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PROCEDURE IN SAFETY ENFORCEMENT PROCEEDINGS WITH RESPECT TO AIRMAN CERTIFICATES—THE EVOLUTION OF AN ADMINISTRATIVE PROCEDURE

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INTRODUCTION

THE procedure in safety enforcement proceedings,¹ held by the Civil Aeronautics Board pursuant to the provisions of Title VI of the Civil Aeronautics Act of 1938,² as amended,³ has passed through an interesting evolution. In such proceedings, hearings are held for the suspension or revocation of airman certificates of pilots or mechanics who endanger air safety by violating provisions of the Civil Air Regulations. Other certificates may also be involved in such actions.⁴ Such proceedings also include hearings held upon appeals to the Board by applicants for airman certificates who are denied certificates by the issuing authority, the Administrator of Civil Aeronautics.⁵

¹ Safety enforcement proceedings should be distinguished from other proceedings conducted by the Civil Aeronautics Board, such as those for the investigation of accidents, for the promulgation of regulations, and for the determination of various issues arising in the economic regulation of air carriers. Such proceedings are conducted under other procedures which are severally more appropriate.

² Sections 601-610 of the Civil Aeronautics Act, June 23, 1938, c.601, 52 Stat. 977, 49 USC 401.

³ For the purposes of this article, the principal amendment was the enactment of Reorganization Plans III and IV, sec. 7 in each, effective June 30, 1940; 5 F.R. 2109, 2421, 54 Stat. 1233, 1235. Prior to this date, the Board was known as the "Civil Aeronautics Authority" or simply the "Authority." Herein, it will uniformly be called the Board and the Civil Aeronautics Act of 1938, as amended, the Act.

⁴ Certificate of parachute technicians, control tower operators or aircraft dispatchers, the production certificates of manufacturers, the operating certificates of air carriers, or the certificates of air agencies such as flight, ground or mechanic schools or repair stations.

⁵ Section 602 of the Act, as amended. The Reorganization Plans referred to in the footnote above created separate powers for the Administrator of Civil Aeronautics, hereinafter called the Administrator, and transferred to him the power to issue certificates and thereafter proceed against certificate holders for alleged violations. The Administrator was given exclusive jurisdiction over the levy and

Although evolution of the safety enforcement proceeding under the Board is the topic herein, some passing mention should be made of the procedure for similar enforcement under the Air Commerce Act of 1926. Such procedure was executive in nature rather than judicial, at least by comparison. For instance, under that act the Secretary of Commerce was empowered, prior to hearing, to suspend or revoke an airman license.⁶ If the holder requested a hearing, the law provided that a hearing must be granted and a decision rendered promptly, but the Secretary's decision was "final, if in accordance with law."⁷ In contrast, the procedure originally adopted by the Board, first called the "Authority," appears cumbersome. In fact, such procedure was later proved unnecessarily formal. The evolution of the Board's procedure will in substantial part show a progress in efficiency achieved by deleting from such procedure those steps and minutiae that were essentially formalistic rather than necessary for the preservation of the rights of certificate holders and the public.

The procedure of the safety enforcement proceeding has principally been developed into its present form in response to the pressure of administrative necessities. The number of airplanes and pilots in civil aviation has increased tremendously since the Civil Aeronautics Act of 1938 became law in June of that year.⁸ The number of violation cases also increased greatly⁹ but no comparative increase was made in

compromise of civil penalties, Cf. *Reid, Airman Certificate*, 5 CAB 4, 7 (1940) with *Peters, Airman Certificate*, 5 CAB 346, 350 (1942). However, with this exception, the Administrator exercises regulatory powers over certificates pursuant to regulatory provisions promulgated, and reviewing powers retained by the Board. In appeals from the Administrator's refusal to issue an airman certificate, the applicant may be a petitioner, but he may also be the respondent in the proceeding when the Administrator's refusal amounts, in substance, to a revocation of an existing certificate. In other safety cases brought with respect to certificates, the Administrator is called the Complainant and the certificate holder the Respondent. For a period of time, recently terminated, the terminology was "Plaintiff" and "Defendant."

