

# D.C. Circuit Rules Crash Investigation Findings Not Subject to Judicial Review

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New York Law Journal Jun 29, 2016



In *Joshi v. National Transportation Safety Bd.*<sup>1</sup> the U.S. Court of Appeals for the D.C. Circuit ruled that the National Transportation Safety Board's probable cause determinations are not subject to judicial review. The decision highlights the conflict of interest in the National Transportation Safety Board's investigation process, which relies on the participation of potential defendants in civil litigation that frequently follows aviation accidents. It also shows that victims, who are forbidden from participating in NTSB investigations, cannot obtain an independent review of allegedly erroneous investigation findings.

In the United States, the NTSB investigates aviation crashes, determines their probable cause(s) and makes safety recommendations that hopefully, if acted upon by the Federal Aviation Administration (FAA) and the aviation industry, will prevent similar crashes and thereby save lives.<sup>2</sup> The NTSB never truly "closes" investigations, and will entertain petitions for reconsideration of its findings. As such, the NTSB's probable cause findings and recommendations are never truly "final" because the NTSB can change them at any time.

The NTSB often invites interested "parties" to assist in its investigations. These parties may include manufacturers, operators and the FAA. The NTSB limits participation in investigations to "those persons, government agencies, companies, and associations whose employees, functions, activities or products were involved in the accident and who can provide suitable qualified personnel to actively assist in the field investigation."<sup>3</sup> This party system helps the NTSB leverage its limited resources.

The system, however, presents a conflict of interest because the parties assisting the NTSB are very often potential defendants in civil actions, and the parties may bear responsibility for the crash. These interested parties may conduct the critical tests and analyses that the NTSB will rely upon in making its findings. For example, examination including disassembly of the wreckage can be performed by the airplane manufacturer. The only interested party forbidden from participating or even having representatives

observe any part of the investigation are the crash victims because the NTSB does not believe that they have expertise that would help with the investigation.

Whatever one thinks about the party system, it puts potential plaintiffs at a distinct disadvantage. Despite the NTSB's commendable efforts to provide more information to victims during investigations and to promptly release its factual findings, victims are largely left in the dark regarding investigations until they are complete. Conversely, the potential defendants are inside the investigations and as parties can even affect their direction.

Aviation crash victims have little ability to influence an investigation. During the course of the investigation, much of the evidence including the wreckage is withheld from non-parties. NTSB investigations can take over a year and have been known to last over two years so a victim may not have access to critical evidence even as statutes of limitations loom. It's often only after the investigation is complete and the NTSB report is issued that victims have access to the evidence. At that point they must conduct their own investigation, and if they disagree with the NTSB's findings their only recourse is to petition the NTSB for reconsideration of its findings.

The NTSB will review a petition to reconsider its findings if the petition is based on new evidence or upon a showing that the board's findings are erroneous.<sup>4</sup> And according to *Joshi*, the decision of the NTSB to deny reconsideration is not subject to judicial review.

## **NTSB Investigation**

Georgina Joshi, a private pilot, was qualified to pilot airplanes by reference to their instruments in reduced visibility conditions. On April 20, 2006, she was piloting a Cessna U208G, a six-seat single engine airplane, on an instrument landing system (ILS) approach, which provided course and glideslope guidance to the airplane, to Monroe County Airport near Bloomington, Ind., when the airplane crashed into trees and then came to rest inverted. Joshi and her four passengers were killed.

The NTSB investigated the accident: It examined the crash site and the wreckage; reviewed the weather, the flight plan, the radar plots of the airplane's flight path and the radio communications between the pilot and air traffic controllers; interviewed witnesses; downloaded data from the engine's monitor that revealed the engine power settings prior to the crash; and reviewed the pilot's ratings, experience and health.<sup>5</sup> After completing the investigation, the NTSB determined that the probable cause of the accident was "[t]he pilot's continued descent below decision height [of the ILS instrument approach] and not maintaining adequate altitude/clearance from the trees while on approach."<sup>6</sup> It further found that factors contributing to the accident were the night lighting conditions and misty weather conditions.<sup>7</sup>

The pilot's father, Yatish Joshi, was not satisfied with the investigation performed by the NTSB and took it upon himself to hire a forensic engineering firm to conduct an independent investigation. That investigation determined that another airplane interfered

with Joshi's airplane's flight path requiring her to take evasive actions that led to the crash. The report put blame on the FAA air traffic controllers for permitting the alleged conflict between the two airplanes. Based on the findings, Mr. Joshi brought a lawsuit against the FAA and as part of a settlement of the case obtained a letter from the Department of Justice suggesting that the government was settling the case because it determined that a court could find merit in some of the plaintiff's claims.<sup>8</sup>

Mr. Joshi presented the NTSB with the results of his investigation, which included a reconstruction of the airplane's flight based on radar data, air traffic control data and other evidence, some of which the NTSB had not considered, and requested that the NTSB reconsider its probable cause finding. The NTSB reviewed Mr. Joshi's submissions, found fault with the engineering firm's investigative methodology and conclusions, and declined to change its probable cause determination. The NTSB analyzed the FAA's actions in controlling the flight and found that its controllers followed proper procedures, and that the DOJ letter did not say otherwise.<sup>9</sup> As a result, the NTSB denied Mr. Joshi's petition for reconsideration.

