any person who resides, is found, or transacts business within the jurisdiction of any district court of the United States, such district court shall upon the request of the Board, have jurisdiction to issue to such person an order requiring such person to comply forthwith. Failure to obey such an order is punishable by such court as a contempt of court.

(4) The Board is authorized to enter into, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of the functions and the duties of the Board under this title, with any government entity or any person.

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(5) The Board is authorized to obtain, and shall be furnished, with or without reimbursement, a copy of the report of the autopsy performed by State or local officials on any person who dies as a result of having been involved in a transportation accident within the jurisdiction of the Board and, if necessary, the Board may order the autopsy or seek other tests of such persons as may be necessary to the investigation of the accident: *Provided*, That to the extent consistent with the need of the accident investigation, provisions of local law protecting religious beliefs with respect to autopsies shall be observed.

(6) The Board is authorized to (A) use, on a reimbursable basis or otherwise, when appropriate, available services, equipment, personnel, and facilities of the Department of Transportation and of other civilian or military agencies and instrumentalities of the Federal Government; (B) confer with employees and use available services, records and facilities of State, municipal, or local governments and agencies; (C) employ experts and consultants in accordance with section 3109 of title 5, United States Code; (D) appoint one or more advisory committees composed of qualified private citizens or officials of Federal, State, or local governments as it deems necessary or appropriate, in accordance with the Federal Advisory Committee Act (5 U.S.C. App. I); (E) accept voluntary and uncompensated services notwithstanding any other provision of law; (F) accept gifts or donations of money or property (real, personal, mixed, tangible, or intangible); (G) enter into contracts with public or private nonprofit entities for the conduct of studies related to any of its functions; and (H) require payment or other appropriate consideration from Federal agencies, and State, local, and foreign governments for the reasonable cost of goods and services supplied by the Board and to apply the funds received to the Board's appropriations.

(7) Whenever the Board submits or transmits any budget estimate, budget request, supplemental budget estimate, or other budget information, legislative recommendation, prepared testimony for congressional hearings, or comment on legislation to the President or to the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Board to submit its budget requests or estimates, legislative recommendations, prepared testimony for congressional hearings, or comment on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(8) The Board is empowered to designate representatives to serve or assist on such committees as the Chairman determines to be necessary or appropriate to maintain effective liaison with other Federal agencies, and with State and local government agencies, and with independent standard-setting bodies carrying out programs and activities related to transportation safety.

(9) The Board, or an employee of the Board duly designated by the Chairman, may conduct an inquiry to secure data with respect to any matter pertinent to transportation safety, upon publication of notice of such inquiry in the Federal Register; and may require, by special or general orders, Federal, State, and local government agencies and persons engaged in the transportation of people or property in commerce to submit written reports and answers to such requests and questions as are propounded with respect to any matter pertinent to any function of the Board. Such reports and answers shall be submitted to the Board or to such employee within such reasonable period of time and in such form as the Board may determine. Copies thereof shall be made available for inspection by the public.

(10) The Board may at any time utilize on a reimbursable basis the services of the Transportation Safety Institute of the Department of Transportation (established for the purpose of developing courses and conducting training in safety and security for all modes of transportation) or any successor organization. The Secretary shall continue to make available such Institute or successor organization (A) to the Board for safety training of employees of the Board in the performance of all of their authorized functions, and (B) to such other safety personnel of Federal, interstate, State, local, and foreign governments and non-governmental organizations as the Board may from time to time designate in consultation with the Secretary. Utilization of such training at the Institute or successor organization by any designated non-Federal safety personnel shall be at a reasonable fee to be established periodically by the Board in consultation with the Secretary. Such fee shall be paid directly to the Secretary for the credit of the proper appropriation, subject to the requirements of any annual appropriation, and shall be an offset against any annual reimbursement agreement entered into between the Board and the Secretary to cover all reasonable direct and indirect costs incurred for all such training by the Secretary in the administration and operation of the Institute or successor organization. The Board shall maintain an annual record of all such offsets. In providing such training to Federal employees, the Board shall be subject to chapter 41 of title 5, United States Code (relating to training of employees).

(11) Establish such rules and regulations as may be necessary to the exercise of its functions.

(c) USE OF REPORTS AS EVIDENCE. - 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.

Original

(d) JUDICIAL REVIEW. - Any order, affirmative or negative, issued by the Board under this title shall be subject to review by the appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia, upon petition filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order. Such review shall be conducted in accordance with the provisions of chapter 7 of title 5, United States Code.

ANNUAL REPORT

Sec. 305. The Board shall report to the Congress on July 1 of each year. Such report shall include, but need not be limited to -

- (1) a statistical and analytical summary of the transportation accident investigations conducted and reviewed by the Board during the preceding calendar year;
- (2) a survey and summary, in such detail as the Board deems advisable, of the recommendations made by the Board to reduce the likelihood or recurrence of such accidents together with the observed response to each such recommendation;
- (3) an appraisal in detail of the accident investigation and accident prevention activities of other government agencies charged by Federal or State law with responsibility in this field; and
- (4) a biennial appraisal and evaluation and review, and recommendations for legislative and administrative action and change, with respect to transportation safety.

PUBLIC ACCESS TO INFORMATION

Sec. 306. (a) GENERAL. - Copies of any communication, document, investigation, or other report, or information received or sent by the Board, or any member or employee of the Board, shall be made available to the public upon identifiable request, and at reasonable cost, unless such information may not be publicly released pursuant to subsection (b) or (c) of this section. Nothing contained in this section shall be deemed to require the release of any information described by subsection (b) of section 552 of title 5, United States Code, or which is otherwise protected by law from disclosure to the public.

(b) EXCEPTION. - The Board shall not disclose information obtained under this title which concerns or relates to a trade secret referred to in section 1905 of title 18, United States Code, except that such information may be disclosed in a manner designed to preserve confidentiality -

- (1) upon request, to other Federal Government departments and agencies for official use;
- (2) upon request, to any committee of Congress having jurisdiction over the subject matter to which the information relates;
- (3) in any judicial proceeding under a court order formulated to preserve the confidentiality of such information without impairing the proceedings; and
- (4) to the public in order to protect health and safety, after notice to any interested person to whom the information pertains and an opportunity for such person to comment in writing, or orally in closed session, on such proposed disclosure (if the delay resulting from such notice and opportunity for comment would not be detrimental to health and safety).

(c) COCKPIT VOICE RECORDER. - Notwithstanding any other provision of law, the Board shall withhold from public disclosure cockpit voice recorder recordings and transcriptions, in whole or in part, of oral communications by and between flight crew members and ground stations, that are associated with accidents or incidents investigated by the Board: *Provided*, That portions of a transcription of such oral communications which the Board deems relevant and pertinent to the accident or incident shall be made available to the public by the Board at the time of the Board's public hearing, and in no event later than 60 days following the accident or incidents: *And provided further*, That nothing in this section shall restrict the Board at any time from referring to cockpit voice recorder information in making safety recommendations.