⁶ May 20, 1926, c. 344, 44 Stat. 568; 49 USC 171. It appears that a "license" was understood to comprise both the certificate of competency and the medical certificate of the airman. Mr. Fagg considered the term "license" incorrect, on the ground that the Act referred to certificates, which imply a right to fly, whereas "license" carries an implication that flight is a mere privilege. Fagg, *Legal Basis of the Civil Air Regulations*, 10 J. Air L. & C., 7, 8-9 (1939). Mr. Fagg was a draftsman of the Civil Air Regulations as promulgated under the Secretary of Commerce, and became Director of Air Commerce on March 1, 1937. For comment on the Air Commerce Regulations and the C.A.R. as first drafted under the Secretary of Commerce, see Wigmore, *Form and Scope of the Civil Air Regulations*, 10 J. Air L. & C. 1 (1939), and Knotts, *Cooperative Planning of the Civil Air Regulations*, *Id.*, 30.

⁷ Sec. 3(f) Air Commerce Act of 1926. Upon request of the certificate holder made after notice, the Secretary was required to arrange for a public hearing within 20 days and all evidence at the hearing was to be forwarded for his decision, which was to be made not more than 10 days after the close of the hearing. See also, Legislative History of the Air Commerce Act of 1926, p. 35; Appendix, House Report 1262, H.R. 10522, 68th Cong., 2nd Sess. (Hearings, December, 1924).

⁸ In rough figures, the number of certificated aircraft in the United States has increased from 10 to 96½ thousand and certificated pilots from 33 to 500 thousand.

⁹ In 1939, there were 131 safety cases of action taken against certificates, in 25 of which hearings were held. In 1947, disposition was made of 550 safety cases, in 194 of which hearings were held. Until 1948, no increase was made in the number of the Board's examiner personnel.

the personnel of the Board engaged in enforcement cases. Other duties of the Board increased greatly.¹⁰ As a practical matter, the Board could not have executed its enforcement duties under the Act if it had retained the procedure originally instituted for hearings and the suspension or revocation of certificates. Such revisions have vastly increased the productivity of CAB personnel working in this phase of regulation.¹¹ The resulting administrative efficiency has saved money for the government and enabled the Board to restore its dockets to a current basis in safety enforcement.¹²

The report issued in 1939-1941 by the Attorney General's Committee on Administrative Procedure¹³ contained several procedural suggestions. It indicated that certain changes that were administratively helpful could be undertaken legally, particularly changes involving the delegation of judicial power to examiners.¹⁴

RELATION OF PROCEDURE TO SUBSTANCE

The procedure in safety enforcement proceedings cases has, of course, a relation to the substantive issues that arise in such cases. Since these cases are civil and remedial in nature,¹⁵ they are not governed by rules applicable only to criminal and penal proceedings. The regu-

¹⁰ Economic proceedings of the Board increased as air transportation expanded with the addition of new routes, new air carriers and new types of air transportation such as feeder lines, international air carriers and operators engaged in non-scheduled and cargo operations. During the defense and war periods, national adjustments of air transportation were required and internal adjustments within the Board were also made necessary by the entry of personnel into the armed forces.

¹¹ In terms of cases decided by examiners, the yearly average per examiner has risen from 35 to 140.

¹² Savings are noticeable in the increased rate noted in the footnote above. However, the increase in cases was too great for the Safety Enforcement Examiners Division to handle without an increase in personnel. In April, 1948, before such increase was effected, a backlog of 707 cases had accumulated (513 non-hearing cases and 194 hearing cases). Such backlog has been substantially reduced subsequent to that date due to the appointment of additional examiners and institution of a system whereby examiners are stationed in regional offices. However, the number of cases for decisions has also increased as experience has demonstrated to investigators and prosecuting authorities (both federal and state) that cases can be brought to disposition promptly. The increase of efficiency tells both in time and in expense but it must be evaluated on an examiner-case basis.

¹³ Attorney General's Commission on Administrative Procedure, Monograph No. 19; Senate Doc. No. 10, 77th Cong., 1st Sess., pt. 6, submitted March 1940, revised May 1940; *Id.*, Final Report 1941.

¹⁴ After discussing the long period of time then required to bring a safety enforcement case to decision, the report asked, in a rhetorical question suggesting a negative answer, "Is there any reason in law or policy which militates against the Board's delegating the power to subordinates to act, not as trial examiners, but as trial judges, authorized to make orders which will be deemed binding unless the Board is petitioned to reconsider the case?"

¹⁵ See *Charles Robert Sisto*, Docket No. SR-1987, decided October 26, 1948, where the Board in its order prohibited the Respondent from carrying passengers for hire, saying in the decision:

"Any action taken here will be remedial and not punitive, a measure for the public safety."

