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Licensing of Domestic Air Transportation

William K. Jones

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LICENSING OF DOMESTIC AIR TRANSPORTATION†

BY WILLIAM K. JONES

PART II

X. PROSPECTS FOR IMPROVEMENT OF THE LICENSING PROCESS

A. Introductory Comment On The Perspective Of The Individual Board Member

A VIEW of the licensing process from the vantage point of the individual Board Member is vital to an appraisal of any proposed change in CAB procedures. It is essential, first, to recognize that only a portion of each Board Member's time is available for licensing matters. In addition to route cases, the Board Member participates in the decision of other formal matters and in the negotiation of bilateral treaties with foreign governments. He is called upon to make decisions relating to the administration of the Board's staff and to the other aspects of maintaining a continuing organization; and he engages in public relations activities and in consultations with members of the industry, community representatives, members of Congress, other Government officials, and various other persons. Rather than attempt a division in terms of these manifold activities, a more meaningful picture may be given by considering the way in which a typical week engages the time of a Board Member. In terms of office time, the averages are roughly as follows:

1. Attending oral argument—one day or slightly less;
2. Attending Board meetings—two days;
3. Other conferences, day-to-day administration—one day or more.

There is relatively little time in the standard work-week for independent study and research. Most of the work that requires sustained reading or attention to details must be reserved for evenings or week-ends.

Returning to the licensing cases, it may be useful to note what a Board Member must consider in order rationally to decide a route case. The issues fall into two categories: first, factual questions concerning economic data relating to the various proposals under consideration; and,

† This is the second part of a special report prepared for the Administrative Conference of the United States in September 1962. At the author's request, the report has not been revised because it was based on extensive interviews conducted at the Board and related to practices then current. However, according to the author, the nature of the Board's problems has not changed markedly in the interim.

See Jones, Licensing of Domestic Air Transportation, Part I, 30 J. Air L. & Com. 113 (1964) [hereinafter cited as Part I, 30 J. Air L. & Com.].

On such a perspective, see Hector, Problems of the CAB and the Independent Regulatory Commissions (1959); McKinsey and Company, Increasing the Effectiveness of the Civil Aeronautics Board, 3-1, Appendix C (1959).
second, legal or policy questions concerning the result which should follow from the data.

The factual questions may be answered principally from two sources, these being the record compiled in the particular case and statistical data, continuously compiled by the Board and others and subject to official notice (some items of which also appear in the record). However, the individual Board Member has no significant personal contact with either of these sources. It is utter fantasy to suppose that in minutes snatched between oral arguments, Board meetings, appointments, daily paper work and the like, Board Members can rummage through thirty volume records and even more extensive statistical compilations. Obviously, their inquiries have to be more narrowly focused. Specifically, the Board Member may seek to ascertain the facts by looking to:

1. The initial decision of the hearing examiner;
2. The briefs of the parties;
3. Statements in oral argument; and
4. Memoranda prepared by his personal assistant or the General Counsel's office.

Even these documents are far from succinct and it is questionable whether Board Members have the time to explore each of these sources fully. Moreover, it would be rare that one could tell, simply by looking at these documents, whose version of the facts is accurate. An examination of the original sources—record and statistics—is often necessary to resolve conflicting claims of the parties or, perhaps more commonly, to reconcile partial truths and differences of emphasis and approach.

The "memorandum of issues" of the General Counsel is of little assistance on this score, except to the extent that it provides cross-references to relevant portions of other documents. Oral argument has been greatly abbreviated in recent years and the Board, for the most part, does not interrogate counsel. Personal assistants are themselves deluged with day-to-day administrative details. Typically, the Board Member takes home the initial decision and briefs of the parties for review the evening before the oral argument and tries to reach a conclusion on the basis of this limited review and the argument itself. If questions remain, the Member may ask his assistant to research the point, or, more rarely, he may ask for statistical information or analysis from the Office of Carrier Accounts and Statistics.

