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 A banner for the 2024 TLA Annual Conference & CTLA Mid-Year Meeting, featuring the same tropical collage as the first slide. The text is centered in a white, cloud-like shape. At the bottom, logos for the Transportation Lawyers Association (TLA) and the Canadian Transport Lawyers Association (CTLA) are displayed.

2024
TLA Annual Conference & CTLA Mid-Year Meeting
May 1 – 4, 2024
 Wyndham Grand Rio Mar Puerto Rico Golf and Beach Resort
 Rio Grande, Puerto Rico

Transportation Lawyers Association CTLA Canadian Transport Lawyers Association

**An Inside View of NTSB Investigations:
 Investigative Protocol and Strategy Considerations**

• Latasha Johnson	Ehrenstein Sager	Moderator
• Benjamin Allen	Holland & Knight	
• Thomas Tobin	Wilson Elser	

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NTSB Investigations – Who, What, When, Where

1. Who are they and what is their authority?
2. How do they investigate? Is anything different?
3. What happens on scene? And the following months?
4. How important are NTSB findings and recommendations?
5. What should we be doing now?

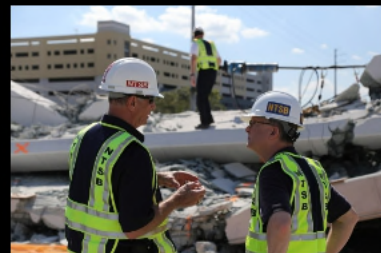
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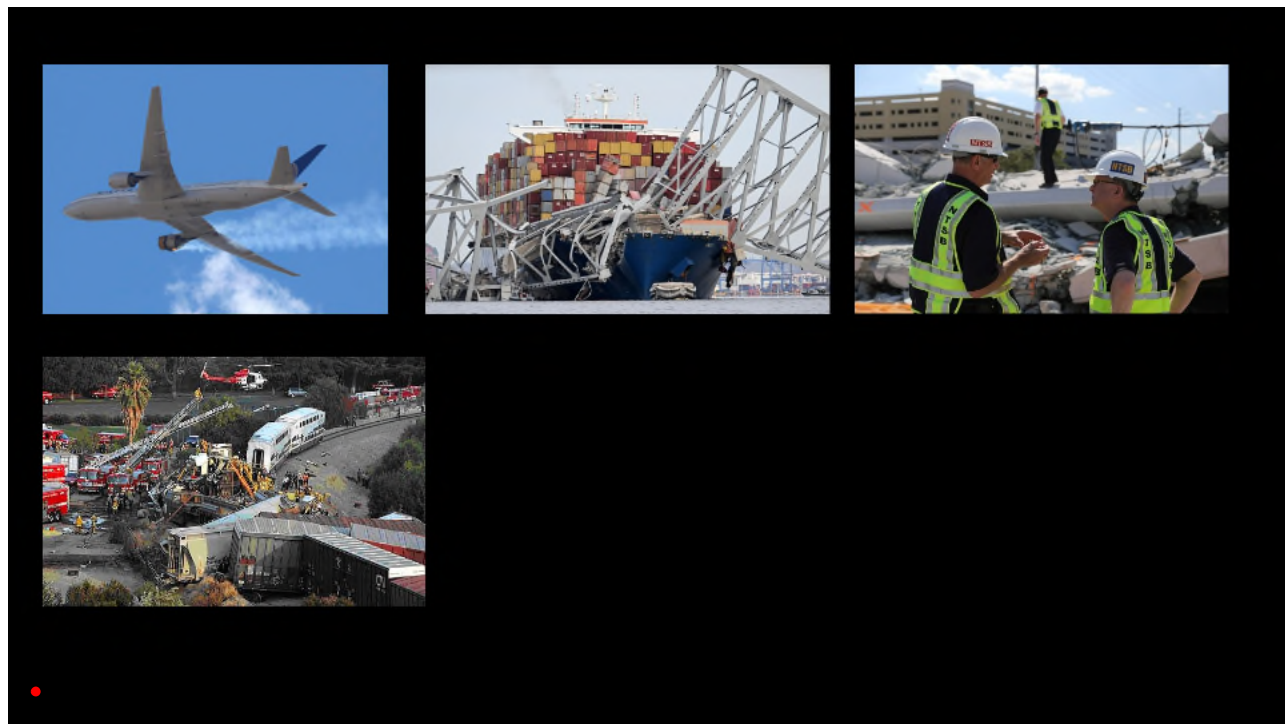
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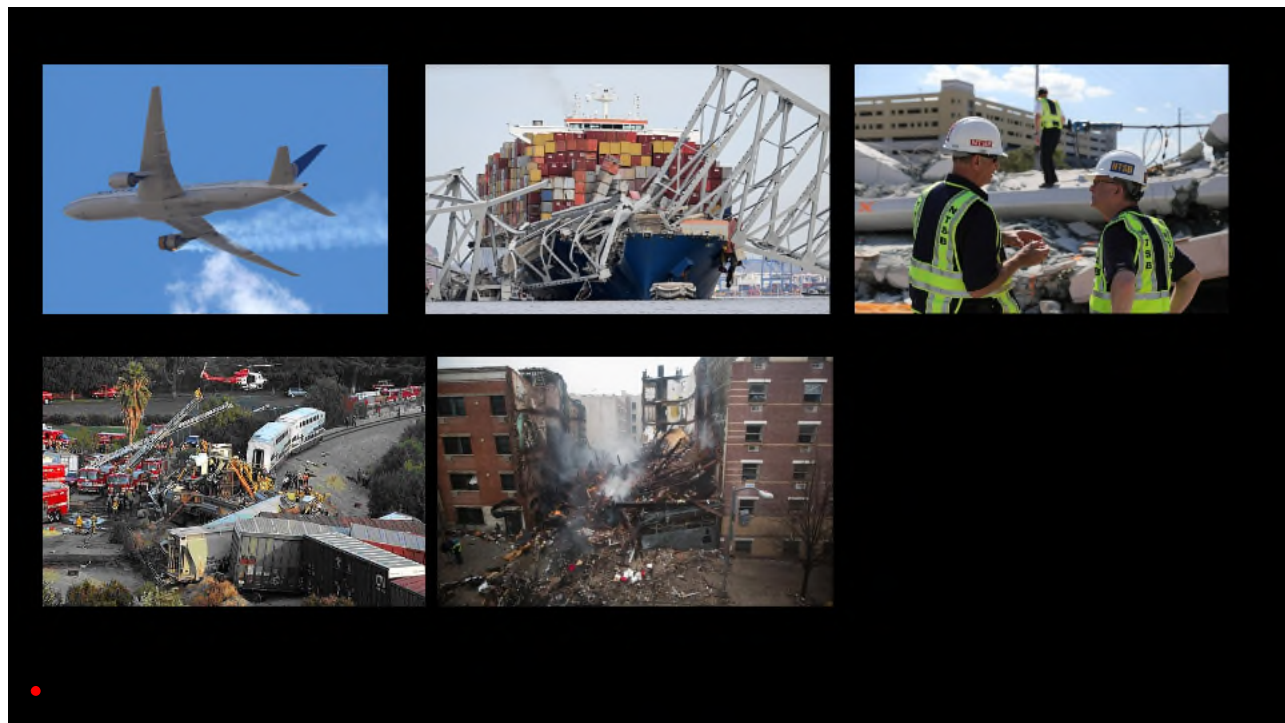
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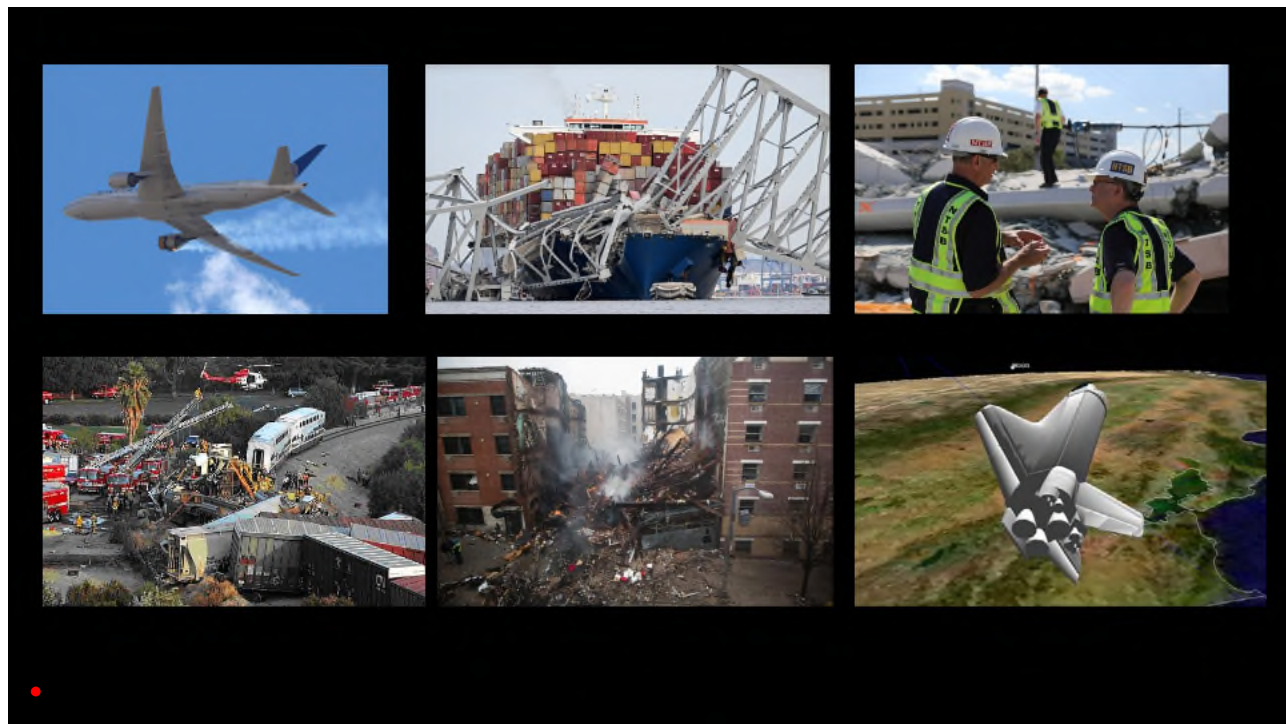
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The Timeline