RESPONSE TO BOARD RECOMMENDATIONS

Sec. 307(a). Whenever the Board submits a recommendation regarding transportation safety to the Secretary, he shall respond to each such

Original

recommendation formally and in writing not later than 90 days after receipt thereof. The response to the Board by the Secretary shall indicate his intention to -

- (1) initiate and conduct procedures for adopting such recommendation in full, pursuant to a proposed timetable, a copy of which shall be included;
- (2) initiate and conduct procedures for adopting such recommendation in part, pursuant to a proposed timetable, a copy of which shall be included. Such response shall set forth in detail the reasons for the refusal to proceed as to the remainder of such recommendation; or
- (3) refuse to initiate or conduct procedures for adopting such recommendation. Such response shall set forth in detail the reasons for such refusal.

The Board shall make copies thereof available to the public at reasonable cost.

(b) The Secretary shall submit a report to the Congress on January 1 of each year setting forth all the Board's recommendations to the Secretary during the preceding year regarding transportation safety and a copy of the Secretary's response to each such recommendation.

CONFORMING AMENDMENTS

Sec. 308. The Department of Transportation Act is amended -

- (1) by deleting section 5 (49 U.S.C. 1654);
- (2) by amending section 4(c) thereof (49 U.S.C. 1653(c)) by deleting "or the National Transportation Safety Board" in the first sentence thereof; and by deleting in the second sentence thereof " , the Administrators, or the National Transportation Safety Board." and by inserting in lieu thereof "or the Administrators."; and
- (3) by amending section 4(d) thereof (49 U.S.C. 1653(d)) by deleting " , the Administrators, and the National Transportation Safety Board" and by inserting in lieu thereof "and the Administrators".

AUTHORIZATION OF APPROPRIATIONS

Sec. 309(a). There are authorized to be appropriated for the purposes of this Act not to exceed \$25,400,000 for the fiscal year ending September 30, 1988; \$27,000,000 for the fiscal year ending September 30, 1989; and \$28,600,000 for the fiscal year ending September 30, 1990. Such sums shall remain available until expended.

(b) An emergency fund of \$1,000,000 is authorized for expenditure by the Board to be available for necessary expenses, not otherwise provided for, of the Board for accident investigations. There is authorized to be appropriated such sums as may be necessary to establish the emergency fund under the preceding sentence and to replenish the fund annually. Such sums are authorized to remain available until expended.

Public Law 93-633, January 3, 1975 as amended by:

- Pub. L. 97-74, November 3, 1981;
- Pub. L. 97-309, October 14, 1982;
- Pub. L. 98-499, October 19, 1984;
- Pub. L. 100-223, December 30, 1987;
- Pub. L. 100-372, July 19, 1988.

Original

Federal Aviation Act of 1958

as Amended

TITLE VII - AIRCRAFT ACCIDENT INVESTIGATION**ACCIDENTS INVOLVING CIVIL AIRCRAFT****GENERAL DUTIES**

Sec. 701. [49 U.S.C. 1441] (a) It shall be the duty of the National Transportation Safety Board to -

- (1) Make rules and regulations governing notification and report of accidents involving civil aircraft;
- (2) Investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;
- (3) Make such recommendations to the Secretary of Transportation as, in its opinion, will tend to prevent similar accidents in the future;
- (4) Make such reports public in such form and manner as may be deemed by it to be in the public interest; and
- (5) Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by conducting special studies and investigations on matters pertaining to safety in air navigation and the prevention of accidents.

TEMPORARY PERSONNEL

(b) The National Transportation Safety Board may, without regard to the civil-service laws, engage, for temporary service in the investigation of any accident involving aircraft, persons other than officers or employees of the United States and may fix their compensation without regard to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of title 5]; and may, with consent of the head of the executive department or independent establishment under whose jurisdiction the officer or employee is serving, secure for such service any officer or employee of the United States.

CONDUCT OF INVESTIGATION

(c) In conducting any hearing or investigation, any member of the National Transportation Safety Board or any officer or employee of the National Transportation Safety Board or any person engaged or secured under subsection (b) shall have the same powers as the National Transportation Safety Board has with respect to hearings or investigations conducted by it. In carrying out its duties under this title, the National Transportation Safety Board is authorized to examine and test to the extent necessary any civil aircraft, aircraft engine, propeller, appliance, or property aboard an aircraft involved in an accident in air commerce. In the case of any fatal accident, the National Transportation Safety Board is authorized to examine the remains of any deceased person aboard or such other tests thereof as may be necessary to the investigation of the accident; *Provided*, That to the extent consistent with the needs of the accident investigation, provisions of local law protecting religious beliefs with respect to autopsies shall be observed. [Subsection (c) as amended by Public Law 87-810, 87th Congress, 2nd Session, approved October 15, 1962, 76 Stat. 921.]

Original

AIRCRAFT

(d) Any civil aircraft, aircraft engine, propeller, appliance, or property aboard an aircraft involved in an accident in air commerce, shall be preserved in accordance with and shall not be moved except in accordance with, regulations prescribed by the National Transportation Safety Board. [*Subsection (d) as amended by Public Law 87-810, 87th Congress, 2nd Session, approved October 15, 1962, 76 Stat. 921.*]

USE OF RECORDS AND REPORTS AS EVIDENCE

(e) No part of any report or reports of the National Transportation Safety 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.

USE OF SECRETARY OF TRANSPORTATION

IN ACCIDENT INVESTIGATIONS

(f) Upon the request of the National Transportation Safety Board, the Secretary of Transportation is authorized to make investigations with regard to aircraft accidents and to report to the National Transportation Safety Board the facts, conditions, and circumstances thereof, and the National Transportation Safety Board is authorized to utilize such reports in making its determinations of probable cause under this subchapter.

PARTICIPATION BY SECRETARY OF TRANSPORTATION

(g) In order to assure the proper discharge by the Secretary of Transportation of his duties and responsibilities, the National Transportation Safety Board shall provide for the appropriate participation of the Secretary of Transportation and his representatives in any investigations conducted by the National Transportation Safety Board under this title. *Provided*, That the Secretary of Transportation or his representatives shall not participate in the determination of probable cause of the National Transportation Safety Board under this title.

Note: The above text, in conformity with the U.S.Code, reflects the transfer of functions from the Federal Aviation Agency to the Secretary of Transportation pursuant to Pub. L. 89-670. "National Transportation Safety Board" was submitted for "Board" pursuant to Pub. L. 93-633.

ACCIDENTS INVOLVING MILITARY AIRCRAFT

Sec. 702. [49 U.S.C. 1442] (a) In the case of accidents involving both civil and military aircraft, the National Transportation Safety Board shall provide for participation in the investigation by appropriate military authorities.

(b) In the case of accidents involving solely military aircraft and in which a function of the Secretary of Transportation is or may be involved, the military authorities shall provide for participation in the investigation by the Secretary of Transportation.

(c) With respect to other accidents involving solely military aircraft, the military authorities shall provide the Secretary of Transportation and the National Transportation Safety Board with any information with respect thereto which, in the judgment of the military authorities, would contribute to the promotion of air safety.

Note: The above text, in conformity with the U.S.Code, reflects the transfer of functions from the Federal Aviation Agency to the Secretary of Transportation pursuant to Pub. L. 89-670. "National Transportation Safety Board" was submitted for "Board" pursuant to Pub. L. 93-633.

