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SHORTENING THE RECORD IN CAB PROCEEDINGS THROUGH ELIMINATION OF UNNECESSARY AND HAZARDOUS CROSS-EXAMINATION

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The Problem of Delay

ON May 27th, 1955, Chairman Ross Rizley of the Civil Aeronautics Board estimated in testimony before a Senate Sub-Committee on Appropriations that as of March 1, 1955, there were pending before the Board approximately 850 airline new route applications requiring hearings to be held pursuant to section 401 of the Civil Aeronautics Act of 1938, as amended, prior to final decision. Of this total 195 were less than 18 months old, 215 were between 18 months and 3 years old, and 445 had been docketed more than 3 years previously. At the present staffing level the Chairman estimated that 130 applications could be disposed of within the coming fiscal year.[1] Since 1 year earlier, then Chairman Gurney had noted only 650 pending route applications,[2] it is evident that at the current experienced rate of receipt of new dockets and processing of old ones, the Board is operating in considerably increasing arrears.[3] The average number of CAB employees during fiscal year 1955 was 550 of whom only 16 were Hearing Examiners qualified to conduct economic proceedings.

The appalling character of the task facing the CAB Examining and Opinion Writing staffs is illustrated by the length of the records in some of the principal cases now pending. For example, the transcript in the *Large Irregular Air Carrier Investigation,* Docket No. 5132, totaled 30,066 pages, covering 274 days in hearing; the *Additional Southwest-Northeast Service Case,* Docket No. 3255, totaled 7,766 pages, covering 61 days of hearing; the *Air Freight Forwarder Investigation,* Docket No. 5947 et al., covered 6,940 pages of transcript and 37 days of hearing; the *New York-Chicago Service Case,* Docket No. 986 et al. entailed 4,059 pages and 29 days of hearing; the *Denver*

[1] Hearings before the Sub-Committee of the Committee on Appropriations U. S. Senate 84th Congress 1st Session on H.R. 6367 p. 267.

[2] Hearings before the Sub-Committee of the Committee on Appropriations, U. S. Senate 83rd Cong. 2nd Sess. on H.R. 8067 at p. 1966.

[3] The Chairman gave a somewhat more optimistic picture of the mail rate proceeding situation. There were 71 cases pending as of July 1, 1954, of which 60 were estimated to be disposed of during fiscal 1955 with 51 new cases being opened. (P. 266 of Hearings in fn 1 above.)

Service Case, Docket No. 1841, covered 4,719 pages of transcript and 37 days of hearing; and the *ACTA-IMATA Commercial Charter Exchange Investigation,* Docket No. 6580, covered 4,654 pages of transcript and 35 days of hearing.

Some idea of the lapse of time involved in analyzing records of this size (which it should be noted do not include the voluminous written exhibits and prepared testimony) may be culled from the records of the Board's Docket Section relating to the lag between the filing of briefs to the Examiner, and issuance of an Examiner's initial decision and subsequently between time of submission of the case to the Board and issuance of its final decision. Thus, in the *Pacific Northwest-Alaska Tariff Investigation,* Docket No. 5067 *et. al.,* where the transcript of hearing totaled 3,042 pages, 88 days elapsed between filing of briefs and initial decision, and 58 days between submission and final decision; in the *Colonial-Eastern Merger Investigation,* Docket No. 5666 *et al.,* where the transcript totaled 5,719 pages, 73 days ensued between briefs and initial decision and 209 between submission and final decision. Although the *Flying Tiger-Slick Merger Investigation,* Docket No. 6047 *et al.,* consumed only 551 pages of testimony, the complexity of the case was such that 49 days elapsed between briefs and initial decision and 51 between submission and final decision. This is not a complete picture either; for it may be assumed that some progress was made during the period from close of hearing to filing of briefs unless the Examiner's schedule was so overloaded as not to permit of any study of the record until briefs were filed.

It is standard practice in CAB proceedings to require that affirmative testimony be reduced to written form for circulation in advance of the sponsoring witness's appearance. In this manner direct examination is practically reduced to elucidating minor corrections in exhibits and written testimony and in some instances to furnishing some additional qualifications of the witness. As a result approximately 95 percent of the average transcript is consumed by cross-examination and re-cross examination requiring exhaustive and time-consuming analysis, comparison, sifting and evaluation first in the preparation of the Examiner's initial decision and again by the Opinion Writing Division in its draft of the Board's final decision. The subject of the ensuing discussion will be to consider whether some cross-examination is unnecessary or even hazardous to the examining attorney and those appearing on his side of the issue; what, if anything, the Examiner can legally and, as a practical manner, accomplish to limit the extent of such cross-examination, and finally what remedies, if any, can be employed to alleviate this aspect of the problem of administrative delay.