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The Timeline

Scene work & interviews	~ 7 days
Preliminary Report (Factual)	~ 30 days
Additional factual work	~ 6-12 months
Draft Factual Reports to parties	~ 6-12 months

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The Timeline

Scene work & interviews	~ 7 days
Preliminary Report (Factual)	~ 30 days
Additional factual work	~ 6-12 months
Draft Factual Reports to parties	~ 6-12 months
Deadline for Party Submissions	~ 30 days after Factual Rpts.
Party meetings w/ NTSB Members	~ within 30 days of Board Mtg
Public Docket opened	~ 12 to 18 months
NTSB Board Meeting	~ 12 to 18 months

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The Party Process

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Party Advantages

“Assisting NTSB Investigation” Publicity
Best way for factual foundation to be factual
Quickest way to enact corrective measures
Correction of draft working group factual reports
“Party Submission” of findings & recommendations
Meetings with NTSB Members

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- Must supply technical staff to assist
- Affirmative duty to advise of relevant information
- Must limit accident-related public statements
- Strict confidentiality of “Investigative Information”
- Limitations on internal investigations
- Litigation limitations on pleadings, discovery responses, access to evidence & expert opinions

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Party Certification

NTSB Investigation No. _____

Date of Accident: _____

Accident Location: _____

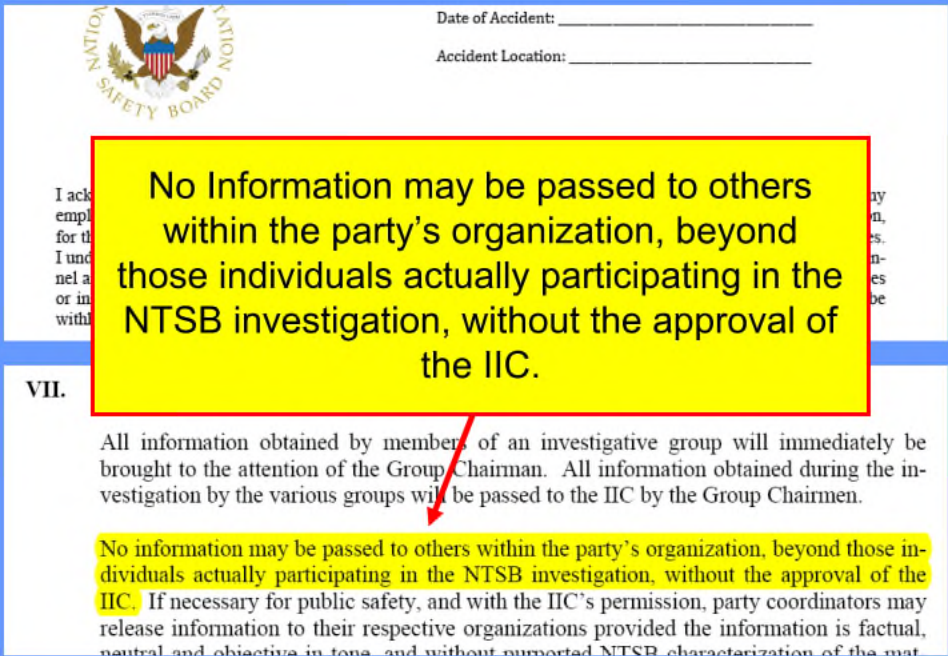
CERTIFICATION OF PARTY REPRESENTATIVE¹

I acknowledge that I am participating in the above-referenced accident or incident investigation, on behalf of my employer who has been named a party to the National Transportation Safety Board (NTSB) safety investigation, for the purpose of providing technical assistance to the NTSB's evidence documentation and fact-finding activities. I understand that as a party participant, I and my organization shall be responsive to the direction of NTSB personnel and may lose party status for conduct that is prejudicial to the investigation or inconsistent with NTSB policies and instructions. No information pertaining to the accident, or in any manner relevant to the investigation, may be furnished to the NTSB by any party or party participant.

I have familiarized myself with the attached copies of the NTSB Accident/Incident Report (Part 831) and Information and Guidance for Parties to NTSB Accident and Investigation, and, if the party coordinator for my party, take all reasonable steps to ensure that my organization comply, with these requirements. This includes, but is not limited to, the selection of investigation information.

I, _____, who also represents claimants or other parties to the investigation, understand that, although factual information may be used in litigation (at the discretion of the court) and 49

10/20/00 49



Date of Accident: _____
Accident Location: _____

