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AIRCRAFT ACCIDENT HEARINGS

BY FRITZ L. PULS†

AN AIRCRAFT accident hearing, like the field investigation of a major accident, is just one phase of the total accident inquiry process. Inquiry is defined nationally and internationally as "the process leading to determination of the cause of an aircraft accident including completion of the relevant report."¹

The current regulations of the Civil Aeronautics Board (CAB) indicate that the hearing is a "fact-finding procedure and there are no formal pleadings or issues and no adverse parties."² Since the accident hearing is simply one of the elements that goes into making a complete inquiry, its objective is the same as the field investigation phase—discover the facts, determine the cause, and ascertain accident prevention measures to prevent similar accidents.

The CAB, the agency previously responsible for the investigation of aircraft accidents, in issuing its first procedural regulations for accident hearings, stated in a succinct manner what an accident inquiry hearing is and what it is not. In the preamble to its first rule adopted in 1950, the CAB said the following:

An aircraft accident inquiry is held solely for the purpose of discovering the facts, conditions, and circumstances concerning an aircraft accident in order to determine the probable cause of the accident and to ascertain the measures which will best tend to prevent similar accidents in the future.³

The CAB then went on to state what the inquiry was not. It stated that:

Such inquiries are not held for the purpose of determining the rights or liabilities to private parties, and the Board makes no attempt to do so.

The public hearing process used by the Safety Board today is a product of an evolutionary process which had its beginning in 1934 when the Federal Government first assumed the responsibility for the investigation of aircraft accidents. The use of formal hearings on a regular basis began in the CAB in 1940. From 1940 to 1947, hearings were generally conducted by a panel of staff officials of the CAB's Bureau of Safety with no participation of Board Members. In July 1942, the CAB established general procedures applicable to the exercise and functions by its Safety Bureau. Included therein was a brief reference to hearings. The Director of the Safety Bureau was authorized to convene hearings and conduct same in accordance with Title 7 of the Civil Aeronautics Act. No attempt

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¹ 14 CFR 431.2.

² Annex 13 to the Convention on Civil Aviation, March 1966, Chapter 1.

³ 15 F.R. 6440, September 23, 1950.

was made at that time to spell out any procedural rules for the use and guidance of the Bureau or for the information of the public.

It was not until 1950 that the CAB promulgated Part 303 wherein it set forth, for the first time for the public's information, the procedures followed by the Board in the conduct of its accident inquiries. Part 303 was not intended to prescribe any new procedures but merely to codify and publish procedures then in use by the CAB. Provision was made for a Board of Inquiry composed of a Presiding Officer, an Investigator-in-Charge, and other persons appointed by the Director of the Bureau of Safety Investigation. It was their responsibility to secure, in the form of a public record, all known facts pertaining to the cause of the accident. All questions were asked by the Presiding Officer or other members of the Board of Inquiry. Other persons present could submit questions to the Presiding Officer and witnesses would be queried if the Presiding Officer found the questions proper and relevant to the proceeding.

In 1946, the CAB began the practice of assigning one of its members as Chairman of such hearings, particularly when they involved accidents which had received considerable public attention. By the Mid-50's, it had become a standard practice for a CAB Member to serve as Chairman of the public inquiry in all major accident cases.

These procedures continued in use until February 1957. At that time, following a detailed study of its procedures, it was decided by the Board that its rules should be revised. The study disclosed that there were deficiencies which it was felt inhibited the development of an adequate record for the use of the Board. The use of written questions by interested parties provided them with an inadequate opportunity to contribute to the proceeding. It was proposed that the Board adopt the technique of having designated "Parties-to-the-Investigation" participate in its hearings with spokesmen who would have the opportunity to question witnesses following questioning by the Board personnel. The new rules provided for a Board of Inquiry charged with the responsibility for questioning witnesses. To assist the Board, the Parties-to-the-Investigation were permitted to question witnesses. The Board also provided for a Prehearing Conference where the Board of Inquiry and the parties could review the areas of questioning and the exhibits to be entered into evidence at the hearing.⁴

In adopting the new rules, the Board stated that they would be subject to re-evaluation after gaining some experience with the new procedures.⁵ During the next eighteen months, the CAB held thirteen hearings and the industry's reaction was generally favorable. Opposition was voiced only by claimant attorneys who made numerous requests that they should be designated parties and permitted to attend Prehearing Conferences and be given an opportunity to question witnesses at the hearings. The CAB denied these requests, declaring that it would be undesirable to expand the concept of the Parties-to-the-Investigation to include such representatives. In reviewing this matter, the Board pointed out that the purpose of permitting the

⁴ 22 F.R. 1026, February 20, 1957.