The events hereinafter described will be disguised or reconstructed in an attempt to preserve anonymity. Any similarity between any of

the characters and situations depicted and the reader of this article is unintentional and purely coincidental.

Recapitulation of Prepared Affirmative Testimony

As Judge E. Barrett Prettyman of the District of Columbia Circuit Court of Appeals so aptly put it in a recent article on the same subject:

> "All too often lawyers seem to think it essential to demonstration of their virility that they cross-examine every adverse witness. I sometimes think these lawyers read too many story books. It may be sad news to them, but the instances in which cross-examination has wrecked a competent witness are few indeed, especially in administrative proceedings, and, moreover, it is a fact that the best weapon with which to destroy hurtful evidence is a good capable witness in rebuttal."[4]

Seldom is this admonition better illustrated than in the situation where counsel attempts, frequently line-by-line, to cross-examine a witness upon his carefully prepared written affirmative testimony. Thus in a recent case an intervenor trade association appeared in support of an exemption from all regulation by the Board, although the association was not then operating so as to come within the Board's jurisdiction and did not contemplate such an operation in the near future. The witness presented a two and a half page document extolling the virtues of free enterprise, voluntary cooperative associations and freedom from government regulation. Cross-examination of this witness consumed 96 pages of transcript involving the better part of a day on the stand. Some of the questions asked included the following:

> Q. "Is it your view with respect to Government regulation that regulation should in all cases come after abuses arise, rather than be prevented and be put into effect before the abuses occur?
>
> Q. "Do you think that abuses that have arisen in the surface field caused by associations in the surface field, as they have been presented to the Interstate Commerce Commission, should be considered by the Civil Aeronautics Board, by the Examiner, in determining whether the association should be regulated here?
>
> Q. "Now if the Government decides that there is such a public need for the applicants, and if it is deemed necessary to place these applicants under restrictive regulation, would it be wise under those conditions to allow their competitors for whom there may also be a public need to be entirely free from regulation? In other words, my question might very well be put: 'Shall the applicants actually be issued a license to lose money or to be driven into bankruptcy?' If the Civil Aeronautics Board deemed it necessary to place the applicants under regulations similar to the type of regulation it now has, is it your position that any competitive form of air carriage should not be placed under supervision or regulation?"

These questions, although relevant to the issues, were so broad in scope as to allow the witness, whose position had been carefully pre-

[4] "Reducing the Delay in Administrative Hearing" Judge E. Barrett Prettyman, Vol. 39 American Bar Association Journal p. 966, 969 Nov. 1953.

pared presumably after extended conference with counsel, to elaborate his written testimony, filling in the omissions wherever possible, accentuating the high points with appropriate gestures and producing a vivid impression upon the presiding Examiner. The latter, then being in the last stages of a 37-day hearing, may not have had the time, or even perhaps the inclination, to have carefully studied the prepared testimony prior to the witness's appearance. Nevertheless, even if the cold statement had been previously read by the Examiner, there is little doubt but that the embellishment caused by the point-by-point recapitulation of the direct testimony could not fail to have created a more telling effect.

One of the other attorneys handled the situation more skillfully. Since the organization represented on the stand was not then engaged in the operation proposed to be regulated—and probably would not be thus engaged until some remote time in the future—he brushed aside the direct testimony as merely of academic interest. Had not the damage already been done, the Examiner might well have ignored the entire presentation instead of making it a basic tenet of his decision with respect to the parties then operating.

Such redevelopment of direct testimony may be a proper technique for a Public Counsel or even for an Examiner struggling to dissect and more fully comprehend the issues in a complicated economic regulation proceeding. But where counsel in effect regurgitates his opponent's policy views in logical order, the result is an enlarged record, unduly time-consuming and expensive for all concerned, and extremely dangerous to the maintenance of the cross-examiner's position. Moreover, experience has shown that successful cross-examination is more often than not illogical in sequence. After all the witness either prepared or studied his statement in the form in which it was presented. Consequently inconsistencies or damaging admissions are more easily obtained if the order of examination is inverted—or better—scattered. The point is that a mere rehearsal of direct examination is not *cross*-examination at all. It is a waste of everyone's time; it substantially increases the cost of litigation; worse, it may have a boomerang effect.