Original

SPECIAL BOARDS OF INQUIRY

Sec. 703. [49 U.S.C. 1443] (a) In any accident which involves substantial questions of public safety in air transportation the National Transportation Safety Board may establish a Special Board of Inquiry consisting of three members; one member of the National Transportation Safety Board who shall act as Chairman of the Special Board of Inquiry; and two members representing the public who shall be appointed by the President upon notification of the creation of such Special Board of Inquiry by the National Transportation Safety Board.

(b) Such public members of the Special Board of Inquiry shall be duly qualified by training and experience to participate in such inquiry and shall have no pecuniary interest in any aviation enterprise involved in the accident to be investigated.

(c) The Special Board of Inquiry when convened to investigate an accident certified to it by the National Transportation Safety Board shall have all authority of the National Transportation Safety Board as described in this title.

Note: The above text, "National Transportation Safety Board" was submitted for "Board" and for "Civil Aeronautics Board" pursuant to the transfers of functions contained in Public Laws 89-670 and 93-633.

Original

PUBLIC LAW 100-223 [H.R. 2310]; December 30, 1987

AIRPORT AND AIRWAY SAFETY AND CAPACITY

EXPANSION ACT OF 1987

For Legislative History of Act, see p. 2533.

An Act to amend the Airport and Airway Improvement Act of 1982 for the purposes of extending the authorization of appropriations for airport and airway improvements, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS

(a) SHORT TITLE. - This Act may be cited as the "Airport and Airway Safety and Capacity Expansion Act of 1987".

(b) TABLE OF CONTENTS. -

Sec. 1.	Short title and table of contents.
Sec. 2.	Secretary and Administrator defined.

TITLE I - AIRPORT AND AIRWAY IMPROVEMENT ACT AMENDMENTS

Sec. 101.	Amendment of Airport and Airway Improvement Act of 1982.
Sec. 102.	Declaration of policy.
Sec. 103.	Definitions.
Sec. 104.	National airport and airway system plans.
Sec. 105.	Authorization of appropriations.
Sec. 106.	Apportionment of funds.
Sec. 107.	Limitations on uses of funds.
Sec. 108.	State sponsorship.
Sec. 109.	Project sponsorship.
Sec. 110.	Grant agreements.
Sec. 111.	Project costs.
Sec. 112.	Limitation on powers.
Sec. 113.	Part-time operation of flight service stations.
Sec. 114.	Explosive detection K-9 teams.
Sec. 115.	Denial of funds for projects using products or services of foreign countries that deny fair market opportunities.
Sec. 116.	State block grant pilot program.

Original

TITLE II - FEDERAL AVIATION ACT AMENDMENTS

- Sec. 201. Amendment of Federal Aviation Act of 1958.
- Sec. 202. Essential air service.
- Sec. 203. Aircraft collision avoidance systems.
- Sec. 204. Civil penalties.
- Sec. 205. Indemnification of Federal Aviation Administration employees.
- Sec. 206. Hazards to safe and efficient air commerce and the preservation of navigable airspace and airport traffic capacity.
- Sec. 207. Public aircraft defined.

TITLE III - MISCELLANEOUS PROVISIONS

- Sec. 301. Noise abatement.
- Sec. 302. Air traffic controller workforce.
- Sec. 303. Safety rulemaking proceedings.
- Sec. 304. Inflation adjustment on collection of certain aviation fees.
- Sec. 305. Amendments to the National Driver Register Act.
- Sec. 306. Low activity level I air traffic control tower contract program.
- Sec. 307. Eligibility of Dermott, Arkansas, municipal airport.
- Sec. 308. Standards for navigational aids.
- Sec. 309. Long-term airport capacity.
- Sec. 310. Radio navigation systems.
- Sec. 311. Reporting of accidents to NTSB.
- Sec. 312. Atlantic City Airport.

(2) REPORT. - Not later than September 30, 1989, the Secretary shall transmit to Congress a report on the results of the study conducted under paragraph (1).

(3) AUTHORIZATION. - There shall be available for carrying out this subsection from the Airport and Airway Trust Fund \$500,000 for fiscal year 1988. Such funds shall remain available until expended.

(c) DEVELOPMENT OF MINIMUM STANDARDS. - Not later than September 30, 1989, the Administration shall establish by regulation minimum standards under which a radio navigation system may be certified as the sole radio navigation system required in an aircraft for operation in airspace of the United States.

SEC. 311. REPORTING OF ACCIDENTS TO NTSB.

(a) GENERAL RULE. - Section 304(a)(6) of the Independent Safety Board Act of 1974 (49 U.S.C. App. 1903(a)(6)) is amended to read as follows:

“(6) establish by regulation requirements binding on persons reporting (A) accidents and aviation incidents subject to the Board’s investigatory jurisdiction under this subsection, and (B) accidents and aviation incidents involving public aircraft other than aircraft of the Armed Forces and the Intelligence Agencies;”.

(b) REPORT TO CONGRESS. - Not later than 18 months after the date of the enactment of this Act, the National Transportation Safety Board shall report to the Congress its findings on public aircraft accidents and incidents.

SEC. 312. ATLANTIC CITY AIRPORT.

Original

(a) LIMITATION ON FUNDING OR TRANSFERS OF PROPERTY. - Notwithstanding any other provision of law, with regard to the Atlantic City Airport, at Pomona, New Jersey, the Federal Aviation Administration shall not convey any interest in property (pursuant to section 516 of the Airport and Airway Improvement Act of 1982) to any municipality or any other entity operating such airport, nor shall any funds authorized to be appropriated for fiscal year 1987 by such Act be available to such municipality or entity for any planning, study, design, engineering, or construction of a runway extension, new runway, new passenger terminal, or improvements to or expansion of the existing passenger terminal at such airport, until such time as -

(1) the master plan update for Atlantic City Airport and Bader Field, prepared pursuant to Federal Aviation Administration Contract FA-EA-2656, is completed and released; and

(2) the Administrator finds that a public entity has been created to operate and manage the Atlantic City Airport, which entity has the following characteristics:

(A) the authority to enter into contracts and other agreements, including contracts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States;

(B) the standing to sue and be sued in its own name;

(C) the authority to hire and dismiss officers and employees;

(D) the power to adopt, amend, and repeal bylaws, rules, and regulations governing the manner in which its business

"Sec. 1101. Hazards to safe and efficient air commerce and the preservation of navigable airspace and airport traffic capacity."

SEC. 207. PUBLIC AIRCRAFT DEFINED.

Section 101(36) is amended by adding at the end thereof the following new sentence: "For purposes of this paragraph, 'used exclusively in the service of' means, for other than the Federal Government, an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days."

TITLE III - MISCELLANEOUS PROVISIONS

SEC. 301. NOISE ABATEMENT.

(a) NOTICE AND HEARING REQUIREMENT. - The first sentence of section 104(a) of the Aviation Safety and Noise Abatement Act of 1979 (49 U.S.C. App. 2104(a)) is amended by inserting after "any air carriers using such airport" the following: "and after notice and an opportunity for a public hearing".

(b) FEDERAL SHARE. - Section 104(c)(1) of the Aviation Safety and Noise Abatement Act of 1979 (49 U.S.C. App. 2104(c)(1)) is amended by inserting before the period at the end of the fourth sentence the following: "or the Federal share which would be applicable to such project if the funds made available for such project were being made available under the Airport and Airway Improvement Act of 1982 for a project at the airport, whichever percentage is greater".