Establishing the facts may be difficult, but given sufficient time the job might be capable of satisfactory solution. However, it is uncertain whether legal and policy questions are soluble in the same way. On strictly legal questions, i.e. whether the Board has power to act in a certain way, the inquiry is often conventional and the Office of General Counsel is the primary source of assistance. Once the issue of power is settled in the affirmative, as it usually is, the question of policy still remains: should the Board act in one way rather than another? In most instances the Board has sufficiently broad discretion that any one of a
wide variety of results is either legally justifiable or at least not subject to meaningful judicial review. To what sources can the Board look to decide which choice to make?

Theoretically, the authoritative source of guidance on policy matters is the Board's governing legislation, but the act talks in such general terms, and with such a multiplicity of policy objectives, that no measure of statutory study will yield an answer to the problems posed by most concrete cases. E.g., could the act be said to indicate which carrier should be selected in the St. Louis-Southeast case?\footnote{St. Louis-Southeast Service Case, 27 C.A.B. 342 (1958), on reconsideration, E-13248 (8 Dec. 1958), aff'd in part, rev'd in part and remanded, sub nom. Delta Air Lines, Inc. v. CAB, 275 F.2d 632 (D.C. Cir. 1959), cert. denied, 362 U.S. 969 (1960), on remand, E-15599 (29 July 1960). For a detailed discussion of the St. Louis-Southeast case, see Part I, 30 J. Air L. & Com. at 152.}

Nor does the legislative background of the statute shed much light. As previously indicated, the multiplicity of purposes stated in the act is merely a reflection of the fragmentation of views expressed by the Congress in the course of considering the measure. Moreover, the basic economic provisions of the statute are now almost twenty-five years old. Many of the circumstances that prevailed in 1938 no longer exist, and many new events have come to pass. The legislative history may provide some useful elaboration of the statutory objectives but it does not inform the Board Member which one to emphasize when a conflict arises.

The same twenty-five years which have rendered some of the act's legislative background obsolete have also produced innumerable Board decisions. These conceivably could provide guidance on policy issues, but their value in this respect is rather dubious, since, like the act and legislative history they implement, they often talk in terms of a multiplicity of general purposes with little clear articulation as to when one purpose will govern and when another. Thus large carriers may win some cases on the ground that, by reason of their extensive route patterns, they can provide more new service improvements for the traveling public. Small carriers may win other cases on the ground that they require strengthening. As a result, when one policy will prevail over the other is difficult to predict.

The conventional sources such as the act, legislative history and Board precedents may tell a Board Member what to think about but it is doubtful that they provide many answers. In the search for solutions, a Board Member may turn inward to his own personal philosophy of economics and government or he may turn outward to the views expressed by politicians, industry representatives, staff personnel, the press and other seemingly knowledgeable persons. In either case the ultimate source of decision stems neither from the record nor from the conventional standards of policy guidance.

It must be remembered that policy choices do not often arise as philosophical questions unconnected with empirical data. Such choices are almost invariably connected with factual data in either of two ways: (1) some controversial policy issues (such as the desirability of compe-
tition among air carriers) may be the subject of extensive factual inquiries (as in comparisons of the nature of operations in competitive and noncompetitive markets); (2) some generally accepted policy considerations may be shown to be inapplicable in a particular case. E.g., it might be shown that a combination of two routes could not be achieved in such a way as to improve traffic flows between them even though the integration of traffic flows is generally of some importance. Many of these matters will be the subject of exhibits in the record or of statistical materials in the Board's files.

Coming back to the record and the statistics and the means by which a Member may achieve an understanding of them, the task can be greatly simplified or greatly magnified by the Member's attitude toward various policy issues. If a Member has resolved for himself a controversial issue, he obviously has cut down the number of record facts he must assess and weigh. If, on the other hand, a Member is uncertain about a policy issue, he may have to consider not only the significance of the policy consideration on the facts revealed by the particular record, but also the facts bearing on its general validity. Probably no two Members will require precisely the same information to dispose of a concrete case nor will the same information mean the same thing to Members with different views.