Yet, the subject matter is relevant and material to the issues of the proceeding and is technically admissible as the opinion of an expert witness of many years actual experience in the field being regulated. An attempt by the Examiner to shut off the examination would probably be met with the argument, plausible if unduly optimistic, that the examining attorney was properly attempting to demonstrate the absurdity of his opponent's position.

While frequently the Examiner may attempt to limit such cross-examination with the remark that policy disagreements should properly be reserved for brief, the persistent attorney would appear to be within his rights to attempt to ferret out and destroy his opponent's position and thereby transmit a quick impression to the Examiner—"jury" favorable to his client in advance of brief. After all an attorney

has no guarantee that an Examiner will read and consider every point in his brief.

More recently there has been a tendency for some airline counsel to present a statement of the company's position as a statement of counsel—not subject to cross-examination. Such a practice adequately informs all parties and the Examiner of the position of the party and avoids the possibility of encumbering the record with the type of futile cross-examination illustrated.

Cross-examination for Information Purposes

Mr. Justice Louis D. Brandeis once said:

> "The successful cross-examiner must possess a knowledge of the case which is greater than the sum of the knowledge possessed by all of the witnesses. You can represent the knowledge of the witnesses by a cluster of dots. One witness will know one dot on the edge of that cluster, one in the center, etc. Another will know a row of dots along one edge. Each witness knows, too, the line or lines connecting his dots. But the knowledge of the cross-examiner who is successful will be represented by the circle drawn around all the dots. Then, a witness may attempt to connect a dot within the circle to one without. Or he may attempt to draw a line tangent to the circle. It is when he makes these attempts that he is tripped up in cross-examination."[5]

All too frequently a situation has arisen where the cross-examiner, instead of confining the examination to matters within his own knowledge, asks a witness a broad, general, informative type of question the answers to which far from strengthening the cross-examiner's case merely afford's the witness an opportunity to furnish data favorable to his position which may have been omitted from the direct examination. For example, in a recent case a certificated air carrier attorney was cross-examining a non-scheduled carrier witness with respect to his operations as follows:

Q. "During the period that you were performing charter work for XYZ company, were you also successful in getting a return load to Phoenix from Los Angeles?"

Q. "How did you get those return loads?"

Q. Did you solicit any of these companies for that return business?"

Q. "How many times have the applicants used your services?"

Q. "Do you own the airplane that you now have?"

Q. "And the five pilots are permanent employees?"

The foregoing series of questions did not to any degree destroy the credibility of the witness or elicit admissions favorable to the cross-examiner's theory of the case. On the other hand, it served to provide the record and the Examiner with additional information which, if anything, strengthened the impression which the witness was

[5] Quoted in "The Brandeis Guide to the Modern World," edited by Alfred Lief, p. 315-316, published by Little, Brown and Company, 1941.

attempting to convey, namely, that his was a soundly operated though small airline—energetic in its attempts to develop traffic.

These questions should never have been put unless the cross-examiner knew the answers and also was certain that they were favorable to his position. Moreover, this error may be compounded where the cross-examiner is but one of several parties on the same side of the issue. In that case the new data elicited from the witness may adversely affect all that attorney's allies.

The inherent danger of not knowing the answer to a question before it is put was clearly underlined in a recent airport safety case. During a morning session the regional chief pilot for the airline involved was asked to state how many complaints had been received from the other pilots of his region who had landed at the point in question. The answer was, "Three over a period of a year." Some time after the noon recess another pilot witness took the stand—this time the safety representative for the airline's union chapter. During direct examination nothing was said about the number of similar complaints received from other pilots. However, on cross-examination one of the local attorneys asked the witness the same question previously asked of the regional chief pilot. The answer this time was "at least 15 complaints."

While it is true that this question and answer did not unduly burden the record, nevertheless, the situation is illustrative of the hazards of unnecessary and unprepared cross-examination.

This "hit or miss" type of cross-examination for information purposes occurs frequently in long drawn-out proceedings where the attorneys, being hard pressed by other responsibilities, are unable to attend all the hearings. Many situations have arisen where counsel having been absent during an early session of the hearing will arrive perhaps several days later and innocently commence cross-examining on ground previously covered by other attorneys—this time eliciting responses from the witness which have had the benefit of reflection and counsel. The result is a confused record—not necessarily in all cases reflecting adversely upon the witness's ultimate credibility since the answers given in the first instance may have been merely the result of incomplete thought which upon further reflection became more complete, logical, and effective.