No Information may be passed to others within the party's organization, beyond those individuals actually participating in the NTSB investigation, without the approval of the IIC.

VII. All information obtained by members of an investigative group will immediately be brought to the attention of the Group Chairman. All information obtained during the investigation by the various groups will be passed to the IIC by the Group Chairmen.

No information may be passed to others within the party's organization, beyond those individuals actually participating in the NTSB investigation, without the approval of the IIC. If necessary for public safety, and with the IIC's permission, party coordinators may release information to their respective organizations provided the information is factual, neutral and objective in tone, and without purported NTSB characterization of the mat

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NTSB "Investigative Information"

NTSB approval needed to disclose (inside or outside)*

Scope initially very broad

Not limited to post-accident actions or documents

Very dependent on issues being examined

Best practice ☾ Ask NTSB Office of General Counsel

* Safety "need-to-know" exception

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What Can Go Wrong as a Party?

- Compromise of “investigative information”
- Comments, even by Headquarters, regarding causation or “findings”
 - Or about investigative information
 - Or about NTSB investigative activities
- Failure to produce relevant information
 - NTSB expects almost unreasonably fast responses by Parties
- Loss of evidence (yes, it happens)
- Conducting a parallel “investigation”
- Shielding/“coaching” employee witnesses
- “Interviewing” witnesses ahead of NTSB
- Disputes regarding protecting internal findings, company tests, or remedial measures
- Challenges protecting company trade secrets and proprietary matters
- And, ultimately, public rebuke by NTSB and removal as a Party to investigation

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Selection of your Party Coordinator

Critically important person

All documents and information will flow through PC

More than just senior technical company interface

Well-spoken & confident while collegial & collaborative

Prepared and well-briefed on the NTSB process

100% for 15 days, 25% for six months, 10% after

(cannot occupy legal position or represent claimants or insurers)

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Selection of On-Scene Team

Party Coordinator & Lieutenant(s)

Working Group Members

Legal Department Counsel

Outside NTSB-Specific Counsel

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Typical NTSB Investigation Working Groups

- Rail Operations
- Control Systems
- Mechanical
- Human Performance
- Survival Factors
- Event Recorders
- Crashworthiness
- Metallurgical

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Typical NTSB Investigation Working Groups

- Rail Operations
- Control Systems
- Mechanical
- Human Performance
- Survival Factors
- Event Recorders
- Crashworthiness
- Metallurgical
- Corporate Policies
- “Safety Culture”
- Governance
- Regulatory Oversight
- ...