Analysis of the facts, including proof that the Respondent, as the pilot in command of a DC-4, for no good reason imperiled the lives of 49 passengers and 5 crew members, requires the conclusion that the Board refrained from punitive action for the reason that such action would not be consistent with the purpose

latory powers of the Board with respect to air safety are interpreted by the Act's broad definition of "air commerce," which was cited by the Supreme Court as an example of congressional action intended to reach to the full extent of its constitutional power.¹⁶ The Civil Air Regulations are thus applicable to all flying, whether interstate or intrastate. However, states and municipalities have some concurrent jurisdiction over violations of their respective laws and ordinances, and as a matter of policy, the Administrator has relied heavily upon their cooperation in reporting violations of the federal regulations and furnishing evidence.¹⁷

Pilot's certificates are usually suspended or revoked for violations of Civil Air Regulations involving peril or injury to the persons or property of others. The Act and the Civil Air Regulations promulgated under it have been intended to impose as little restriction as safety will permit upon private, noncommercial, flying.¹⁸ However, one objective of the Board under the Act is "The regulation of air commerce in such manner as to best promote its development and safety,"¹⁹ and Section 609 of the Act permits the suspension of airman and other certificates "if the interest of the public so requires." The Board has suspended the certificates of some pilots because they have undertaken

of a safety enforcement proceeding. The order was designed to protect commercial passengers from the "irresponsible character" revealed by the conduct of the airline pilot. In *Angel, Airman Certificate*, 5 CAB 10, 11-12 (1940) the Board held that its suspension and revocation proceedings are civil in nature, and that for this reason proof beyond a reasonable doubt is not required. Of course, civil and remedial orders may have some punitive effect, but this is unavoidable.

¹⁶ *Polish Nat. Alliance (etc.) v. N.L.R.B.*, 322 U.S. 643, 647, 64 S. Ct. 1196, 88 L.Fed. 1509 (1944) with reference to section 1(3) of the Act (52 Stat. 973, 977, 49 USC 401 (3)).

"Section 1(3) 'Air Commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft which directly affects, or may endanger safety in, interstate, overseas, or foreign air commerce." (Emphasis supplied.)

See also and compare, *Neiswonger v. Goodyear T. & R. Co.*, 35 F. 2d 761 (D. Ct., N.D.O., 1929, decided under the Air Commerce Act; annotated, 1 J. Air L. 359 (1930)).

¹⁷ See Hearings, S. 3659, 75th Cong., 3rd Sess., p. 99, where registration provisions were advocated for regulation of "all flying, of an intrastate character and of a noncommercial character." For articles of interest and authorities with respect to federal and state jurisdiction and cooperation, see text and citations in Elwell, *Enforcement of Air Safety Regulations*, 14 J. Air L. & C., 318 (1947); Report of the Standing Committee on Aeronautical Law, American Bar Association, 10 J. Air L. & C., 505 (1939); Tipton, *Legislative Program for Aviation*, 11 Law & Cont. Prob. 564, 567 (1946); *The Enforcement of Safety Regulations by the Civil Aeronautics Authority*, 35 Calif. L.R. 280 (1947); and Black, *Uniformity in Air Safety Regulation: Cooperative Federalism Applied*, 15 J. Air L. & C. 181 (1948).

¹⁸ The Federal Aviation Commission in its Recommendation No. 31, Senate Doc. No. 15, 74th Cong., 1st Sess., Jan. 30, 1935, recommended that there be a minimum of regulation upon private flying, and that for safety alone. Sec. 601(b) of the Act requires the Board to give "full consideration" to differences between air transportation and other air commerce, (i.e., to differences between air carrier operations, and other aircraft operations, principally private flying), and states that the Board "shall not deem itself required to give preference" to either "in the administration and enforcement of this title."

¹⁹ Section 2(e) of the Act.

to obstruct enforcement of the Act and the Civil Air Regulations.²⁰ Such obstruction affects air safety.

A review of the scope of the Civil Air Regulations would extend beyond the reasonable confines of this subject. It may briefly be stated that pilot certificates are most frequently suspended or revoked as a result of a pilot's low flying, with or without diving at houses, vehicles, vessels, persons, or for his flying in weather that is under minimums established for visual ("contact") flight rules.