It may be contended that perhaps the matter would have been uncovered on redirect examination in any event. However, counsel do not always recover all elements of lost ground on redirect. Moreover, occasionally, redirect occurs at the end of the day when the parties, and perhaps even the Examiner, may have become somewhat weary; so that a prolonged re-examination may not receive the attention that perhaps it deserves. Under these circumstances, it may be prudent for counsel to forego the privilege of redirect at least partially if not entirely, leaving unrepaired the damage suffered on cross.

In any event the ejection of a telling "second-guess" reply to cross-

examination which is apparently spontaneous may have a more electrifying effect on the Examiner and serve to persuade him of the merit of the witness's position much more effectively than if the answer had been given on redirect where it may be assumed to be self-serving and probably the result of a recess rehearsal.

Asking the Ultimate Question

Francis L. Wellman once gave this advice concerning the cross-examiner who didn't know when to halt after having scored a point:

> "Stop boring when you hit oil—many a man has bored clear through and let the oil run out of the bottom."[6]

Sometimes attorneys insist upon asking the witness, usually an airline executive, the ultimate proposition which the cross-examiner is trying to establish instead of stopping after the constituent factors have been identified leaving the conclusion to be drawn therefrom to be argued on brief. For example, if it is a part of the interrogator's case that there is a need for an additional all-cargo service which the existing certificated carriers do not provide, a favorite method of attack is to ask the defending airline witness how many all-cargo type aircraft his company owns. In a recent case this question was asked and the witness replied: "None—We sold our last DC-4 all-cargo plane three months ago." The cross-examiner scenting impending victory pursued further:

> Q. "So XYZ airline has no interest in providing all-cargo transportation, has it?"

The witness obviously prepared for such a question answered in great detail, setting forth the experience of the company in providing cargo service through combination passenger and cargo equipment and how its former all-cargo aircraft had not been fully utilized when in service with the result that it was deemed to be sound management policy to dispose of the all-cargo fleet. Had the ultimate question not been asked, a point would have been scored for later elaboration in brief; opposing counsel may have neglected to cover it on redirect, or the Examiner may have disregarded such redirect as obviously prepared during recess.

Another illustration comes to mind. In a new route proceeding the following question was asked:

> Q. "Will you just clear me up, then—just how this St. Petersburg service is going to help you compete with XYZ airline between Miami and New Orleans?"

The witness then replied in detail, setting forth the various reasons: why such an authorization would permit his company to operate schedules which might not otherwise be justified by intermediate traffic, why the intermediate point would be a point of traffic genera-

[6] "The Art of Cross-Examination," Francis L. Wellman, the MacMillan Company, 1925.

tion which would enable his company to meet the competition which it faces from a rival airline thereby resulting in the strengthening of the entire route structure.

Very clearly the witness had conveyed the complete theory of his case which was later to be reiterated in brief by his counsel thereby gaining the advantage of a quick impression on the Examiner. Needless to say the record was unnecessarily enlarged by several pages. Finally, the cross-examiner's question was improperly phrased in that it not only sought to elicit the ultimate question at issue in the case but it also included one of the two greatest pitfalls in cross-examination: namely, questions commencing with the words "how" and "why."

By this time the reader, if he is a practicing attorney, has probably concluded that the root of the problem of shortening the record lies at the feet of the Examiner who sits idly by permitting useless material to enlarge the record without stepping in quickly with an exclusionary ruling to stem the overflow.

Unfortunately, however, the courts do not appear to agree with this view of the Examiner's function.

The Proper Role of the Examiner

When questions are asked which are outside the scope of proper cross-examination and no objection is raised, the Examiner finds himself in this dilemma: if he steps in to stop the examination he may appear to be favoring one side or the other—especially, if the question is relevant and material but is also of the type that is likely to boomerang against the cross-examiner and therefore no objection is raised by opposing counsel. Secondly, if the Examiner intervenes, the probability is that the cross-examiner will object and state the reasons for desiring to ask the question, his opponent will counter-argue and as a result more space is consumed on the record than if the Examiner had simply allowed the question to be answered without interruption in the first place.

At least three courts have spoken out against Examiner interference. In *Associated Laboratories* v. *F.T.C.* 150 F 2nd 629 (CCA 2-1945) the Examiner's exclusion of borderline irrelevant evidence was upheld but the Court said at p. 630:

> ". . . we should have been better satisfied had he let it in. Irrelevant evidence will of course inevitably to some extent prolong a trial; but ordinarily that is the only issue at stake in its admission; and it is almost always better to let it in, unless it will consume too much time, or unless it is palpably not offered in good faith. To exclude it is often to invite nice questions of dialectic, which are the curse of the whole law of evidence, and which only serve to confuse those engaged in the trial and to provoke idle appeals, as here."

