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HAVE YOU SEEN MY FACTUAL REPORT?

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If you've visited the NTSB aviation accident database lately (www.nts.gov), you may have noticed a more streamlined appearance. Many of us had become accustomed to links to the big three NTSB reports on the search results: Preliminary, Factual, and Probable Cause Reports. The current "dashboard" replaces all of these with a "Final Report," and adds a "Data summary." The Final Report aggregates the Factual and Probable Cause reports into one report, but the substance of the reports can all be found in the Final Report. Apparently, this more efficient approach is a result of the NTSB's need to modernize and update its own systems (just imagine the vast amounts of data stored by the NTSB) and it automatically changed the reports going back to the earliest reports available both online and internally to the Board.

This would all be well and good if it weren't for decades of litigation that defined what is and isn't admissible in civil litigation. The starting point was the statutory prohibition on use of "a report of the Board" in evidence or civil litigation as found in 49 U.S.C. § 1154(b). Then, we argued for years over what was and wasn't a "report of the Board." Depending on which side was favored by information found in the factual reports, either side would attempt to convince the unfortunate judge that the statutory prohibition was or wasn't applicable. Eventually a consensus evolved, later codified by the NTSB in its own regulations. "Board accident report means the report containing Board's determinations, including the probable cause of an accident... no part of a Board accident report may be admitted as evidence..." 49 CFR § 835.2. "Factual accident report means the report containing the results of the investigator's investigation of the accident." *Id.* "The Board does not object to, and there is no statutory bar to, admission in litigation of factual reports." *Id.*

So, what to do with a "Final Report," or as the full title reads, "National Transportation Safety Board Aviation Accident Final Report?" Unfortunately,

aviation lawyers are currently facing the unintended consequence of the Board's modernization efforts, and it would appear much like Michael Palin and John Cleese in a famous *Monty Python* sketch, we're forced to argue about the character of these aggregated reports:

The sketch:

A customer enters a pet shop.

Mr. Praline: 'Ello, I wish to register a complaint.

(The owner does not respond.)

Mr. Praline: 'Ello, Miss?

Owner: What do you mean "miss"?

Mr. Praline: (*pause*) I'm sorry, I have a cold. I wish to make a complaint!

Owner: We're closin' for lunch.

Mr. Praline: Never mind that, my lad. I wish to complain about this parrot what I purchased not half an hour ago from this very boutique.

Owner: Oh yes, the, uh, the Norwegian Blue...What's,uh...What's wrong with it?

Mr. Praline: I'll tell you what's wrong with it, my lad. 'E's dead, that's what's wrong with it!

Owner: No, no, 'e's uh,...he's resting.

Mr. Praline: Look, matey, I know a dead parrot when I see one, and I'm looking at one right now.

Owner: No no he's not dead, he's, he's restin'! Remarkable bird, the Norwegian Blue, idn't, ay? Beautiful plumage!

Mr. Praline: The plumage don't enter into it. It's stone dead.

Owner: Nononono, no, no! 'E's resting!

Mr. Praline: All right then, if he's restin', I'll wake him up! (*shouting at the cage*) 'Ello, Mister Polly Parrot! I've got a lovely fresh cuttle fish for you if you show...

(owner hits the cage)

Owner: There, he moved!

Mr. Praline: No, he didn't, that was you hitting the cage!

Owner: I never!!

Mr. Praline: Yes, you did!

Owner: I never, never did anything...

Mr. Praline: (*yelling and hitting the cage repeatedly*) 'ELLO POLLY!!!! Testing! Testing! Testing! This is your nine o'clock alarm call!

(Takes parrot out of the cage and thumps its head on the counter. Throws it up in the air and watches it plummet to the floor.)

Mr. Praline: Now that's what I call a dead parrot.

Owner: No, no....No, 'e's stunned!

Mr. Praline: STUNNED?!?

Owner: Yeah! You stunned him, just as he was wakin' up! Norwegian Blues stun easily, major.

Mr. Praline: Um...now look...now look, mate, I've definitely 'ad enough of this. That parrot is definitely deceased, and when I purchased it not 'alf an hour ago, you assured me that its total lack of movement was due to it bein' tired and shagged out following a prolonged squawk.

Owner: Well, he's...he's, ah...probably pining for the fjords.

Mr. Praline: PININ' for the FJORDS?!?!?!? What kind of talk is that?, look, why did he fall flat on his back the moment I got 'im home?

Owner: The Norwegian Blue prefers keepin' on it's back! Remarkable bird, id'nit, squire? Lovely plumage!

Etc.

Credit: "Pet Shop Sketch." *Monty Python's Flying Circus*. BBC. 7 December 1969. Television.

And, this isn't just theoretical. As just one example, when faced with a "National Transportation Safety Board Aviation Accident Final Report" the attorneys in *LeBlanc v. Panther Helicopters, Inc.*, attempted to convince the judge to parse out the factual section, but he refused and struck the entire report ("Because the report appears to be from the NTSB and is not an investigators report...") 2018 WL 1392897 * 2 (E.D. La. 2018).

Unlike Stillwell, Chennault was a visionary and unorthodox in his thought processes. He knew his men were outnumbered and had to take advantage of the Japanese by hit-and-run tactics and by moving from air base to air base so the Japanese never knew where they were. This resulted in the Japanese squandering substantial resources looking for the Flying Tigers and bombing American bases while Chennault and his airmen had superior intelligence on the Japanese, the location of their aircraft and the flight paths of the aircraft when they were airborne. This information enabled Chennault and his pilots to gain local air superiority when needed. Limitations on resources available to Chennault required him to focus and husband his resources, unlike his Japanese opponents.

CONCLUSION

The activities of Claire Chennault and his Flying Tiger pilots in China are a remarkable study in the ability of a smaller force to keep a vastly larger force at bay using the elements of surprise and superior combat tactics to offset the sheer numbers and weight of the Japanese Air Force in China. The air war in China was anything but orthodox. It was a maverick or guerrilla air war flown by American pilots under the leadership of an American commander who had gone rogue. By any measure, as a combat strategist Chennault was a genius. However, he had a taciturn personality, and his direct line of communications with President Roosevelt made him a political threat to his superior officers. The air war in China in World War II was a rough and tumble affair, and Claire Chennault was the perfect commander to combat the superior forces of the Japanese Empire. It is to the deep regret of the United States of America that Claire Chennault was not aboard the U.S.S. Missouri when the Japanese surrendered in Tokyo Bay at the conclusion of hostilities. If anyone deserved to be at that surrender ceremony, it was Claire Chennault.

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Well, I'm happy to report that a fix is in the works. According to Sean Dalton, Executive Officer for Chairman Sumwalt, the NTSB is aware of this issue and is working on getting "stand-alone" factual reports back on the website. Meanwhile, upon request to the Office of Records Management, the NTSB can recreate a

"stand-alone" factual report. So, please spare yourself the energy of trying not to admit that you've got a dead parrot on your hands – if you have a need to make use of the treasure trove of information in the Factual Report, just request one from the NTSB.



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