LIMITATION OF ACTIONS

The Act contains no period for limitation of actions available as a defense. Section 609 imposes a limitation period of 30 days applicable to the emergency suspension of certificates by the Administrator, which period may be extended pending hearing to 60 days, but there is no statutory limitation relating to the time of instituting proceedings. The effect of administrative delay or laches has been considered in safety proceedings before the Board. From 1942 to 1946 section 92.19 of the Civil Air Regulations required that a complaint be filed within six months of the occurrence of the offense on which it was based. This regulation was abrogated after the case of *John Clarence Hayes, Jr.*²¹ However, many proceedings have since been terminated, or the period of suspension reduced, because of unwarranted delay by the Administrator or the Board.²²

Under the present practice of the Board, prejudice to the Respondent by reason of the delay and the unavailability of witnesses or other considerations bearing upon the fairness and adequacy of a delayed hearing are weighed in each case. The policy of the Board is to insure prompt determinations in safety enforcement cases.

COMMENCING THE PROCEEDING

Under present practice, a proceeding is commenced when the Board serves upon a certificate holder, as Respondent, a complaint filed by the Administrator of Civil Aeronautics, as Complainant. Service

²⁰ Illustrative cases of certificate suspension are those of *Herbert M. Peters*, SR-559 (1943) where Respondent assaulted a CAA inspector who was engaged in the performance of assigned duties; *James Owen Brooks*, SR-929 (1945) where Respondent aided and abetted a student pilot in the latter's assault on a mechanic for reporting a violation; *Jack Kenneth Brown*, SR-4-79 (1948) where Respondent surreptitiously removed one of the papers used in giving an official examination for commercial pilot rating.

²¹ Docket No. SR-1547 (May 24, 1946). In this case the Administrator pointed out, upon appeal, among other arguments, that a fixed rule of limitation might prejudice the public interest in air safety in individual cases involving extreme violations. Prior to its abrogation by Amendment 97-4, June 11, 1946 (11 F.R. 6583), sec. 97.19 had been renumbered sec. 97.20. Section 97 of the CAR contains the Board's Rules of Practice applicable in safety enforcement cases.

²² See and compare *Cyrus Rodney Nicholson*, SR-847 (1946); *Victor R. Evans*, SR-1363 (1947); *Robert Elmer Bailey*, SR-1547 (1947); *George A. Van De Sande*, SR-3-138 (1948).

is by registered mail in accordance with the provisions of the Act²³ and the Board's Rules of Practice.²⁴ The Board's Rules of Practice further provide that any allegations of the complaint that are not answered shall be deemed admitted. The period of 10 days that is allowed for answer is short, because in the great majority of cases issues are factual, requiring only a single statement without necessity for careful draftsmanship or legal research. However, as a matter of practice, when reasonable extensions of time to answer are requested, they are liberally granted.

Under the original practice of the Board, proceedings for the suspension or revocation of certificates were instituted upon an order to show cause issued by the Board. Such proceedings were cumbersome and more formal than was appropriate to the nature of the proceeding. During this period, the Board, included within its organization the Administrator of Civil Aeronautics and his staff. Prosecution was conducted by attorneys from the Safety Enforcement section of the Operations Division of the General Counsel's Office, who decided the cases in which an order to show cause should issue and presented the case against the certificate holder at the hearing. Since attorneys from the same section were sometimes assigned as examiners at hearings, and upon the filing of exceptions to an examiner's report might thereafter recommend action by the Board on such exceptions, the Attorney General's Commission on Administrative Procedure commented adversely on the procedure.²⁵

The Board was not required to remedy the situation of combined prosecuting and judicial functions because Congress removed the need by the enactment of Reorganization Plans III and IV, effective June 30, 1940.²⁶ Subsequent to the effective date of the Reorganization Plans, the Administrator has in almost all cases made the decision to proceed against certificate holders, while the examiners of the Board have acted in a judicial capacity only. However, the Board has retained concurrent power to bring proceedings for the suspension or revocation of certificates. When the Administrator does not act in a case where the General Counsel's Office of the Board deems such a proceeding necessary, the Board institutes the proceeding, still by order to show cause. Cases are now heard by examiners in the Safety Enforcement Proceedings Division of the Board's Bureau of Hearing Examiners, which division no longer has any ties to the General Counsel's Office.

²³ Sec. 1005(c).

²⁴ Sec. 97.13, CAR.

²⁵ Monograph No. 19, pp. 120-131; Senate Doc. No. 10, 77th Cong., 1st Sess., Pt. 6, pp. 52-57. Although the Committee was critical of the organizational handling of the cases, it made clear that the practice of combining examiner-attorney functions had not been prejudicial to certificate holders.