## **Circuit Court**

The Federal Aviation Act provides authority to the D.C. Circuit to review final orders of the NTSB.<sup>10</sup> Mr. Joshi filed a petition with the D.C. Circuit for a review of the NTSB's decision to deny his petition for reconsideration.

An NTSB final order must come at the end of its "decision making process and must determine rights or obligations or give rise to legal consequences."<sup>11</sup> The D.C. Circuit found that the probable cause determination of the NTSB and its denial of the petition for reconsideration lacked the necessary determinate consequences to be a reviewable final order. This was because NTSB investigations are merely "fact finding proceedings with no formal issues and no adverse parties. They are not subject to the provisions of the Administrative Procedures Act and are not conducted for the purpose of determining the rights or liabilities of any person."<sup>12</sup>

The D.C. Circuit noted that federal law prohibits probable cause determinations to be admitted into evidence or used for any other purpose in litigation.<sup>13</sup> It found that the harms that Mr. Joshi claims to have suffered including "reputational harm, financial harm, emotional harm and informational harm" were not legal harms, but rather practical consequences of the NTSB's decision and, as such, are insufficient to trigger judicial review.<sup>14</sup>

The D.C. Circuit found that the NTSB does not intend that its findings have any legal consequence and indeed that it anticipated that the findings would not be used in litigation. The NTSB's probable cause findings are only used within the government and only for safety purposes.

The D.C. Circuit did not address Mr. Joshi's complaints about the role that the FAA played in the NTSB investigation. Mr. Joshi pointed out that the NTSB permitted the

FAA, a potentially responsible party for the crash, to participate in the crash investigation. Mr. Joshi claimed that the FAA's involvement contributed to the inadequate investigation and erroneous findings. He also submitted evidence of what he asserted were admissions on the part of the FAA that air traffic control failures contributed to the accident and that his daughter was not entirely at fault.<sup>15</sup> The D.C. Circuit found that it had no jurisdiction to address the complaints regarding the FAA's role in the investigation.

## Conclusion

The NTSB performs a vital function in investigating accidents and in promoting aviation safety with limited resources. The party system may be necessary to enable the NTSB to meet its responsibilities. *Joshi* demonstrates, however, that victims have no judicial recourse if they believe that an NTSB investigation got it wrong or that it was improperly influenced by one of the parties.

The NTSB believes that it can manage the inherent conflict in its party system in part because parties to the investigation do not participate in probable cause determinations. The NTSB, however, makes its probable cause determinations based on the investigation's factual findings and parties to the investigation work closely with the NTSB investigators in formulating those factual findings. The inability of victims to participate in investigations is frustrating because they want to know the facts and may urgently need the information for a potential civil action.

### ENDNOTES:

1. 791 F.3d 8 (D.C. Cir. 2015).
2. 49 U.S.C. 1131(a)(1); 49 C.F.R. 831.4.
3. 45 C.F.R. 831.11(a). Section 831.11(a) affords no one the right to participate in an investigation, and the NTSB has revoked the party status of investigation participants for violating the regulations. For example, after the crash of UPS Flight 1354, a A300-600 cargo jet, the NTSB revoked the party status of the pilot union and UPS after they made public comments about their relative positions on the investigation. <http://www.nts.gov/news/press-releases/Pages/PR20140825.aspx>.
4. 49 CRF 845.41.
5. See NTSB Factual Report, CH106FA117.
6. See NTSB Probable Cause Report, CH105FA117.
7. *Id.*
8. *Joshi*, 791 F.3d at 13n.2.

9. Id. at 11.

10. 49 U.S.C. 1153(a). NTSB "final orders" include its review of FAA enforcement actions regarding pilot certificates. See 49 U.S.C. 44703, 49 U.S.C. 47709 and 49 U.S.C. 46301.

11. *Joshi*, 791 F.3d at 10 (quoting *Safe Extensions v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007)).

12. Id. (quoting 49 C.F.R. 841.4).

13. Id. (citing 49 U.S.C. 1154(b); 49 C.F.R. 835.3).

14. Id. at 12.

15. See *Joshi v. NTSB*, 2015 WL 661307 at \*46 (D.C. Cir. Feb. 13, 2015) (Appellate Brief).