⁵ C.A.B. Press Release 57-20, February 15, 1957.

participation of parties was "not to enhance the position of these parties but to assist the Board in developing a more complete factual record. The manufacturer, the air carrier, the Administrator, or any other group designated as 'Party-to-the-Investigation' must be in a position to contribute specific factual information or skills which would not otherwise be supplied."⁶ The Board went on to state that they felt the congressional policy expressed in section 701(e) of the Federal Aviation Act clearly showed an intent to exclude liability questions from the Board's accident inquiries.

The Board made no major change in the regulations previously adopted, although it did amend them to the extent of spelling out the composition of the Board of Inquiry and providing for a technical panel of Board personnel who would be charged with the responsibility of questioning witnesses for the Board. The Board of Inquiry would consist of a Board Member as Chairman and Presiding Officer, the Director of the Bureau of Safety, or his designee, and a member of the staff of the General Counsel.

The procedural rules adopted in 1957, and as amended in 1959, underwent no significant amendment prior to the time the aviation accident investigation responsibility was transferred to the Safety Board in 1967.

When the Safety Board assumed responsibility, Part 303 was adopted by the Safety Board and renumbered Part 431 of Title 14 of the Code of Federal Regulations.⁷ At the time of the Safety Board's adoption of Part 431, it was stated that the procedure would be continuously reviewed during the first few years to determine if any modifications were necessary. As of today, no modifications have been made, although the matter remains under study.

From the above, one can see that the procedures presently being utilized have been in existence for better than a decade and that their adoption was the result of an evolutionary process. It should be stated here that aircraft accident hearings are not subject to the provisions of the Administrative Procedure Act, there being no final order as defined in such Act, and hence, they are not an "adjudication" as defined in said Act.⁸ It is interesting to note that in the Attorney General's Manual on the APA, aviation accident proceedings held pursuant to Title VII of the then applicable Civil Aeronautics Act of 1938 were identified as a type of hearing which was not within the meaning of section 5 of the Administrative Procedure Act.⁹

The present procedure also is a product of a compromise process. It lies somewhere between the original type of hearing and a full adjudicatory hearing. The original type hearing, while public, was thought by many to bear many of the traits of a "star chamber" proceeding, since only the Board participated in the questioning. There was little or no opportunity for the involvement of others. On the other side of the coin, and a tech-

⁶ 24 F.R. 2224, March 21, 1959.

⁷ 32 F.R. 7139-40, May 11, 1967.

⁸ 5 U.S.C. 554 (1964).

⁹ Attorney General's Manual on the Administrative Procedure Act.

nique never utilized by the CAB or this Board, is a full adversary-type hearing which would of necessity bear many of the elements of an adjudicatory hearing. This type of hearing, while never utilized in the United States, has been utilized and is being utilized by a number of foreign countries. In discussions with representatives of such countries, it has been their view that the adversary-type proceeding is unduly complex, lengthy, and much of its effectiveness toward the goal of accident prevention is lost in the effort to define fault in the legal sense. It has generally been stated by those familiar with both type proceedings that the U.S.-type hearing is far superior, both in achieving a timely disposition of the matter, the adequacy of the record for the purpose intended, namely, accident prevention, and the separation of the statutory purpose of the inquiry from the legal liability problem which inevitably becomes a major factor in such hearings.

While the existing procedure was not consciously developed to achieve a balance between these two extremes, experience indicates that a reasonable, effective compromise has been achieved. The hearing remains under the control of the Board, through its Board of Inquiry, but through the participation of parties a better record is obtained. This is primarily the result of the fact that different parties have different points of view and, although under the hearing scheme they are participating for the purpose of assisting the Board, they nevertheless cannot divest themselves entirely of their own involvement in such proceedings and the questioning from these different points of view has served to provide a more complete record.

It must, of course, be conceded that no procedure is ever perfect nor so effective that modifications may not be required from time to time. However, despite the criticisms which have been leveled at the procedure they have not persuaded the Board that the type of hearing should be significantly altered. Nevertheless, improvements are always under consideration.

Before pursuing some of the objections, I would like to describe the process as it evolves, once a decision is made to hold a hearing. Perhaps the most effective way of imparting to one a clear picture of the hearing process would be to describe, chronologically, what takes place from the time the determination is made to hold a hearing until the proceeding is completed. The decision to hold a public hearing is the responsibility of the Chairman of the Safety Board and he will order a hearing whenever he deems it necessary in the public interest. In reaching his decision, the Chairman will consider the degree of public interest in the particular accident involved, the seriousness of possible deficiencies in the aircraft or related equipment, the type of operation involved, and the potential benefits in terms of accident prevention. Catastrophic air carrier accidents are generally the type in which hearings are held, although there are exceptions to this rule. If a new type of operation is involved, such as an air taxi operation, an accident of less than major proportions is a likely accident for a hearing.