²⁶ See footnotes 3 and 5 *supra*.

FORMULATION OF ISSUES

The issues in safety enforcement proceedings are normally defined by the complaint and answer without further procedure. A Respondent may file a motion to make the complaint more definite and certain if he desires further information.²⁷ Usually, proceedings go to hearing upon a denial of the allegations of the complaint or a defense of extenuating circumstances alleged in the answer.

Pre-hearing conference procedure is used in these proceedings although it is obviously not as valuable as in economic proceedings where there are often numerous parties, and it is often difficult to formulate issues clearly, and wherein a large amount of evidence of a documentary nature is introduced by stipulation and reference, in part at the request of Public Counsel. In safety enforcement proceedings, there are usually some facts which may be stipulated. Short conferences held immediately prior to the opening of proceedings enable the parties to come to an agreement as to what facts are in issue, serving to shorten and clarify the hearing itself.²⁸ On some occasions, it has even been found that such conferences remove the necessity of any contest whatsoever.²⁹ The parties then know what they can or can not prove and sometimes find, after such a conference, that they are in agreement with respect to the terms of the order that is determined appropriate by the examiner. In such cases, of course, the time and expense of the hearing and subsequent procedure are considerably lessened.

Amendments are freely granted when they will not operate to the prejudice of Respondents.³⁰ From the legal point of view, amendments are more generously permissible in a civil and remedial proceeding than they would be if the proceeding were criminal in nature. From the practical point of view, it appears that Respondents are usually not interested in unnecessary continuances or in otherwise delaying the proceedings (or decisions and orders therein), as defendants often are in other types of cases. Respondents in safety enforcement cases are usually interested in getting a decision promptly and, if they perceive that a period of suspension or revocation must run against them, they are usually interested in having it start and determined as quickly as possible.

NON-HEARING PROCEDURE

Under the procedure of the Board, decisions are issued by examiners after hearings and also after the examination of records of evidence submitted under nonhearing procedure. The evolution of safety enforcement procedure was furthered by the Board's instituting non-hearing procedure.

²⁷ Sec. 97.15 CAR.

²⁸ Sec. 97.29(g) CAR.

²⁹ Sec. 5(b) Administrative Procedure Act.

³⁰ In *Lyle Pedelty*, SR-5-177 (1948) an amendment to conform to the proof was denied when such amendment appeared prejudicial to Respondent.

The institution of nonhearing procedure, which obtains when a certificate holder has waived his right to hearing, has saved an immense amount of time and administrative detail in the enforcement of safety regulations and standards. The Board found by experience that a large proportion of respondents were not interested in contesting complaints brought against them by the Administrator, if a means was provided whereby the respondent might place his view of the case and personal considerations relating to the terms of suspension before the Board.³¹ Such procedure is also appropriate, of course, when there is no meritorious defense or mitigating circumstances (or personal situation of the Respondent) that requires consideration in the formulation of the findings or order. Such procedure might more appropriately be called "waiver" or "informal hearing" procedure, but the terminology "non-hearing" has been established by usage.

Under nonhearing procedure Respondent files an answer or a statement, which may be supported by statements of other individuals having information with respect to the violations in issue or factors bearing upon the order that would be appropriate upon proof of the violation. The Administrator submits evidence, which usually includes the statements of persons who have complained to Civil Aeronautics officials about the Respondent's conduct, and recommends a suspension or revocation of the Respondent's airman certificate. Upon such a record, the examiner issues an initial decision including findings and an order. The examiner may request further information from the parties when he deems that additional evidence is necessary for a determination of the issues in the public interest. Such procedure is obviously inappropriate for the determination of contested issues of fact involving substantial conflicts of evidence. However, in such cases of factual conflict hearings are seldom waived.

There is some question whether an examiner possesses the power to order a hearing, notwithstanding waiver, although the Board has exercised such power when it found a hearing was necessary to protect the public interest in air safety.³² By court decision, it has been decided, in a case where evidence was sufficient, that the Board may decide the case upon the evidence submitted, even though other evidence that was also available was not submitted. In *Cameron v. Civil Aeronautics*

³¹ Sec. 97.22 CAR.