(c) SOUNDPROOFING OF SCHOOLS AND HOSPITALS. - Section 104(c) of the Aviation Safety and Noise Abatement Act of 1979 (49 U.S.C. App. 2104(c)) is amended by adding at the end thereof the following new paragraph:

"(3) The Secretary is authorized under this section to make grants to operators of airports and to units of local government referred to in paragraph (1) for any project to soundproof any public building (A) which is used primarily for educational or medical purposes in the noise impact area surrounding such airport, and (B) which is determined to be adversely affected by airport noise."

(d) PROCEDURES FOR PREPARATION AND SUBMISSION OF NOISE COMPATIBILITY PROGRAMS. -

(1) STUDY. - The Secretary shall conduct a study of the procedures established under the Aviation Safety and Noise Abatement Act of 1979 for the preparation and submission of noise compatibility programs. The objectives of such study shall be to determine whether or not such procedures could be revised to provide a more simplified process which meet the objectives of such Act and to determine whether or not expedited and simplified procedures which meet the objectives of such Act could be developed to take into account special circumstances at certain airports.

(2) CONSULTATION REQUIREMENT. - In undertaking the study under this subsection, the Secretary shall consult airports, airport users (including air carriers), representatives of persons residing in areas surrounding airports, concerned Federal, State, and local officials, and other interested persons.

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

ACTION NOTICE

A 8020.17

Subject: ACTION: ACTION NOTICE - Responsibilities of the FAA
 FAA in Public Aircraft Accidents and Incidents
 FAA Order 8020.11, paragraph 120

Approval Date: July 25, 1989

From: Executive Director for Regulatory Standards
 and Compliance, AXR-1

Expiration Date: July 25, 1990

To: Director, Flight Standards Service, AFS-1
 All Flight Standards Division Managers

Reply to: Frank DelGandio:267-9624
 Attn. of:

Effective October 24, 1988, the National Transportation Safety Board (NTSB) revised its Rules and Regulations, 49 CFR Part 830, to include the amended statutory definition of public aircraft and to require certain operators of public aircraft to submit reports to the Board on accidents and certain incidents involving public aircraft. The amended statutory definition was changed by Congress on December 30, 1987, with Public Law 100-223.

Section 830.2 now defines public aircraft as follows:

"Public Aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes. For purposes of this section "used exclusively in the service of" means, for other than the Federal Government, an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days.

By direction of Public Law 100-223 the NTSB amended Part 830, Subpart E (section 830.20) to require operators of public aircraft, except the Armed Forces and Intelligence Agencies, to report accidents and covered incidents to the Board within 10 days after an accident or incident listed in Section 830.5(a).

All Regional Flight Standards Division Managers have been queried regarding this action notice and are basically in agreement as to the need to investigate such occurrences and to ascertain if the FAA's areas of responsibility were involved.

OTE: THE CONTENTS OF THIS ACTION NOTICE, IF APPROPRIATE, SHALL BE INCORPORATED INTO THE DIRECTIVES SYSTEM WITHIN 12 MONTHS AFTER THE DATE OF APPROVAL.

Original

The NTSB has agreed to notify appropriate Flight Standards District Offices when such notifications concerning public aircraft are received.

Between October 1, 1988, and April 1, 1989, the NTSB has received reports of 19 accidents and/or incidents involving public aircraft. The NTSB estimates that there are approximately 78 public use accidents per year that will meet the requirements of this Action Notice. Accident investigation reports for CY88 have shown that the FAA used an average of 18 man-hours per civil aircraft accident. Therefore, based on these facts, the man-hour impact of public aircraft investigations is not considered significant and should be carried out within existing manpower resources.

Effective immediately, the FAA Accident Investigation Quality Assurance Program will be expanded to include "public aircraft" with the following guidance:

1. FAA district offices receiving notification of a public aircraft accident/incident will investigate the occurrence but only to the extent necessary for determining if any of the FAA's responsibilities may be involved.
2. The FAA is neither required nor authorized to (a) conduct a formal accident/incident investigation except in those cases where a prior written agreement exists; (b) accept accident delegation responsibility; or (c) accomplish the accident or incident reporting forms, i.e. 8020-5, 6120.19A, and 6120.4, normally used in civil aircraft investigations.
3. For those occurrences determined to be accidents, FAA Form 8020-16 will be completed and forwarded through regions to AAI-200.
4. Involvement of the FAA's areas of responsibility will be handled in the same manner as a civil aircraft.

(signed 25 July, 1989)

C. R. Melugin, Jr.

Original

**National Transportation
Safety Board**

Memorandum

Date:

To: The Board

From: Director, Bureau of Field Operations
Thru: Peter Kissinger
Managing Director

Subject: Aircraft Accident Investigation Selection Criteria

In 1981, in an effort to maximize the safety benefits of the Board's aircraft accident investigation efforts in light of significant reductions in staff levels, and the field starting to take an additional 2000 accidents, previously investigated by the FAA, criteria were established to guide the determination of the level of investigative effort to be expended on each accident. These criteria specified three objectives which the Board's accident investigation program serves:

- (1) Oversight/Public Confidence - accidents in which there would always be the need for full, thorough, independent investigative oversight to assure the public's confidence in the safety of the transportation system;
- (2) Selected Emphasis Areas - specified types of accidents involving significant and life-threatening safety problems for which there was a need to conduct full, thorough field investigations to find solutions to the problems. (As solutions to the problems causing one type of accident were found in-depth investigations of that type of accident could be eliminated and replaced by accidents involving new safety problems or issues.); and
- (3) Data Collection Needs - all other accidents required to be investigated by the Board, with the level of investigation limited to that necessary only to gather sufficient data on which trends can be identified and projected.

The types of accidents identified at that time for inclusion in the "Oversight/public confidence" and the "Selected emphasis areas" are shown in Attachment E. These categories have remained essentially unchanged since that time, with the following exceptions. "General aviation crashworthiness" was deleted as a special emphasis area following publication of the Board's safety studies and issuance of extensive recommendations on that subject. In addition ultralight accidents were designated as a special emphasis area for a year, following which analysis of the accident data collected resulted in Board recommendations to FAA.

Original

Following the identification of these accident selection criteria, the forms for documenting the accident investigations conducted were significantly revised and expanded with the objective of collecting the kind of data necessary to permit analysis of both the specific safety issues identified as special emphasis areas and more general accident trends apparent from an analysis of the total accident population.

Several years of data are now available on the new common data base, and the effort to analyze that data is now underway through the mechanism of the safety study program (e.g. the projected studies of: instructional flying, and small transport-category turbine-powered aircraft). It, therefore, seems appropriate at this time to reevaluate the types of accidents which are included in each category.

In addition, a changing workload situation dictates such a reevaluation. While the total number of aircraft accidents has continued to decline, the Board has increased its investigations of aircraft incidents in critical safety areas, such as ATC. Further, the FAA has been unwilling or unable to conduct on-site investigations of fatal and other aircraft accidents on behalf of the NTSB, as envisioned when the original selectivity plan was formulated. The original selectivity plan, for example, provided that, while it was deemed essential to conduct on-site investigation of all fatal accidents, that investigation could be conducted by FAA for the Board in those fatal accidents not meeting the criteria for NTSB oversight or selected emphasis areas. However, in cases in which FAA did not agree to send an investigator to the scene, it was often necessary for Board investigators to conduct the investigation.