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On-Scene Activity

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NTSB On-Scene Activity

Preservation of perishable evidence including memories

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NTSB On-Scene Activity

Day 1	Arrival, organization, parties & working groups
Day 2	Physical evidence, docs & working groups
Day 3	Evidence, testing, interviews & documents
Days 4-6	More...
Days 7-9	Prep and review of Field Notes

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Board Members @ Press Briefings ...

- "There is no such thing as an accident..."
- "This is indeed a tragic human error"
- Operator turned "a perfectly good [aircraft] into a death trap"
- Operator "intentionally exploited a regulatory loophole"
- Crewmembers experienced "a lot of [psychological] trauma"
- "Illegal" charter flight "never should have been allowed to take off in the first place"

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Party interaction with other stakeholders

Fellow company employees & senior management

NTSB Parties: FRA, unions, others ...

Press

Politicians

Your company's own litigation defense attorneys

Plaintiffs' attorneys & judges (eventually)

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Party interaction with other stakeholders

Fellow company employees & senior management

NTSB Parties: FRA, unions, others ...

Press

Politicians

Your company's own litigation defense attorneys

Plaintiffs' attorneys & judges (eventually)

Local DA's, State Attorney General, U.S. Dept. of Justice

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Post-Scene Activity

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NTSB Factual Phase – Next 6 to 12 Months

Additional document requests

Laboratory testing

Additional factual interviews – “Safety Culture”

- Risk Management
- Safety Management Systems
- Training
- Career development of professionals

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Active Participation

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Be an Active Participant

Provide accurate & timely responses to NTSB inquiries

Be diplomatic, but don't sit back and watch

Strive for a thorough investigation and analysis

Insist on balanced, fair statements & characterizations

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Be Very Active

You may have more experience and equally good ideas

Speak up if perishable evidence is in danger

If important testing is in doubt, make a formal proposal

Do not ignore your internal safety investigation

If a sensitive issue develops – affirmatively respond!

Be a leader

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NTSB Factual Reports

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NTSB Factual Reports are Fully Admissible



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**Sometimes
factual statements
communicate
opinions....**



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NTSB Analytic Phase

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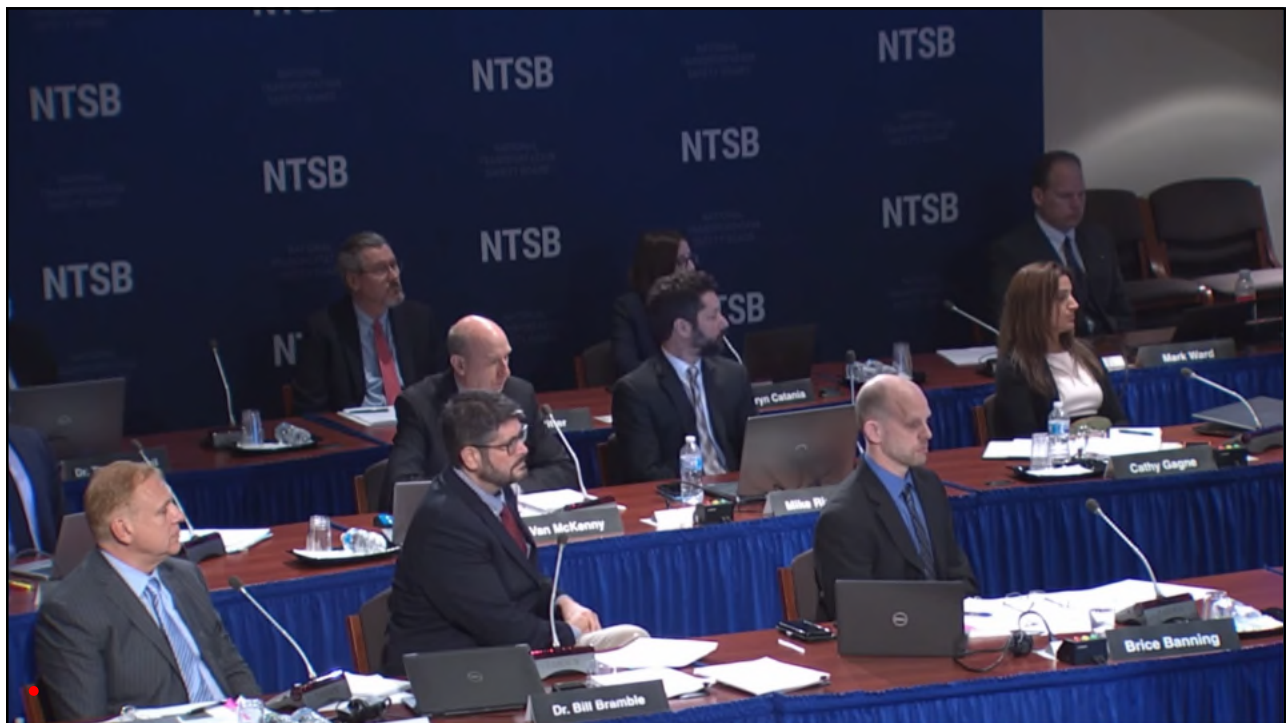
Party Submissions of Proposed Findings