³² Section 97.29 of Civil Aeronautics Regulations, Rules of Practice Governing Safety Cases, does not specifically include such power, but it may be delegated therein by implication. It delegates the authority, upon an assigned case, to hold and regulate the course of hearings and to make an initial decision. The question bears some fundamental analogy to that of the power and duty of an examiner to call and, if necessary, examine and cross-examine necessary witnesses who are present at a hearing but not called by a party. Such participation by examiners in hearings is discussed in the text hereinafter. As a practical matter, parties will usually consent to a formal hearing when an examiner indicates that he thinks one is necessary for the protection of the public interest in air safety.

*Board*³³ the Board's nonhearing procedure was tested by the Respondent upon appeal to the Circuit Court of Appeals. Therein, Respondent contended that the Board should have obtained further evidence upon an ultimate fact whether or not the pilot had obeyed control tower instructions during a landing approach. It appears that in accordance with usual tower procedure a recording had been made by dictaphone record preserving the conversation of the control tower and pilot, but that this had not been submitted nor played as evidence to be considered in determination of the issues. The Board rendered its decision against Respondent on the evidence submitted, which was otherwise sufficient. The court affirmed the Board's decision in view of Respondent's waiver of hearing, and the Supreme Court denied certiorari.³⁴

The *Cameron* case affirms the Board's power therein exercised but appears to concede by implication that the Board could have required the submission of further evidence. It appears that the facts of any particular case and the exercise of expert judgment with respect to the requirements for air safety should guide the Board in its making of requests for further evidence and, by extension of the same principle, in requiring hearings notwithstanding waiver thereof. The Board is not neutral in its functions, although it is impartial among litigants. The Board is primarily judicial in safety enforcement cases, but it also functions under a command by Congress to foster and protect air safety. The protection of air safety and due recognition of the rights of certificate holders require an adequate record in enforcement cases.

HEARINGS

In the cases where a hearing is held, hearing procedure is similar to that of other administrative hearings. Procedure is informal in comparison to the procedure in court actions but it generally follows that used in judicial proceedings. Decisions are issued on the basis of the reliable, probative and substantial evidence that has been received.

The examiner is sometimes required to participate actively in hearings. It may appear appropriate to make unrequested rulings in order to preserve the rights of Respondents who are not represented by an attorney. An examiner must also participate in the examination or cross-examination of witnesses because of his duty to develop fully evidence necessary to obtain an adequate record.³⁵ As a practical matter, such questioning can occur with unpredictable witnesses when the attorneys for the parties are reluctant to ask crucial questions to which an adverse answer might prejudice their cases. Examiners have no responsibility for the prosecution of violations, as distinguished from the conduct of hearings, and the nature of the cases heard makes any

³³ 140 F. 2d 482, 485 (CCA 7, 1944). Other issues than that discussed herein were decided. Among these, it was determined that a military pilot who is flying on duty must conform to the Civil Air Regulations unless his orders require a violation.

³⁴ 323 U.S. 716.

³⁵ Sec. 97.29(d) CAR delegates to examiners the power to examine witnesses.

personal interest of an examiner in a case unlikely. The authors do not know of any case where a well-founded objection to any Board examiner has been made on the grounds of his alleged bias or prejudice.⁸⁶

DECISION AND ORDER

Under present procedure authorized by the Administrative Procedure Act, examiners issue initial decisions which, if no appeal is taken in a stated time, become effective as decisions of the Board.⁸⁷ Appeals to the Board in such decisions are relatively infrequent.⁸⁸ This procedure is followed in both hearing and nonhearing cases, and in hearing cases with respect to both written and oral decisions. It saves an immense amount of time and detailed work in contrast to the former procedure, wherein the Board wrote a full opinion in every safety proceeding case.⁸⁹

Both the present and the past procedure of the Board may, of course, be contrasted further with that which obtained under the Air Commerce Act of 1926, where the Secretary of Commerce suspended or revoked certificates and then permitted an appeal to the Secretary from such order of suspension or revocation. Under present procedure, full consideration is given to a certificate holder's contentions and evidence before any action is taken against his certificate, but time and expense are not wasted in unnecessary formal procedures.

The procedure described was approximated in Board practice prior to the effective date of the Administrative Procedure Act. In appropriate cases, examiners indicated their decisions orally at the close of hearings, and when both parties were satisfied, and waived their rights to appeal from the indicated order, an order to become effective immediately was entered upon the record. In confirmation, written copies of the order were issued formally by the Board at a later date after the reporters' submission of the record transcript. Such procedure accommodated the parties and saved substantial expense to the govern-

⁸⁶ The issue was raised in *D. W. Rentzel v. Charles Robert Sisto*, SR-1987, October 26, 1948, which case is now on appeal to the Court of Appeals for the District of Columbia. The rules of practice provide for disqualification of an examiner on his own motion or by the Board for reasons of his bias or prejudice. Sec. 97.29(m) (2 and 3) CAR.