The Chairman's decision is made even more difficult by the high costs and manpower requirements associated with a hearing which make it impossible to hold more than a few in any one year, whereas there are numerous accidents in which a hearing would be appropriate. For example, hearings were held in connection with only nine aviation accidents during 1969, a year in which there were ten fatal air carriers accidents and 651 fatal general aviation accidents.

Once a hearing has been ordered by the Chairman, he will designate a member as Presiding Officer and the Director of the Bureau of Aviation Safety will designate a Hearing Officer, who will then commence to lay the groundwork for the hearing. A Notice of Hearing will be issued, setting forth the time and location of the hearing. This notice will not only be published in the Federal Register, but will also be sent to all known interested persons and publicized in aviation trade journals and local newspapers near the scene of the accident. In past years, hearings have generally been held near the scene of the crash in view of the local interest in the accident.

The staff will then proceed to compile the exhibit material which will be offered as evidence at the hearing. This material consists primarily of factual reports covering the dozen or so areas of the investigation plus related documentation gathered during the course of the investigation, such as photographs, diagrams, charts, witness statements, transcripts and reports of tests or examinations. A list of witnesses whose testimony will cover the areas to be explored at the hearing will be prepared. The witnesses, arranged in what is considered the most logical order, and the list of exhibits will be set forth in a Hearing Outline.

The next step will be the designation of the Parties-to-the-Investigation who will participate in the hearing. Generally, such parties are government agencies and/or companies and associations whose employees, functions, activities or products were involved in the accident and whose special knowledge and aeronautical skills can be expected to contribute to the development of pertinent evidence. Participation in the field investigation is generally a condition precedent to being named a party at the hearing, although the earlier participation does not mean one is automatically named a party at the hearing. As the CAB previously stated, the designation of parties is not to enhance the position of the person or organization named, but to obtain their assistance. Only one party, the FAA, appears as a matter of right.¹⁰

After completion of the foregoing steps, and at least two weeks prior to the hearing, a set of exhibits, the Hearing Outline, and other pertinent material are delivered to the designated parties. They are invited to review this material and to suggest changes or additions and to propose any additional witnesses. They are asked to submit their recommendations in sufficient time to allow the Board to consider them and to take whatever action may be necessary prior to the Prehearing Conference.

The next step is a Prehearing Conference by Board personnel and repre-

¹⁰ 49 U.S.C. 1441(g) (1964).

sentatives of the Parties-to-the-Investigation. The Prehearing Conference may be held a day or two prior to the hearing, or as much as a week before the hearing, if there are complex problems to be resolved. The purpose of the Prehearing Conference is to brief the parties on hearing procedures, to finalize the exhibits and list of witnesses, including their areas of testimony, and to resolve any difficulties which might tend to prolong the hearing. Experience has shown that hearings are considerably more productive if everyone is fully apprised of what to expect and if serious problem areas are minimized to the extent possible.

The hearing itself is held before a Board of Inquiry, which is composed of the following persons: A Member of the National Transportation Safety Board who, as Chairman of the Board of Inquiry, acts as the Presiding Officer; the Director of the Bureau of Aviation Safety, or his designee; the designated Hearing Officer; and the General Counsel, or his designee. In an overall sense, the Board of Inquiry is responsible for securing in the form of a public record all of the known facts pertaining to the accident.

The Chairman of the Board of Inquiry is in charge of the hearing and has the responsibility to assure that the hearing is conducted in an orderly manner. He opens and closes the proceeding, calls the witnesses, and regulates the course of the hearing with respect to the admissibility of evidence and the disposition of procedural matters.

The questioning of the witnesses, on behalf of the Safety Board, is conducted primarily by a Technical Panel which is composed of four or five air safety investigators who performed major roles in the investigation. The panel is anchored by the Investigator-in-Charge. Each of the panel members is assigned to question those witnesses whose testimony lies within his specialty.

The hearing, of course, is open to the public. The Chairman of the Board of Inquiry commences the hearing with an opening statement in which he briefly describes the facts of the accident, outlines the purposes and procedures of the hearing, and identifies the participants. The first witness called is traditionally the Investigator-in-Charge, who summarizes the investigation to date and places the exhibits into the record. The remaining witnesses are then called in the order set forth in the Hearing Outline. The witnesses are initially examined by the Technical Panel, following which the parties, through their spokesman, are given the opportunity to ask additional questions.

