



# SORTING THROUGH THE RUBBLE

Understanding and adapting to the restrictive National Transportation Safety Board investigative process is a must for attorneys litigating transportation infrastructure cases.

By || KRISTINE MEREDITH

**I**n Minnesota, a bridge's deck truss fails catastrophically during rush hour. One thousand feet of the bridge span falls into the Mississippi River, and 13 people are killed. In Ohio, a railroad track breaks and 17 cars derail. The cars carrying ethanol explode. In California, a weld in a gas transmission pipe gives way and the pipe ruptures. The explosion leaves a crater the size of a football field in the midst

of a suburban community, killing eight people and destroying hundreds of homes.

Each of these disasters was caused by metal fatigue, which results from parts being left in service year after year, instead of being replaced. Such fatigue is taking its toll on infrastructure across the United States, and experts say infrastructure disasters will become increasingly commonplace in the future.<sup>1</sup>

Infrastructure disasters involving the nation's transportation system—such as highways, railroads, and pipelines—fall within the jurisdiction of the National Transportation Safety Board (NTSB).<sup>2</sup> The board's investigation determines only

an accident's probable cause, not fault. Rather than assigning blame, the NTSB delivers nonbinding safety recommendations to the industries and agencies involved. That's one reason regulations prohibit the NTSB's determination of an accident's cause from being used in litigation.<sup>3</sup> Plaintiff attorneys handling infrastructure cases should learn about the NTSB's investigative process and plan cases accordingly.

**Accessing the investigation.** Federal regulations allow the NTSB to control the disaster scene and exclude all other agencies from the investigation.<sup>4</sup> The board also has the right to exclude

the victims' attorneys and experts, and almost always does. It will, however, allow those who were likely responsible for the accident to participate, under the reasoning that those parties have technical know-how that the NTSB lacks.<sup>5</sup> This method of investigation—in which corporate wrongdoers may participate while their victims are excluded from even observing the process—is called the “party system.”<sup>6</sup>

If the NTSB's party system seems biased in favor of potential defendants, it is. The RAND Corporation studied the party system in 1999, and concluded that the participation of potential defendants

in investigations represents an inherent conflict of interest that limits its integrity.<sup>7</sup>

**Controlling the evidence.** The NTSB often relies on party representatives to assist in gathering and analyzing evidence. Despite the fact that the victims' representatives are excluded from this process, destructive testing is performed and evidence is sent to labs—including those owned or controlled by potential defendants. It is not unheard of for evidence to be “lost” in transit to the lab, or while there.

Although the NTSB has the power to subpoena witnesses and documents, the board often asks open-ended, non-accusatory questions with no probing follow up. Any interview recordings are usually destroyed. Sometimes, only a summary of the interview is included with the NTSB's factual reports; other times, the NTSB foregoes interviews altogether in favor of witnesses' written statements.

A common result is factual reports that lack the analysis usually present in an attorney's case assessment. For example, the NTSB report on a 2007 Minnesota bridge collapse included findings about the construction methods of the faulty bridge truss, which were based on interviews with the men who originally worked on its construction in 1957.<sup>8</sup> The report does not mention the witnesses' ages, although they were all presumably octogenarians asked to recall events occurring 50 years earlier, and the NTSB did not consider or comment on their credibility or reliability.

**Ineffective discovery.** NTSB investigators frequently destroy notes or photos before preparing their report. What is left of those documents—such as test data, test protocols, and evidence collected from the accident site—may not be subpoenaed.<sup>9</sup> Rather, litigants must make an official demand to the NTSB's general counsel, along with an affidavit stating that the material sought is

relevant and unavailable elsewhere.<sup>10</sup> Alternatively, the NTSB may respond to a Freedom of Information Act request.