⁸⁷ Sec. 97.22 and 97.23 CAR.

⁸⁸ In the early period of safety enforcement appeals were taken in approximately 20 percent of the cases, and in the period now terminating in approximately 10 percent. However, this latter percentage includes hearing waived cases and all objections and exceptions raised. Among such appeals are requests by Respondents which are not legal exceptions but prayers for greater leniency; there are also objections based upon facts which occurred after submission or, having occurred earlier, had not been placed before the examiner when he issued his decision. Under court terminology and procedure, many of such petitions and requests would not qualify as appeals.

⁸⁹ Compare the cases of *Clarence A. Conroy*, SR-66, Oct. 24, 1941 with *James F. Holmes*, SR-82, Oct. 28, 1941. 5 CAB Reports 180, with *Charles Glen Pierce*, SR-5-36, March 29, 1948 and *John Joseph Pfaffinger*, SR-1931, Feb. 11, 1948. Separation of findings of fact from conclusions of law in decisions was also discontinued at an early date. See *Thomas Guy Brown*, SR-914 (1944). With respect to the passage of time in issuance of decisions, see footnote 41 hereinafter.

ment. Legally, such procedure constituted an approximation of the consent decree.⁴⁰

Considerable time is saved in the issuance of a decision when it is issued orally by an examiner at the hearing. Examiners normally hear cases in groups that are docketed for hearing at places near the residences of Respondents in a series of hearings convenient for traveling from one place to another. To issue a written decision, an examiner must complete a series of hearings, return to his headquarters, wait for the submission of the transcripts by the reporter (in most cases), and thereafter study the transcripts and prepare the decision. Such delay may total 14 to 60 days with no lack of diligence whatsoever on the part of the examiner.⁴¹ At the close of such period, a pilot whose certificate was suspended for a short period might, in the case of an immediately effective decision, be flying again.

As a matter of law, a Respondent is entitled to exercise the privileges of his airman certificate until such date as it is actually suspended or revoked by an order that has become effective as an order of the Board.⁴² However, in practice, airport operators and officials regulating instruction in aeronautics under the GI Bill of Rights are often reluctant to permit persons charged with violations from flying until the Board has taken action. Respondents, with very few exceptions, prefer to have orders issued and effective as soon as possible. The Administrator's attorneys are generally pleased to have their cases reach disposition. Therefore, when it is possible for an examiner to issue a decision orally, the parties usually appreciate such action.

An oral decision may not be issued if either party requests a written decision, and in some cases an examiner feels that it is necessary to study the transcript of the record or to conduct research into authorities before entering findings or an order. When parties do not waive their rights to appeal, oral decisions are like written decisions in that, in the absence of appeal, they become effective as orders of the Board within a stipulated time, 10 days or a longer period if requested.

Under the Administrative Procedure Act, parties are entitled to submit findings of fact and conclusions of law.⁴³ As a matter of practice, this right is not usually claimed. Oral argument to the examiner is also permissible and the filing of briefs, but in practice either is rare.⁴⁴ The parties or their attorneys do frequently make statements, however, to clarify their positions and summarize the evidence in support of their cases. Such statements are often the informal equivalent of oral argument before the examiner.

⁴⁰ See section 5(b) Administrative Procedure Act; *Id.*, Legislative History, p. 24.

⁴¹ The time consumed in such normal processing should be considered in connection with the further time necessary for issuance when each case was studied by individual Board Members, placed upon the Board's agenda, and an opinion acceptable to each member drafted.

⁴² In practice, the Administrator does not suspend certificates at once in exercise of his emergency powers, except in extreme cases.

⁴³ Section 8(b) Administrative Procedure Act; sec. 97.30 CAR.

⁴⁴ Sec. 97.30 CAR.

An examiner's authority with respect to a proceeding does not terminate until the time for appeal to the Board has expired.⁴⁵ He may thus reconsider findings or conclusions within this period and revise an initial decision if good cause appears. The exercise of such power is available for changes of substance, but is most appropriate for the correction of clerical errors or oversights. In practice, examiners very rarely exercise such authority for any purpose.