The differences in Member outlooks, when coupled with the many-sided character of Board decisions, tend to perpetuate the difficulties which beset Board Members. If a route case can be resolved by any number of solutions, and if Board Members reach determinations on highly individualized grounds, the Board's efforts in a particular case are likely to involve, first, a struggle to reach a composite result—points to be served, carrier(s) to be chosen, restrictions to be imposed—to which a majority will adhere; and, second, an effort to state a theory upon which the result may be justified. The first step is probably the one which absorbs most of the collective energies of the Board. The latter task, the statement of a rationale, is not only of secondary importance but is often highly generalized and inconclusive because the grounds of individual Members in the majority are not the same and the result may reflect no consistent policy approach, but rather a compromise of conflicting individual solutions incapable of mustering a majority. Thus, as a source of policy guidance for the future, the opinions of the Board tend consistently to fall short of their potential because of the nature of the cases and the lack of coherent policy guidance in the past. The process does not preclude gradual accretions of precedential policy, but it makes the attainment of a general consensus extremely unlikely.

The major problem in these vast and unwieldy route cases is to fulfill the twin objectives of:

(1) providing Board Members with the information they require, in light of their individually divergent views, to reach satisfactory conclusions on both factual and policy issues, and

(2) encouraging the Board as a whole to achieve as much consensus as
possible in its formulation of policy within the limits imposed by the inevitable divergent individual viewpoints.

B. General Form Of The Proceeding

Much of the comment on CAB route licensing has been directed at the general format of the process. Trial-type procedures, it has been argued, are singularly inappropriate for resolution of the many-sided controversies that characterize complex route proceedings. The function is one of planning and management, which requires executive direction rather than case-by-case adjudication.8 But the differences in approach between “management” and “adjudication” may be more rhetorical than real. Planning need not be incompatible with some measure of case-by-case adjudication, and even the most discretionary form of executive management would presumably require some factual basis for its determinations. The inquiry can perhaps be more sharply focused by asking: (1) how should plans and policies be formulated? and (2) how should factual determinations be made? for whatever label is pinned on the process, these two interrelated functions must somehow be performed.

It is necessary as an initial step to take note of some of the common ground upon which any procedural system must be built.

First, the substantive policies of commercial aviation regulation are not in issue. A re-examination of both substantive policies and their procedural implementation would open a number of avenues for change, particularly in evaluating the respective roles of regulation and market competition. However, this is not now before us.

Second, commercial aviation will therefore continue to be developed, under a continuation of existing substantive polices, by private business enterprise subject to public regulation. This has important implications for proposed procedural arrangements. If private management is to function effectively, if investments are to be made and other business risks incurred, there must be a measure of stability and certainty in the regulatory scheme. From the vantage point of the regulator, nearly unlimited discretion would certainly expand the possibilities of regulation; and the ability to make decisions promptly would increase the effectiveness of regulation. But from the viewpoint of the regulated enterprises these same qualities could result in unpredictable administrative controls inflicted without warning and without opportunity for adjustment. As long as private enterprise is employed to develop commercial aviation, probably the regulatory scheme must be somewhat “sticky” in its operations, a necessary compromise between the flexibility and decisiveness desired by the regulators and the predictability and stability required by the regulated interests.

Third, under unchanged substantive policies, route awards will continue to be made on the basis of a balancing of numerous conflicting

8 Landis, Report on Regulatory Agencies to the President-Elect, 41, 42 (1960); Redford, National Regulatory Commissions 14 (1959); Hector, New Critique of the Regulatory Agency (1959); Hector, supra note 1 at 55.
policy considerations—situations like the *St. Louis-Southeast Service Case.* With a relatively mature route pattern, it is unrealistic to think of "planning" in terms of making actual routes conform to some over-all ideal worked out in advance by the planners because the job is too big, the current need is too small, the substantive regulatory tools are too limited and the disturbance of existing economic interests and relations would be too great. Rather it seems likely that the regulatory task will continue to be a series of *ad hoc* adjustments in route patterns to meet changing or unsatisfied needs, and that the primary role of planning will be to determine the order in which such adjustments are made and to introduce new or different policy considerations into their resolution. While some such planning may improve and perhaps simplify the process, the net result probably will not be markedly different from contemporary route proceedings, except that the adjustments may be smaller and the proceedings therefore more manageable.