In *Samuel H. Moss, Inc.* v. *Federal Trade Commission,* 148 F. 2d 378 (CCA 2, 1945), cert. den. 326 U. S. 734 (1945)—the same Circuit

Court criticized a strict ruling on relevancy in the following terms at p. 380:

> ". . . if the case was to be tried with strictness, the examiner was right. It is quite true that if he had not so tried it a less confusing record would have resulted. Why either he or the Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude evidence, and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chances that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy."

In *Donnelley Garment Co.* v. *NLRB* 123 F 2d 215 (1941) the Court stated at p. 224:

> ". . . we expressed the opinion that the practice which should be followed by a trial examiner in taking evidence and ruling upon objections to evidence is that which applies to special masters in equity proceedings, and 'that the record should contain all evidence offered by any party in interest, except such as is palpably incompetent . . .' . . . If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided."

See also *NLRB* v. *Washington Dehydrating Food Co.* 118 F. 2d 980, 986 (CCA-9th 1941), where the Examiner who cut short cross-examination in a labor relations proceeding was held to have been biased on that ground, *inter alia.*

Congress has also tied the hands of the Examiner to some extent. Thus, Section 7 (c) of the Administrative Procedure Act provides:

> "Every party shall have the right . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts."

However, the House Committee Report on this section at first glance appears to enhance the power of the Examiner to control cross-examination. It provides as follows:

> "The provision on its face does not confer a right of so-called 'unlimited' cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths by a party or whether it is required for the 'full and true disclosure of the facts' stated in the provision. Nor is it the intention to eliminate the authority to agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states whether it is required 'for a full and true disclosure of the facts.' In many

rule-making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings. The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the section as well as to cases, in which oral or documentary evidence is received in open hearing. . . ."[7]

If the Committee Report had stopped at that point it might be said that the Examiner's problem was solved, but unfortunately the Report continued:

". . . To the extent that cross-examination is necessary to bring out the truth, the party must have it."[8]

Moreover, the problem of limiting cross-examination is complicated by the broad definition of public interest and public convenience and necessity considerations found in the Civil Aeronautics Act.[9] Thus, even though particular cross-examination may be unnecessary, if the interrogator is adamant in pressing his questions, it is difficult indeed for an Examiner reasonably to exclude them as irrelevant or immaterial to the issues involved in a CAB proceeding in view of the latitude encompassed by section 2.

On the other hand Professor Kenneth Culp Davis believes that cross-examination of so-called legislative facts is both unnecessary and objectionable. In his treatise on Administrative Law he states:

"After all, probably the brief and the oral argument are the most usual vehicles for presenting legislative facts. This is true not merely when a so-called Brandeis brief is used, but it is also true of the conventional brief or argument, in which factual observations are necessarily interwoven with other materials. Cross-examination is frequently not only unnecessary for legislative facts but affirmatively objectionable because of its awkwardness, as the experience of such agencies as the Wage and Hour Division and of the Food and Drug Administration rather clearly shows. See, e.g., Att'y Gen. Comm. Ad. Proc. Monograph, FLSA 38 (1940): '. . . a major stumbling block to the free utilization of available informa-

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[7] 79th Congress 2d Session Senate Document 248 p. 271.

[8] *Id.* See to same effect Senate Committee Report *id* p. 209.

[9] Section 2

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

> tion has been cross-examination. . . . [The] insistence upon cross-examination . . . has tended to lengthen and clog the record.' A reading of the records of wage-order hearings discloses lamentably few nuggets in the battle of lawyers' wits. One need only read through the more than 100 pages devoted to an attorney's endless cross-examination of an economist . . . to realize that cross-examination may not be the best method of elucidating facts."[10]

A substantial stride forward has been taken by the President's Conference on Administrative Procedure in its report receipted by the President on March 3, 1955. Recommendation B1 relating to "Exclusion of Evidence" provides as follows:

> ". . . That the United States Courts be urged to encourage hearing officers and agencies in formal administrative proceedings to exclude irrelevant, immaterial and repetitious evidence."[11]

CONCLUSION

The situation calls for a revived spirit of cooperation among attorneys, Examiners, The Board and the Courts in the task of limiting cross-examination and thereby cutting the cost of litigation and reducing the delay which affects the right of litigants further down on the calendar to early relief.