APPEAL TO THE BOARD

Under present practice, appeals may be taken to the Board from initial decisions issued by examiners.⁴⁶ Such decisions customarily allow a short time for the taking of appeals, for the principal reason that most Respondents do not appeal and are interested in having the order become effective at as early a date as is possible. However, if attorneys or Respondent desire extensions of time to prepare an appeal, such extensions are granted as a matter of course. The taking of an appeal suspends, for the duration of the appeal, the effectiveness of an initial decision. Under the former practice of the Board, the equivalent of an appeal was taken by the filing of exceptions to the recommended decision set forth in the report of the examiner.

The Board rarely grants oral argument upon appeals in safety enforcement proceedings. This practice obtains because appeals rarely raise issues that merit oral argument. Parties may submit briefs to the Board, and these are carefully considered. The issues on appeals are reviewed, together with the records of the case and appeals prepared for submission to the Board by the Assistant Chief Trial Examiner in charge of the Safety Enforcement Division and by a review attorney. By this procedure, examiners of the Board are not forced to review the work and the decisions of one another.⁴⁷

Examiners are not advised of the application of Board policy to particular cases prior to decision, but are guided by the precedents of the Board established in decided cases. In the spirit of the Administrative Procedure Act, such procedure avoids any questionable pressure from the agency and approximates the way in which lower courts are guided by decisions of superior courts in appellate cases. The examiner who has issued an appealed decision does not appear before the Board during the course of the review of his decision.⁴⁸

The Board also reviews cases upon the filing of a motion for review filed within 15 days after an initial decision has become effective.⁴⁹

⁴⁵ Sec. 97.29(m) (1) CAR.

⁴⁶ Sec. 97.22 and 97.23 CAR.

⁴⁷ The Attorney General's Committee commented adversely on such mutual reviewing. See citation footnote 13 above.

⁴⁸ Under former practice, examiners were sometimes present before the Board during its decision conferences. An appellant alleged such an instance as error in *O'Carroll v. CAB*, 114 F. 2d 993 (Apps. D.C., 1944). However, the record on appeal disclosed that the examiner had made no comments of materiality, and the court overruled the appellant's objection.

⁴⁹ Sec. 97.27 CAR.

Such motion will not stay the effectiveness of the decision in issue. The Board may also review decisions without appeal or motion of a party but upon its own motion. For such review the Board may stay the effect of the order or leave it in effect.

POSSIBLE CHANGES IN PROCEDURES

Both the President's Air Policy Commission and the Congressional Aviation Policy Board have recommended that the safety enforcement activities of the Board and the Administrator be coordinated into unitary control.⁵⁰ At present, there is some confusion in such activities that arises from the separation of powers with respect to promulgation of the regulations and enforcement. Lack of unitary powers is a further problem with respect to civil penalties over which the Administrator has sole control, and with respect to reprimands and proceedings for the suspension or revocation of certificates which involve responsibilities of both the Board and the Administrator. In the event that enforcement is again coordinated under a single agency, there would be no reason to anticipate any prejudice arising to certificate holders by reason of the fact that the prosecutor and judge work for the same agency. Examiners are segregated from attorneys and remote from prosecution activities by virtue of the provisions of the Administrative Procedure Act. It is not anticipated that a coordination of activities would materially change procedure of safety enforcement proceedings, as above described. However, some broadening of procedure might be necessary if the proceedings were to include issues relating to civil penalty as well as issues pertaining to the suspension and revocation of certificates.

CONCLUSION

In the above discussion, only passing reference has been made to the various provisions of the Administrative Procedure Act. Those who are familiar with that act will note that the various changes of procedure that have been commented upon above are in the spirit of, and consistent with the provisions of that act. From a governmental and administrative point of view, it is principally interesting to note that most changes were made prior to the effective date of that act, and that several important changes were made primarily to effect greater administrative efficiency in the issuance of decisions for the enforcement of air safety. Such administrative experience tends to confirm the practicality of the Administrative Procedure Act, and of course also endorses the changes that have been made by the Board, making them appear forward looking and well-formulated in the interests of proper judicial procedure.

⁵⁰ SURVIVAL IN THE AIR AGE, pp. 137, 139 (1948); Senate Report No. 949, 80th Cong., 2nd Sess., Rec. No. 84, pp. 50-51, Rec. 89, p. 52 (1948). See also Final Report of the Attorney General's Committee on Administrative Procedure, p. 175 (1941).