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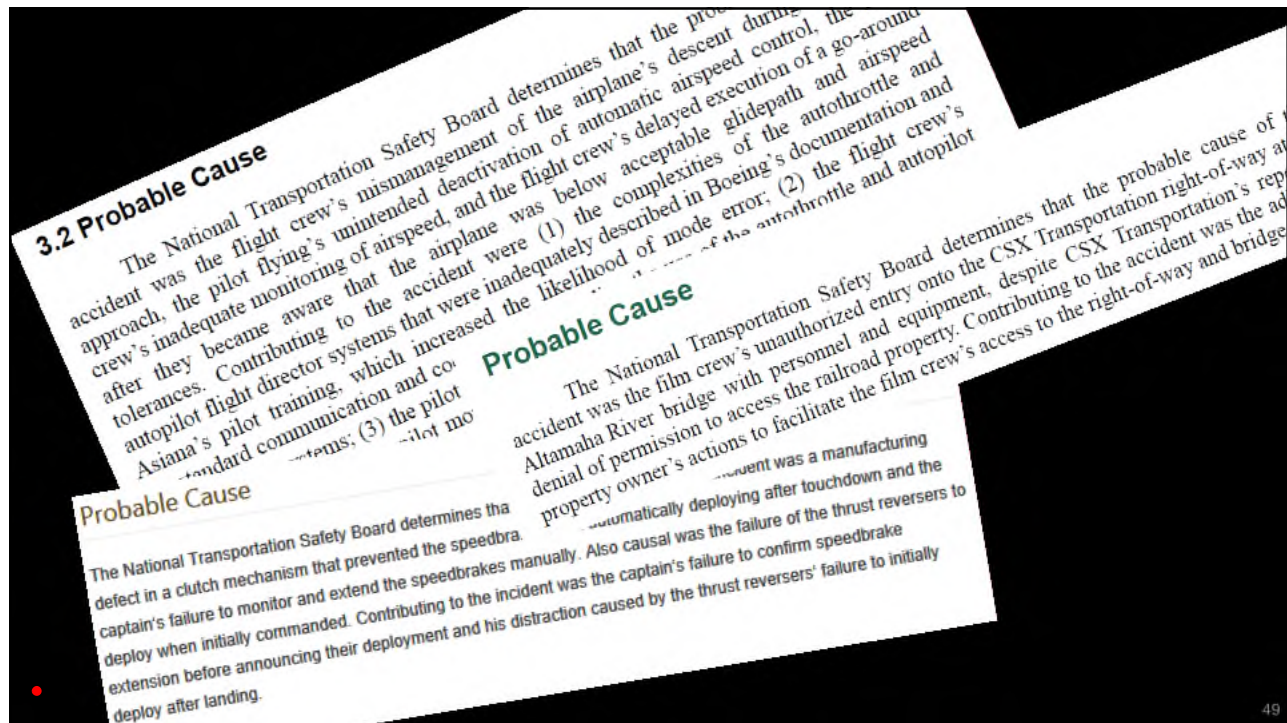
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NTSB Recommendations

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What's Different when the NTSB is Involved?

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What's Different?

NTSB is in charge of investigation

Limitations on external **and** internal communications

Distractions ☾ Requests for assistance, information, documents, interviews & overall process

Scrutiny beyond accident at issue (overall safety culture)

Restrictions in litigation

Difficult to ignore NTSB recommendations

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What Should You be Doing Next to Prepare?

1. Identify likely Party Coordinator (and an alternate!)
2. Train Party Coordinators and emergency response team
3. Review: NTSB “public dockets” from other incidents, NTSB preliminary reports, Party submissions, interviews, accident briefs & reports
4. Select inside counsel team for NTSB activity
5. Select outside NTSB Counsel

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Thank you!

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