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Title 49 —Transportation

Subtitle B —Other Regulations Relating to Transportation

Chapter VIII —National Transportation Safety Board

Part 835 Testimony of Board Employees

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PART 835—TESTIMONY OF BOARD EMPLOYEES

Authority: 5 U.S.C. 301; Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*).

§ 835.1 Purpose.

This part prescribes policies and procedures regarding the testimony of employees of the National Transportation Safety Board (Board) in suits or actions for damages and criminal proceedings arising out of transportation accidents when such testimony is in an official capacity and arises out of or is related to accident investigation. The purpose of this part is to ensure that the time of Board employees is used only for official purposes, to avoid embroiling the Board in controversial issues that are not related to its duties, to avoid spending public funds for non-Board purposes, to preserve the impartiality of the Board, and to prohibit the discovery of opinion testimony.

[63 FR 71607, Dec. 29, 1998]

§ 835.2 Definitions.

Accident, for purposes of this part includes “incident.”

Board accident report means the report containing the Board's determinations, including the probable cause of an accident, issued either as a narrative report or in a computer format (“briefs” of accidents). Pursuant to section 701(e) of the Federal Aviation Act of 1958 (FA Act), and section 304(c) of the Independent Safety Board Act of 1974 (49 U.S.C. 1154(b)) (Safety Act), no part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports.

Factual accident report means the report containing the results of the investigator's investigation of the accident. The Board does not object to, and there is no statutory bar to, admission in litigation of factual accident reports. In the case of a major investigation, group chairman factual reports are factual accident reports.

[63 FR 71607, Dec. 29, 1998, as amended at 64 FR 5622, Feb. 4, 1999]

§ 835.3 Scope of permissible testimony.

- (a) Section 701(e) of the FA Act and section 304(c) of the Safety Act preclude the use or admission into evidence of Board accident reports in any suit or action for damages arising from accidents. These sections reflect Congress' "strong * * * desire to keep the Board free of the entanglement of such suits." Rep. No. 93-1192, 93d Cong., 2d Sess., 44 (1974), and serve to ensure that the Board does not exert an undue influence on litigation. The purposes of these sections would be defeated if expert opinion testimony of Board employees, which may be reflected in the views of the Board expressed in its reports, were admitted in evidence or used in litigation arising out of an accident. The Board relies heavily upon its investigators' opinions in its deliberations. Furthermore, the use of Board employees as experts to give opinion testimony would impose a significant administrative burden on the Board's investigative staff. Litigants must obtain their expert witnesses from other sources.
- (b) For the reasons stated in paragraph (a) of this section and § 835.1, Board employees may only testify as to the factual information they obtained during the course of an investigation, including factual evaluations embodied in their factual accident reports. However, they shall decline to testify regarding matters beyond the scope of their investigation, and they shall not give any expert or opinion testimony.
- (c) Board employees may testify about the firsthand information they obtained during an investigation that is not reasonably available elsewhere, including observations recorded in their own factual accident reports. Consistent with the principles cited in § 835.1 and this section, current Board employees are not authorized to testify regarding other employee's reports, or other types of Board documents, including but not limited to safety recommendations, safety studies, safety proposals, safety accomplishments, reports labeled studies, and analysis reports, as they contain staff analysis and/or Board conclusions.
- (d) Briefs of accidents may be released in conjunction with factual accident reports. Nevertheless, they are not part of those reports and are not to be admitted in evidence or used in a deposition approved under this part.
- (e) Not all material in a factual accident report may be the subject of testimony. The purpose of the factual accident report, in great part, is to inform the public at large, and as a result the factual accident report may contain information and conclusions for which testimony is prohibited by this part.
- (f) No employee may testify in any matter absent advance approval by the General Counsel as provided in this part.

[55 FR 41541, Oct. 12, 1990, as amended at 63 FR 71607, Dec. 29, 1998; 64 FR 5622, Feb. 4, 1999]

§ 835.4 Use of reports.

- (a) As a testimonial aid and to refresh their memories, Board employees may use copies of the factual accident report they prepared, and may refer to and cite from that report during testimony.

- (b) Consistent with section 701(e) of the FA Act and section 304(c) of the Safety Act, a Board employee may not use the Board's accident report for any purpose during his testimony.

[55 FR 41541, Oct. 12, 1990, as amended at 63 FR 71607, Dec. 29, 1998]

§ 835.5 Manner in which testimony is given in civil litigation.