It is essential that as we consider selection criteria, we also attempt to balance that workload against our investigator resources in consideration of our staffing problems. The field aviation workload for 1987 by investigator is shown for reference purposes in Attachment I. This is extremely important, not just to meet short term objectives, but also to reduce the amount of time lost to training investigators who we cannot retain. For example, at the end of this year it is expected that only 26 of the 50 ASIs in the Bureau of Field Operations (50 percent) will be at the GS-13 journeyman level. Those journeyman investigators and their office chiefs must also spend a sizable amount of their time training new hires and investigators who have not yet achieved journeyman status. They also must investigate the most difficult accidents when less experienced investigators are not qualified to take those accidents. Finally, the staffing-workload formulation contained in Attachment G assumes that journeymen investigators will continue the current practice of completing some limited investigations as well. Thus, the workload of our journeyman staff is at a critical level now and is expected to get worse if it is not promptly addressed. Options to address this problem are currently being explored.

The accomplishment of the stated safety objectives is also dependent on the number of journeyman level investigators available within the Bureau of Field Operations. Because of an unexpectedly high turnover in recent years, workload and work conditions for the remaining investigators has become very heavy and demoralizing.

Finally, experience has shown that the types of accidents included in each category are overlapping and not always clearly defined, thus leading to confusion and misunderstanding in their application. The revised formulation presented as Attachment C, therefore, is simpler, shorter, and more specific, and is designed to accommodate the accident selection criteria to the staffing levels available.

The Limited Investigator position, was created in 1983 to relieve the Air Safety Investigator (Field) from writing Limited accident investigation reports. Since the original concept the individuals hired to fill these vacancies has changed from one who would expect no further growth into an ASI(F) position, to an individual with very little experience and is being trained to be competitive for an ASI(F) position. This change has been gradual and we are in the process of revisiting the original policy to ascertain whether we should go back to the original concept or change the policy and identify the position as a trainee position with growth to an ASI(F).

In light of the staffing problem discussed above, the Safety Board may not be able to investigate all of the accidents and incidents mentioned in category 1 and 2 of the attached Accident Selection Criteria as full field investigations. In the event that situations develops, priority will be given to conducting full field investigations of all accidents in the Oversight/Public Confidence category, since by definition they always require investigation, whereas there is greater flexibility in the special emphasis areas based on personnel availability. Attachment E provides some additional definitions and guidance on the type of investigations and selection criteria.

Board approval of the proposed aircraft accident investigation selection criteria set forth in Attachment C is requested.

Attachments

Original

CURRENT AVIATION SELECTION CRITERIA

1. Oversight/public confidence:
 - a. Commercial passenger service
 - b. Air traffic control operations
 - c. Midair collisions
 - d. Newly-certificated aircraft
 - e. In-flight fire
 - f. In-flight breakup
 - g. Turbojet aircraft
 - h. Newly-formed airlines
 - i. FAA surveillance of air carrier operations and maintenance

2. Selected emphasis areas:
 - a. Inadvertent flight into severe weather
 - b. Instructional flying
 - c. Light twin-engine power failures
 - d. Small transport-category turbine-powered aircraft accidents/incidents

3. Data collection needs

It should be noted that during calendar year 1988 it is anticipated that approximately 18 FTE will be devoted to oversight/public confidence accidents, 12.5 FTE to selected emphasis areas, 13.5 FTE to limited investigations (data collection), and 8 FTE to other areas.

CURRENT AVIATION SELECTION CRITERIA

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 - d. Small transport-category turbine-powered aircraft accidents/incidents

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It should be noted that during calendar year 1988 it is anticipated that approximately 18 FTE will be devoted to oversight/public confidence accidents, 12.5 FTE to selected emphasis areas, 14.5 FTE to limited investigations (data collection), and 9 FTE to other areas.

Attachment B

STAFFING - WORKLOAD RELATIONSHIPS

Assumptions:

Staff authorized: 40 Air Safety Investigators (based on funding for 324 FTE)
 8 Air Safety Investigators (Limited)
 3 Investigative Assistants

Output capability: 17-20 full field investigations per ASI
 130 limited investigations per year per ASI (limited)

Estimated total accidents	2450
Estimated total incidents	150
	2600

Accidents delegated to FAA (Historically they have accepted approximately 260 to 280 a year. Goal will be 13% or approximately 350 accidents. Historically this has been a mix between agricultural, homebuilt, experimental and other aircraft accidents (part 91).

	-350
--	------

Accidents investigated by NTSB	2250
--------------------------------	------

Full field investigations (Oversight and Special emphasis areas)	750	(40 ASIs x 18.75 investigations per ASI)
--	-----	--

Limited investigations	1155	(8 ASIs (Limited) x 120 investigations per ASI) plus 3 investigative assistants at 65 investigations each.
------------------------	------	--

	345	(40 ASIs x 8.6 investigations per ASI)
--	-----	--

	2250
--	------

The estimate workload for the ASI (Limited) investigators is based on their lack of experience. Only 1 has been with the Board for more than 3 years and two have been with the Board for 3 years. Additionally, the Bureau has authority to recruit to 53 FTE but has not been able to fill all the positions prior to losses through retirements or transfers.

Original

Attachment C

PROPOSED AIRCRAFT ACCIDENT SELECTION CRITERIA

1.	Oversight/Public Confidence:	
a.	All Part 121 and 135 accidents (includes former categories of commercial passenger service, newly formed airlines, and FAA surveillance of aircarrier operations and maintenance; would also focus attention on 135 operators with multiple accident history).	170
b.	Air Traffic Control operations.	20
c.	Midair collisions.	20
d.	Newly certified aircraft (1st accident or less than 10 years old).	5
e.	Inflight fires.	20
f.	Aircraft accidents that expose the public to high risk, extensive property damage or high public interest.	25
2.	Selected Emphasis areas:	
a.	Part 91 accidents with elements common to Part 121/135 operations (e.g. aircraft typically used in 121/135 operations; Part 121/135 training flights, etc.).	50
b.	All fatal general aviation accidents.*	350
c.	Commercial passenger flight incidents with safety recommendation potential.	50
d.	ATC incidents with safety recommendation potential.	15
e.	Foreign aircraft accident investigation as required.	10
3.	Data collection needs:	1500
4.	Public use aircraft accidents	15
	Total	2250

* The NTSB, through a letter of agreement with the FAA, delegates all (including fatal) agricultural, homebuilt and experimental category aircraft to perform an on scene (Field) investigation. Some FSDOs comply, some do not. Thus the Field Chiefs have discretionary authority to withhold the delegation on accidents when the FAA has indicated they do not intend to travel. Additionally on other categories of fatal aircraft accidents (Part 91) where there is no safety pay off, the Field Chief can delegate these to the FAA, when he insures there will be a field investigation.

Original

REPORT CATEGORIES

Major Investigations - Blue Cover Report

A full Field Major investigation with a formal "blue cover" report. These investigations normally include a team effort with several working groups and a designated report writer. Preference will be given to reporting Field Majors as summary reports rather than "blue cover" reports. The necessity for recommending a blue cover report is decided at the Bureau Director level after consultation with the field chief. The field staff will conduct a "blue cover" type investigation only in rare cases.