Lawyers should restrain their natural instinct for too great detail. Complicated economic regulatory proceedings are seldom if ever decided upon the basis of minutiae. As has been shown, unduly meticulous and persistent cross-examination is a frequently unnecessary and often dangerous procedure which may produce an opposite effect upon the Examiner than the one intended. Concentration upon the highlight propositions to be established and greater reliance upon rebuttal witnesses would be helpful to the cause of shortening the

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[10] "Administrative Law" by Kenneth Culp Davis published by West Publishing Co. 1951 p. 498 fn 71. The author defines legislative facts as "those a tribunal seeks in order to assist itself in the legislative process of creating law or determining policy. Legislative facts are ordinarily general and do not concern merely the immediate parties." Id p. 487.

[11] In its comment on this recommendation the Conference stated in part as follows:

"This Conference concurs in the views expressed by the Judicial Conference when, by adopting the Report of its Advisory Committee on Administrative Procedure on September 24-26, 1951, it stated (on p. 5 of the Report) as follows: '. . . The tendency on the part of hearing officers to excessive leniency (in admitting irrelevant and immaterial evidence) has been due principally to the attitude of the regulatory agencies themselves and of the Federal courts, which have criticized hearing officers for excluding evidence of doubtful relevancy in unwarrantedly sweeping terms.

" 'The resulting reaction on the part of hearing officers has been an unwarranted degree of liberality in the reception of evidence. In fact, many courts, agencies, hearing officers, and members of the Bar, both government and private, have had a fixed attitude against any restriction of evidence in administrative proceedings. That attitude is a prime cause of the conditions (excessive delay and expense and unduly voluminous records) here considered. Without a reversal of that attitude on the part of all concerned, no remedial steps can be effective . . .'

"In the course of this Conference's work, there has been found confirmation of the marked influence of judicial criticism upon the attitude of hearing officers in admitting evidence. It is believed that much would be accomplished to counteract excessive leniency by the expression of occasional words of encouragement in court opinions directed to the hearing officer who has correctly excluded evidence."

record and might also be more effective advocacy. If counsel feel that curtailed cross-examination is too cryptic or subtle for the full understanding of the Examiner before the case has been briefed, perhaps a short oral argument at the close of the hearing should be held so that counsel may sum up the facts believed to have been established much as the summation before a jury in civil and criminal courts. A healthy and effective step in the right direction is that taken by attorneys who reduce policy testimony to statements of counsel not subject to cross-examination.

On our part we Examiners should be more willing to risk reversal by stepping in quickly with an exclusionary ruling before needless colloquy between counsel and witness over policy considerations hopelessly clutters the record at the expense of all parties concerned. Examiners should limit cross-examination to factual matters. Cross-examination on opinion testimony should be closely confined to legitimate areas such as impeachment by prior inconsistent testimony or qualifications as an expert. It should never be permitted to degenerate into a debate between counsel and witness over policy matters. Repetitious questioning by attorneys who have not been in attendance throughout the hearing should be ruled out of order. More extended use of off-the-record resolution of colloquy between counsel and between counsel and witness should be employed followed by a short summarization of the agreement by the Examiner on the record subject to exception or amendment by participating counsel.

However, there is nothing that an Examiner can or properly should do to eliminate hazardous cross-examination. This is a matter of self-control on the part of attorneys in the interest of their clients as well as their professional standing. There is a real place for skillful cross-examination in CAB proceedings by uncovering prior inconsistent testimony, identifying false logic in preparing forecasts of traffic and operating costs, and exposing outright errors in computations and purported facts of fitness and ability—to name a few areas. But if one of the purposes of cross-examination is to discredit a witness in the eyes of the Examiner—jury, unless the question is so narrowly phrased as to permit only one line of response and the cross-examiner knows that such a response must of necessity be favorable to his position—the question had better not be posed.

The Board and the Courts should stand ready to affirm the Examiner who, without acting arbitrarily, attempts to keep the record within reasonable bounds. Part of the task of judicial administration is the expeditious processing of applications and petitions for relief. Often justice too long delayed is not justice at all. Applicants for licenses cannot be expected to earmark capital for new ventures for too many years while awaiting their approval. The Board and the Courts, in recognition of this situation, should reconsider and reverse the philosophy of the cited decisions which discourage the Examiner who takes a short stride toward expediting administrative proceedings by limiting cross-examination strictly to legitimate areas.