An NTSB investigator may not be called as a witness at trial, although litigants may depose a representative with prior permission from the board.<sup>11</sup> Depositions, however, are often a waste of time due to a number of restrictions. For example, attorneys may not ask the witness any question that will elicit an opinion.<sup>12</sup> Witnesses may respond to questions by simply reading from their report, and may not be questioned on any report prepared by others. Witnesses may not even be shown any report other than the one they prepared. In other words, depositions offer little information besides that already contained in the reports.

on the event, it helps attorneys identify witnesses, understand potential causation theories, and guide their investigations. In the 2010 California pipeline explosion case mentioned above, the board issued a 140-page accident report that referred to six factual reports. Plaintiff attorneys worked with the material scientists to determine the most helpful among them, particularly any content that would be useful as a trial exhibit.

Attorneys representing victims of America's infrastructure failures must seek justice within the bounds of NTSB's investigative authority. But through litigation, plaintiff attorneys can move beyond the NTSB's mere safety



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**Using NTSB reports.** The NTSB issues two types of official reports: group chairman accident reports and investigative factual reports, although only the latter may be used in litigation.<sup>13</sup> The factual reports contain the substance of the investigation. As attorneys sift through all of the reports, they must keep in mind that the board's purpose in generating these reports is to support a safety recommendation only, while the defendant's purpose in contributing to the reports is to prepare a defense to any potential litigation.

Plaintiff attorneys can still use NTSB reports to their advantage. Although the report provides a filtered perspective

recommendations to obtain justice in the courtroom—holding wrongdoers accountable and providing greater protection to the public. ■



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**NOTES**

1. See Steve Kroft, *Falling Apart: America's Neglected Infrastructure* (Nov. 23, 2014), [www.cbsnews.com/news/falling-apart-america-neglected-infrastructure](http://www.cbsnews.com/news/falling-apart-america-neglected-infrastructure).
2. 49 U.S.C. §1131(a)(1) (2012).

3. See 49 U.S.C. §1154(b)(1) (2012) and *Chiron v. Nat'l Transp. Safety Bd.*, 198 F.3d 935, 940 (D.C. Cir. 1999) ("The simple truth here is that the NTSB investigatory procedures are not designed to facilitate litigation, and Congress has made it clear the Board and its reports should not be used to the advantage or disadvantage of any party in a civil lawsuit.")
4. See 49 U.S.C. §1131(a)(2)(A). With the exception of the FBI, the NTSB is the controlling authority for accident site investigation. 49 U.S.C. §1131(a)(2)(B).
5. The parties to the investigation are limited to "persons, government agencies, companies, and associations whose employees, function, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel actively to assist in the investigation." 49 C.F.R. §831.11(a)(1) (2011). The contractors or controlling entity representative—but not their lawyers—will be invited to participate.
6. See 49 C.F.R. §831.11.
7. RAND Corporation issued a \$400,000 report about the NTSB and aviation accidents. It determined the following: "The party process presents inherent conflicts of interest for entities that are both parties in an investigation and 'party defendant' in related litigation. Indeed, RAND has found, at least within certain complex types of accidents, the party system is potentially unreliable and that party representatives may be acting to further various interests beyond prevention of a similar accident." Cynthia C. Lebow et al., *Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations* 30 (2000), [www.rand.org/pubs/monograph\\_reports/MR1122](http://www.rand.org/pubs/monograph_reports/MR1122).
8. Nat'l Transp. Safety Bd., *Collapse of I-35W Highway Bridge, Minneapolis, MN, August 1, 2007* 103-05 (2008), [www.nts.gov/investigations/AccidentReports/Reports/HAR0803.pdf](http://www.nts.gov/investigations/AccidentReports/Reports/HAR0803.pdf).
9. 49 C.F.R. §837.3(a), (b).
10. 49 C.F.R. §837.4(b)(2).
11. 49 C.F.R. §835.5.
12. 49 U.S.C. §831.10(c).
13. "[Sections] of the Federal 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' and serve to ensure that the Board does not exert an undue influence on litigation." 49 C.F.R. §835.3(a) (quoting S. Rep. No. 93-1192, at 44 (1974)); 49 U.S.C. §1154(b).