Field Major -

An accident may be designated a Field Major because of its complex nature, high visibility, number of fatalities, VIP involvement, congressional interest or the issues involved. This designation is made by the field chief with concurrence of the Bureau Director. Reporting will be done by the 6120.4 with a complete ICAO narrative, and may also include preparation of a summary report. The summary report should be provided to the Board within 6 months of the occurrence, whenever possible. The summary report cannot go to the Board prior to the completion of the docket. A summary report will frequently involve air carrier accidents and incidents, but may also include significant general aviation operations that have national implications. A summary report will normally have clearly identified safety recommendations or safety issues. The designation of a summary report will be made by the Bureau Director at the request of the Field Chief.

Incident Investigations -

Incidents involving Part 121, 129, and 135 operations may provide an opportunity to solve problems before they result in a major accident. The lack of substantial damage or serious injuries should not hinder the pursuit of relevant safety issues. Reporting will be done with a core form and applicable supplements, and investigation will be carried out as a field investigation.

Original

Field Investigation -

When an on scene accident investigation is done by an NTSB investigator and a 6120.4 with all applicable supplements is completed, the accident should be carried as a Field investigation. Occasionally, a Limited investigation may be upgraded to Field status when the hours spent on the investigation approximate the time spent on a normal Field investigation. Likewise, a Field investigation may be downgraded to Limited status if it is clear that there are no safety issues and the data base needs can be met with a Limited investigation reporting format. Designation of Field investigations is done by the Field Chief.

Limited Investigation -

When an investigation is done without an NTSB investigator proceeding to the scene of the accident it should be classified as a Limited investigation. However, limited investigations may involve some brief travel to accomplish follow-up actions. Component testing may be performed by the FAA or contracted out to reputable repair shops. Limited investigations are reported on the 6120.4. The narrative portion should only reflect the complexity of the accident.

Delegated -

The FAA has agreed to accept all cropduster, homebuilt and experimental aircraft accidents as Delegated accidents. A Field Chief should consider them on a case by case basis. He is not obligated to delegate an accident simply because the FAA has agreed to accept a delegation. Likewise, any accident that does not conflict with the NTSB oversight responsibility may be delegated to the FAA if they will accept the delegation. Each Field Chief should consider the type of accident and the FAA's capability before delegating an accident. The Field Chief will be responsible for the quality, timeliness and completeness of all Delegated reports. The FAA will not perform a Limited investigation. When a delegation to the FAA is accepted, they also accept the responsibility for performing a Field investigation.

ACCIDENT SELECTION CRITERIA

1. Oversight/Public Confidence

a. Commercial Passenger Service

This category includes accredited representative on foreign investigations and Major accident support activity. Fields would be done on most Part 121 and Part 135 scheduled commuter flights, excluding some turbulence encounter accidents that do not have substantial damage. Some non-scheduled Part 135 (on demand air taxi - passenger and cargo) accidents may be done as Limited's when the circumstances of the accident are straightforward such as a gear up landing with no serious injuries and the pilot states "I forgot to lower the gear".

b. Air Traffic Control Operations

Field investigation is normally performed on any accidents that involve air traffic control personnel or equipment as a factor. Also, may include incidents where air traffic involvement is considered likely. Normally does not include accidents that occur while the pilot is in contact with ATC when there is no causal link such as a pilot who hits a parked aircraft during taxi at an airport with a control tower.

c. Midair Collisions

Field investigation normally performed on all collisions where at least one of the aircraft has communications established with ATC. May exclude situations such as collisions which occur during a planned formation flight or an air race.

d. Newly Certificated Aircraft

May include Part 25 certification test flights.

e. Inflight Fires

Field investigation normally performed on any certificated aircraft with uncontrollable inflight fires. Does not necessarily include smoke in the cockpit or minor fires that are easily extinguished and do not have safety ramifications.

f. Inflight Breakup

Field investigations normally performed on all accidents where the primary failure is structural failure of a normally certified aircraft.

g. Aircraft accidents that expose the public to high risk, extensive property damage or high public interest

In depth investigations normally performed on any accident that would indicate a safety hazard, safety recommendation potential or controversial use of airspace.

2. Selected Emphasis Areas

Sufficient data has been collected to prepared safety studies on the Board's current selected emphasis areas. Therefore, these areas will no longer be investigated under the special emphasis area criteria.

The new areas proposed are:

- (1) Part 91 accidents with elements common to Part 121/135 operations
- (2) Commercial passenger flight incidents with safety recommendation potential
- (3) ATC incidents with safety recommendation potential
- (4) Foreign aircraft accident investigation as required

3. Data Collection Needs/Other Mandated Accidents

The level of these investigations is to be determined by the data base requirements, visibility of the accidents, and available manpower. The objective is to investigate for potential safety issues while meeting our legislative mandate and supporting the needs of the aviation data base. The intensity of the investigation will be only to the degree necessary to meet these needs.

4. Public Use Aircraft

These aircraft accidents will be investigated as workload permits.

Attachment F

EXPECTED FIELD ASI STAFFING
DEC. 31, 1988

	FTE	ASI(F)	ASI(D)	ASI(L)	Investigative Assistants	Vacant
ANC	3	1	2	0		
ATL	6	4	0	1		1
CHI	6	0	4	1		1
DEN	5	4	0	1		
FTW	6	3	1	1	1	
LAX	7	4	1	1	1	
MIA	5	3	1	1		
MKC	4	2	1	1		
NYC	5	1	3	0	1	
SEA	4	2	0	1		1
DCA	2	2	0	0		
-----				-----	-----	
TOTAL	53	20	13	8	3	3

Total authorized includes 3 known vacancies.

ASI(F) GS-13 level investigator.

ASI(D) Full ASI that is not at the GS-13 level.

ASI(L) Fully qualified limited investigator (routinely signs their name to the 6120.4 report).

Investigative Assistant is considered 1/2 of a limited ASI for workload purposes.

Vacant/New Hire includes known vacant positions and employees with less

Original

Attachment I

CALENDAR YEAR 1987 AVIATION WORKLOAD

ANCHORAGE

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
*Kobelnyk	7	1	3	1	25	37
Labelle	10	0	2	0	26	41
Michelangelo	7	0	2	0	56	65
*Stella	10	0	1	1	22	34

ATLANTA

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
Burnett	1	0	0	0	4	5
Coleman	7	0	0	3	16	26
*Fouts	9	1	0	1	26	36
*Hicks	14	1	0	5	16	35
*Powell	13	1	0	1	29	44
*Stiner	14	1	1	2	22	40
Strickland	8	0	0	1	95	104

BUREAU OF FIELD OPERATIONS - HEADQUARTERS

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
*Dickinson	13	0	0	0	25	38
*Jones	9	0	0	3	16	28
Kleckner	0	0	0	0	4	4

CHICAGO

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
*Benson	6	0	1	3	1	11

Original

Bruce	9	0	1	6	15	31
Carmien	2	0	0	1	33	36
Dinwiddie	3	0	0	2	22	27
*McAvoy	12	1	0	3	12	28
*Siedlein	3	1	0	0	2	6
Troka	0	0	0	0	42	42
Wilson	2	0	1	1	21	25