In keeping with the non-adversary nature of the proceeding, it is stated that "cross-examination in the legal sense" is not permitted. What is really intended is that every effort will be made to avoid questioning which would serve to impeach, entrap, or otherwise attack the reputation of a witness. Questions which are unduly repetitious and cumulative will be ruled out of order. All rulings of the Chairman concerning the materiality, relevancy and competency of witnesses' testimony, exhibits or physical evidence are final and are not subject to objection by the parties.

Two types of complications occur infrequently which deserve mention.

Under the Federal Aviation Act, the Board has the authority to grant immunity and compel testimony¹¹ and it may upon request, or on its own motion, order that information obtained by the Board be withheld from public disclosure.¹² The exercise of such authority is reserved unto the full Board. A determination by the Board is required before such action can be taken by the Board of Inquiry at the hearing.

In the last three years, a refusal of testimony, absent of grant of immunity, has occurred only once. On that occasion, the need for the testimony was not deemed sufficient for the Board to grant the requested immunity and compel the testimony. Only one request for confidentiality has been processed in the same period. In that case the Board, by formal order, denied a request to withhold from public disclosure the pertinent portions of a readout of the cockpit voice recorder.¹³

Following the completion of the hearing, and within the time specified by the regulations, any person may submit his recommendations as to the proper conclusions to be drawn from the testimony and exhibits submitted at the hearing. The regulations also provide that an accident investigation is never closed but is kept open for the submission of new and pertinent evidence. These provisions manifest the Board's philosophy of utilizing every possible source of information in attempting to reach the correct conclusions as to the reasons for the accident.

The public record of the investigation includes the transcript of the hearing and/or depositions, the exhibits, any recommendations submitted by interested persons, and all other information concerning the accident which the Board has not ordered to be withheld from the public. In its final form the record becomes the public docket of the Board and is on file in Washington, D.C. It may be reviewed by the public and any person may obtain a copy of the docket by ordering one and paying duplication charges.

I would now like to mention several of the more common complaints concerning our proceedings. The first involves the designation of parties. The position of claimant's attorneys has not changed. They still urge that the presence of one or more of their number would enhance the record. One prominent practitioner described the process of questioning by the Board's panel and the parties at a hearing as comparable to the practice of brain surgery by plumbers. The expertise available is recognized, but so is the primary motive in seeking such participation. The resolution by the CAB in 1959 of the question of whether claimant's attorneys should participate in hearings is still deemed to be a wise decision.

Another complaint, often voiced by the press, is that the hearing does not present a complete picture of what occurred. This is true, but only because the hearing record used by the Board consists not only of the testimony which they hear but also the extensive exhibits, which they generally do not understand. It is not the intent of the Board to develop, in de-

¹¹ 49 U.S.C. 1484(i) (1964).

¹² 49 U.S.C. 1504 (1964).

¹³ NTSB Order No. SO-1 adopted December 5, 1967.

tail, at the hearing all of the areas of inquiry. On some occasions, the hearing may deal exclusively with one or two areas to the exclusion of others. The areas covered will be those requiring the necessary elaboration and verification provided by the testimony of live witnesses.

A third area of criticism is the absence of analytical testimony, particularly someone to say "How did it happen?". This criticism stems from a lack of understanding of the process. As was said earlier, accident hearings are an extension of the fact-finding process. The hard task of analysis comes later. Causation of today's complex accidents is generally the product of detailed analysis, testing and research. Answers do not come easy. The alternatives may be many.

A fourth area of complaint, and one of particular concern to some of the Board's staff, is whether the fear of litigation is having an adverse effect on Board hearings. It would be naive of me not to acknowledge such a trend. It is a development not peculiar to the Safety Board or any other agency working in the transportation safety field. The critical question is whether it is a trend which will inhibit the Board in the performance of its primary function of accident prevention. To the extent we permit its influence to cut off lines of communication or to make more difficult the development of all of the facts, it is not in the public interest. To the extent that either fear of or contemplation of litigation serves to assist the Board in its search for the facts, the public interest is being served. The maintenance of the delicate balance involved presents a challenge to both Board procedures and to those of us who seek to implement such procedures.

In closing, I would like to summarize briefly what I believe to be the major points in discussing the aviation accident hearing process. First, the purpose of the inquiry, including the hearing, is to develop the facts necessary to determine cause and ascertain corrective measures. Second, the hearing is not held for the purpose of determining rights or liabilities. Third, the use of parties is to assist the Board, not enhance the position of such parties. Fourth, the hearing is only one part of the inquiry process. These considerations are basic to any evaluation of the process.