- (a) Testimony of Board employees with unique, firsthand information may be made available for use in civil actions or civil suits for damages arising out of accidents through depositions or written interrogatories. Board employees are not permitted to appear and testify in court in such actions.
- (b) Normally, depositions will be taken and interrogatories answered at the Board's office to which the employee is assigned, and at a time arranged with the employee reasonably fixed to avoid substantial interference with the performance of his duties.
- (c) Board employees are authorized to testify only once in connection with any investigation they have made of an accident. Consequently, when more than one civil lawsuit arises as a result of an accident, it shall be the duty of counsel seeking the employee's deposition to ascertain the identity of all parties to the multiple lawsuits and their counsel, and to advise them of the fact that a deposition has been granted, so that all interested parties may be afforded the opportunity to participate therein.
- (d) Upon completion of the deposition of a Board employee, the original of the transcript will be provided the deponent for signature and correction, which the Board does not waive. A copy of the transcript of the testimony and any videotape shall be furnished, at the expense of the party requesting the deposition, to the Board's General Counsel at Washington, DC headquarters for the Board's files.

[55 FR 41541, Oct. 12, 1990, as amended at 63 FR 71607, Dec. 29, 1998]

§ 835.6 Request for testimony in civil litigation.

- (a) A written request for testimony by deposition or interrogatories of a Board employee relating to an accident shall be addressed to the General Counsel, who may approve or deny the request consistent with this part. Such request shall set forth the title of the civil case, the court, the type of accident (aviation, railroad, etc.), the date and place of the accident, the reasons for desiring the testimony, and a showing that the information desired is not reasonably available from other sources.
- (b) Where testimony is sought in connection with civil litigation, the General Counsel shall not approve it until the factual accident report is issued (*i.e.*, in the public docket). In the case of major accident investigations where there are multiple factual reports issued and testimony of group chairmen is sought, the General Counsel may approve depositions regarding completed group factual reports at any time after incorporation of the report in the public docket. However, no deposition will be approved prior to the Board's public hearing, where one is scheduled or contemplated. The General Counsel may approve a deposition in the absence of a factual accident report when such a report will not be issued but all staff fact-finding is complete.
- (c) The General Counsel shall attach to the approval of any deposition such reasonable conditions as may be deemed appropriate in order that the testimony will be consistent with § 835.1, will be limited to the matters delineated in § 835.3, will not interfere with the performance of the duties of the employee as set forth in § 835.5, and will otherwise conform to the policies of this part.

- (d) A subpoena shall not be served upon a Board employee in connection with the taking of a deposition in civil litigation.

[63 FR 71607, Dec. 29, 1998]

§ 835.7 Testimony of former Board employees.

It is not necessary to request Board approval for testimony of a former Board employee, nor is testimony limited to depositions. However, the scope of permissible testimony continues to be constrained by all the limitations set forth in § 835.3 and § 835.4.

[63 FR 71608, Dec. 29, 1998]

§ 835.8 Testimony by current Board employees regarding prior activity.

Any testimony regarding any accident within the Board's jurisdiction, or any expert testimony arising from employment prior to Board service is prohibited absent approval by the General Counsel. Approval shall only be given if testimony will not violate § 835.1 and § 835.3, and is subject to whatever conditions the General Counsel finds necessary to promote the purposes of this part as set forth in § 835.1 and § 835.3.

[63 FR 71608, Dec. 29, 1998]

§ 835.9 Procedure in the event of a subpoena in civil litigation.

- (a) If the Board employee has received a subpoena to appear and testify in connection with civil litigation, a request for his deposition shall not be approved until the subpoena has been withdrawn.
- (b) Upon receipt of a subpoena, the employee shall immediately notify the General Counsel and provide all information requested by the General Counsel.
- (c) The General Counsel shall determine the course of action to be taken and will so advise the employee.

[63 FR 71608, Dec. 29, 1998]

§ 835.10 Testimony in Federal, State, or local criminal investigations and other proceedings.

- (a) As with civil litigation, the Board prefers that testimony be taken by deposition if court rules permit, and that testimony await the issuance of the factual accident report. The Board recognizes, however, that in the case of coroner's inquests and grand jury proceedings this may not be possible. The Board encourages those seeking testimony of Board employees to contact the General Counsel as soon as such testimony is being considered. Whenever the intent to seek such testimony is communicated to the employee, he shall immediately notify the General Counsel.
- (b) In any case, Board employees are prohibited from testifying in any civil, criminal, or other matter, either in person or by deposition or interrogatories, absent advance approval of the General Counsel. The Board discourages the serving of a subpoena for testimony but, if issued, it should be served on the General Counsel, rather than the employee.
- (c) If permission to testify by deposition or in person is granted, testimony shall be limited as set forth in § 835.3. Only factual testimony is authorized; no expert or opinion testimony shall be given.

[63 FR 71608, Dec. 29, 1998]

§ 835.11 Obtaining Board accident reports, factual accident reports, and supporting information.

It is the responsibility of the individual requesting testimony to obtain desired documents. There are a number of ways to obtain Board accident reports, factual accident reports, and accompanying accident docket files. Our rules at parts 801 and 837 of this chapter explain our procedures, as will our web site, at www.nts.gov. Or, you may call our Public Inquiries Branch, at (800) 877-6799. Documents will not be supplied by witnesses at depositions, nor will copying services be provided by deponents.

[63 FR 71608, Dec. 29, 1998]