DENVER

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
Collins	1	0	0	1	103	105
Feith	17	0	1	0	12	30
Johnson	0	0	0	1	23	23
Mangum	4	0	0	1	2	7
*Scott	13	1	0	2	19	35
*Tranter	15	0	0	0	18	33
Wiemeyer	8	1	3	1	15	28

FORT WORTH

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
Dickens	20	0	1	1	13	35
*Edwards	11	2	0	0	22	35
*Johnson	16	0	1	2	25	44
McFall	1	1	0	2	1	5
*Roth	1	0	0	0	0	1
*Wandel	15	0	1	0	17	32
Wilson	6	0	0	0	70	76

LOS ANGELES

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
Eckrote	1	0	0	0	128	129
Leighton	0	0	0	1	17	18
*Llorente	13	0	0	1	9	23
Mucho	2	0	0	1	0	3
Pollack	15	0	0	1	6	22
*Rich	16	0	0	0	5	21
Schutte	11	0	0	1	4	16
*Wall	16	0	0	2	13	31
Wilcox	12	0	0	1	77	90

KANSAS CITY

Original

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
Hruban	2	0	0	0	45	46
*Roth	14	0	0	0	42	56
Thorpe	8	0	1	2	36	47
Vargas	14	0	0	1	14	29

Original

MIAMI

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
*Alston	15	0	0	7	17	39
*Bird	14	1	0	2	25	42
Hill	15	0	0	1	32	48
*Kennedy	12	0	2	5	20	39
Monville	3	0	0	7	104	114

NEW YORK

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
Danhauer	10	0	0	0	3	13
Hancock	15	0	0	2	17	34
Lewis	0	0	0	0	190	190
Marcantelli	12	0	1	4	4	21
*Twine	9	1	0	2	8	21

SEATTLE

Investigator	Field	Field Major	DCA Major	Incident	Limited	Total
Carerra	2	0	0	2	118	122
*Daily	10	1	0	0	18	29
Mangum	16	0	0	2	11	29
*McCreary	9	1	0	5	5	20

*Investigators were GS-13s throughout the year.

Original

AVERAGE INVESTIGATOR WORKLOAD

Director's Survey)	1987 Actual Data		Regional Estimate (Based on	
	Field Investigations	Limited Investigations	Field Investigations	Limited Investigations
ASI (Limited) Includes Investigative Assistant	110.6	5.3	126	
ASI (Field) GS-9, GS-11 and GS-12	15.0	15.4		14-17
ASI (Field) GS-13	18.5	15.4		17-20

FOR OFFICIAL USE ONLY

NATIONAL TRANSPORTATION SAFETY BOARD

NOTATION 3488F

NOTATION MEMORANDUM

TO: The Board **Date:** FEB 11 1991

THRU: The Managing Director

FROM: Director, Office of Research and Engineering

SUBJECT: Proposed Board Policy on Release of Cockpit Voice Recorder Transcripts

Background Discussion

The cockpit voice recorder (CVR) and flight data recorder (FDR) sections of the accident investigation manual (AIM) are being revised to reflect the Board's recent reorganization, the Board's amended legislative authority governing the release of CVR information to the public and changes in recorder regulations and technology. The process of revising these sections of the AIM has been going on for several weeks and will take several more weeks to complete.

However, a Board policy on the release of a transcript of CVR information to the public and to the parties is needed soon because of the impending public hearing on the recent runway incursion of two Northwest Airline airplanes at Detroit and because of a recent letter from The Air Line Pilots Association expressing its concern about the manner in which it understands the CVR transcript from that accident will be released (a copy of this letter is attached).

Before the Board's CVR legislation was amended, transcripts of CVR recordings were released to the public and the parties 60 days after an accident. Recently, this has resulted in the CVR transcripts being made available to the parties well in advance of a public hearing.

Accordingly staff has proposed, for the Board's consideration, the attached policy statement, which will be incorporated into the revised CVR/FDR section of the AIM. The proposed policy will require that the transcript of the CFR be made available to the public and the parties on the first day of the public hearing at least six hours before it is convened. This will provide a definite, minimum time period for the parties to review the transcript and prepare for the hearing (the party CVR group members will already have had the opportunity to review the transcript in the Board's laboratory one week prior to the pre-hearing conference) and still enable the Board to comply with the amended legislation.

Original

~~Previous Board Action~~

The Board last revised the CVR/FDR section of the investigation manual in January, 1989. That revision (Notation 3488E, page 14, attached) was adopted to amend procedures relating to CVR transcript security following the Delta flight 1141 accident in Dallas/Fort Worth, Texas on August 31, 1988.

~~Requested Board Action~~

Staff proposes that the attached language governing the release of transcripts of cockpit voice recorder information to parties to Board investigations and to the public be incorporated into the CVR section of Board Order 6200.1A, page 14, replacing the 3rd paragraph.

~~Staff~~

Monty Montgomery (RE-20, 382-6688) - Writer/Chief, Engineering Services Division
System Information-ntsbd/sims/not.memobernie

Dr. Bernard S. Loeb

I concur:

Director, Office of Aviation Safety (AS-1)	2-6-91
General Council (GC-1)	2-6-91
Director, Office of Congressional and Intergovernmental Relations (GA-1)	2-6-91
Office of Public Affairs (PA-1)	2-6-91

Original

1 If the Safety Board conducts a public hearing, the CVR group
2 members will be permitted, upon request, to review in Washington, the
3 transcript in final form. This review will be scheduled to take place
4 approximately one week prior to the pre-hearing conference (no copies
5 or written notes will be allowed). A copy of the transcript will be
6 made available to each of the party coordinators and to the public on
7 the first day of the public hearing at least six hours prior to its
8 being convened.

9
10 If a public hearing is not conducted, the final transcript will
11 be made available to the public and to the parties when a majority of
12 the other factual reports regarding the accident or incident are
13 placed in the public docket. The CVR group members will be permitted,
14 upon request, to review, in Washington, the transcript in final form.
15 The review will be scheduled to take place approximately one week
16 prior to the opening of the public docket (no copies or written notes
17 will be allowed).

18
19
20
21

22

23

24

25

Original

NATIONAL TRANSPORTATION SAFETY BOARD
BOARD ACTION REPORT

Notation 3488E

Date: 1/23/89

To: ___ Director, Bureau of Accident Investigation
___ Director, Bureau of Safety Programs
___ Director, Bureau of Field Operations
___ Director, Bureau of Technology
___ General Counsel

Subject: Revised Section of the NTSB Manual on Flight Recorders

=====

___ The Board Members today completed the following action concerning the Notation item ___ by voting record/ ___ in a Board meeting:

___ adopted as presented. ___ requested revision and recirculation.
___ adopted as revised. ___ disapproved.

Votes were recorded as follows:

		Did not	Did
not			
	<u>Concurred</u>	<u>concur</u>	
<u>participate</u>			
Chairman	_____	_____	_____
Vice Chairman	_____	_____	_____
Member-1	_____	_____	_____
Member-2	_____	_____	_____
Member-3	_____	_____	_____

=====

___ The Notation item has been superseded by Notation _____.

___ The Notation item was withdrawn by ___ the originating Bureau.
___ the Managing Director.

___ Editorial Services (MD-5) will process the document as adopted. Please provide any further corrections or changes to MD-5 immediately.

___ Please take the following action:

___ Prepare the attached
___ recommendation letter as adopted for ___ signature.
___ correspondence ___ publication.
___ report ___ distribution.
___ opinion and/or order
___ brief of accident
___ summary report

Original

-
- Deliver the original of the document(s) checked above to MD-5 in final form for proofreading by ___/___/___.
 - Include the attached dissent of ___C ___ VC ___ M-1 ___M-2 ___ M-3 in the final document.
 - Other:

NTSB Form 1320.14 (Rev. 11/85)

Original

The completed CVR group Chairman's factual report (the transcript will be an attachment to the factual report) shall have a cover sheet which notes all capital letters at the top and bottom of the sheet; "PRELIMINARY -- DUPLICATION OF THIS DOCUMENT IS PROHIBITED." It shall also contain a statement of the CVR caveat: "Warning: The reader of this report is cautioned that the transcription of a CVR tape is not a precise science but is the best product possible from an NTSB group investigative effort. The transcript or parts thereof, if taken out of context, could be misleading. The attached CVR transcript should be viewed as an accident investigation tool to be used in conjunction with other evidence gathered during the investigation. Conclusions or interpretations should not be made using the transcript as the sole source of information."

The complete group chairman's factual report shall, at this time, be reviewed by the Directors of the Bureau of Technology and Accident Investigation or Field Operations or their designees. The Directors will take into consideration the recommendations of the CVR Group Chairman, the Chief of the Aviation Accident Investigation Division or Director, Bureau of Field Operations or his designee and the CVR group, in determining what portions, if any, of the transcript will be deemed non-pertinent, deleted, and labeled accordingly.

Restrictions on report duplication and report access end when it is officially released to the public through the Director, Bureau of Accident Investigation or Field Operations. Public release will occur 60 days from the accident date or during the NTSB public hearing, whichever comes first. The preliminary notice on the CVR sheet shall be removed before public release, but not the CVR caveat. Copies of the final transcript will be made available to the party coordinators one working day prior to its public release.

~~Disposition of Flight Recorders, Original Tapes, and CVR Copy Tapes~~

The flight data recorder and the original tape or foil will be returned to their owner as soon as possible after the laboratory is satisfied that it has a definitive readout of the data.

Unless there are issues which the Safety Board believes remain unresolved, the cockpit voice recorder and the original tape will be returned to their owner shortly after the public release of the CVR group chairman's factual report.

Under certain circumstances the Safety Board may elect to retain the original CVR tape for further examination. Such determination will be made by the Director, Bureau of Technology and the Director, Bureau of Accident Investigation or Field Operations in consultation with the on-scene Board Member. When such a determination has been made, the owner shall be informed of the reason for the necessity of retaining the original CVR tape and, if appropriate, provided a high quality copy of the original CVR reading.

AIR LINE PILOTS ASSOCIATION

1625 MASSACHUSETTS AVENUE, N.W. ? WASHINGTON, D.C. 20036 ? (703) 689-2270

January 24, 1991

The Honorable James L. Kolstad
Chairman
National Transportation Safety Board
Room 812
800 Independence Avenue, S.W.
Washington, D.C. 20594

Dear Mr. Kolstad:

Our organizations worked diligently to achieve recent legislation which was designed to prevent the premature release of Cockpit Voice Recorder information. Both the NTSB and ALPA recognized the desirability of protecting this information until a full disclosure of all factual information relating to the accident could be made. We appreciate the cooperation and assistance of NTSB representatives in promulgating this significant legislation.

However, we are somewhat disappointed to learn of the procedures now being planned for the forthcoming public hearing involving the ground collision of two Northwest Airlines aircraft at Detroit. This will be the first major investigation under the new legislation.

As we understand it, the hearing would be convened for the purpose of introducing the exhibits, including the CVR transcript, into the public record. But then the hearing would be adjourned until the next day. This, in our view, is totally unacceptable as it can only be viewed as creating media sensationa lism. There is no other purpose which can be envisioned. This procedure would contravene the intent of the legislation which we all worked so hard to attain. I ask that the Board reconsider this precedent-setting policy and the deleterious effect it would have on the hearing. Further, consider the economic effect of prolonging the hearing, all for the purpose of educating the press.

Original

On a corollary matter, the parties have been denied access to the comprehensive time correlation of the various recordings including the two flight data recorders, the two CVR's, the ATC transcripts, and the radar data. This process of resolving the factual data to determine the location of both aircraft as a function of time will undoubtedly play an important part at the public hearing. As a result of the current CVR procedures the Performance Group have not been able to review and verify the incorporation of the CVR information in the Performance study. As a result, the parties will be severely hampered in their ability to adequately explore this aspect at the hearing.

While the parties have had access to the CVR through the member of the CVR Group, and while it is intended that the hearing spokesman will be allowed to review the transcript prior to the hearing, we believe full access to the CVR information within the security of the NTSB building by the Performance Group should have been allowed.

This would have been consistent with the intent of the legislation as expressed in the preamble of the Senate report which states:

"All parties to an accident investigation recognize both the rights to privacy of the individual crewmembers and the need to conduct a full and fair investigation. This section seeks to maintain a balance between those interests. The section is not intended, however, to restrict the parties to the investigation in any way from access to the CVR information, prior to public disclosure, for purposes of the investigation."

I respectfully request that the Board reconsider the plan to reconvene the hearing on the next day following the introduction of the exhibits into the record. Additionally, I request that the parties be allowed to participate fully in any correlation of factual information including CVR information.

Sincerely,

(signed January 24, 1991)

J. Randolph Babbit, President

JRB/cm

Original

**National Transportation
Safety Board**

Memorandum

DATE: January 10, 1991

TO: Monty L. Montgomery

FROM: Director, Office of Congressional and Intergovernmental Relations

RE: Draft Flight Recorder Section of NTSB Investigation Manual

In reference to your memorandum of January 10, I have made suggested changes on page 21 of the draft you provided regarding public disclosure of CVR transcripts. As you know, the law now states that if a public hearing is held, release of the CVR transcript to the public is made at that time, and if no public hearing is held, release is made at the time the majority of other factuals is placed in the public docket. The way page 21 is now worded, it appears that the Board has an either/or option, which in fact is not the case.

cc: Bernie Loeb
Bud Laynor
Ron Battocchi
Jim Cash
Dennis Grossi
Ron Schleede
Bob Johnson
George Prellezo
Bob McIntosh
Bob Benson
Tom Haueter
Tom Conroy
Barry Strauch
Al Dickinson
Les Kampschror
Herb Banks
John Clark

Original

of 15 minutes of audio information on 4 channels.

(b) Public Disclosure of the CVR Transcript

The recording from the CVR is treated very differently than other factual information developed during the course of an investigation. Because of the sensitive nature of the oral communications within the cockpit and the sensationalism the contents of the CVR tape from a major accident generally receive when released to the public, Congress provided for an exemption to the Freedom of Information Act for the CVR transcript. Section 4 of Public Law 101-641, the Independent Safety Board Act Amendments of 1990, directs the Board to make available to the public CVR transcriptions at the time of the Public Hearing, and if the Board does not conduct a public hearing at the time when a majority of the other factual reports regarding the accident are made available to the public. Section 306 of the Independent Safety Board act of 1974 (49 U.S.C.

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