Fourth, there is the obvious need to make available to the decisional authority the factual material upon which the relevant policy considerations are based. Someone has to collect and collate the information. Under the present procedural arrangement, much of the work is done by private parties although with the aid of Board statistics. If this work were to be undertaken by the Board's staff, their task would be magnified enormously. Even then it would be difficult to exclude pertinent information submitted by an outsider. It, too, would have to be considered and evaluated. Of course, some information is peculiarly within the knowledge of private parties. Moreover, since much of the information is technical and complex, explanation is often necessary. Cross-examination, properly employed, can bring forth that explanation and expose the underlying methods and assumptions (and perhaps fallacies and mistakes) that led to the stated conclusions. Whatever the decisional method employed, some technique must be devised for collecting, evaluating and checking relevant information. Whether cross-examination of witnesses is essential may be reserved for later discussion.

Finally, decisions in route cases will continue to have an enormous impact on the economic prospects of affected enterprises and communities. It is unthinkable, in our society at least, that such affected parties will stand by passively while the decisional process grinds out its momentous conclusions. The choice is between giving such parties an overt role in the process, one in which they can seek to influence the result, or relegating them to surreptitious efforts to "pull strings" in order to achieve the desired outcome. Our approach traditionally has been to make a virtue of necessity and confer an overt role on such affected interests. If this summary is accurate, the procedures required in route cases must be characterized by (1) some measure of continuity in policy and slowness in making changes; (2) *ad hoc* adjustments of route patterns based on conflicting policy considerations, including those devised by the planners; (3) methods for collecting, evaluating, and checking relevant factual in-
formation; and (4) roles for affected interests which permit overt efforts to influence results. No mention has been made of "fairness" or "due process," since it is believed that considerations normally associated with these generalized concepts are subsumed under the third and fourth categories. If the processes for gathering relevant information lead to accurate results, and if affected parties are afforded an opportunity to attempt overtly to influence the result, the procedure is fair and satisfies due process. Within the limitations enumerated, the present procedural arrangement, viewed as a whole, is an appropriate means for implementing existing substantive policies. Suggestions for revision are called for and are hereafter made, but these can be carried out within the current framework. Proposals for more radical changes in regulatory structure, including the transfer of some or all of the Board's functions to an executive department, have been considered as have the criticisms which led to their formulation, but it has been concluded that such proposals are directed toward either (a) changes in substantive policy, which are beyond the scope of this study, or (b) criticisms of the present system which can be remedied as well, if not better, by relatively moderate changes in existing procedural arrangements, as indicated in subsequent discussions.

An exception to this generalization is the possibility of lodging ultimate responsibility for regulation in a single administrator rather than a multi-member Board. Such a change would facilitate the process of policy determination at any given time but it would probably aggravate the tendency of policy outlooks to change radically with shifts in personnel. In any case, it seems unlikely that such a substitution would be tolerated in the absence of firmer agreement on the ultimate policies to govern commercial aviation; and if such a consensus could be achieved, the need for the substitution would be considerably less.

C. Expanded Use Of Rulemaking In Route Proceedings And The Role Of Cross-Examination

One proposal which might be classified either as a radical change or as a revision in existing procedures is the suggestion that the issues in route proceedings be divided into two kinds: (1) what new route authority should be granted? and (2) to whom should the authority be granted? Under this proposal, the first issue should be decided in informal proceedings, as by rulemaking, and only the second should be made the subject of a formal hearing.4 The objections to the proposal take two lines, one legal and the other practical.

The legal objection is that the governing statute requires a "hearing" before new route authority can be granted, and that the issues encompassed include both determination of the need for service and the selection of an appropriate carrier.5 The question raised by this provision is whether

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4 Landis, supra note 2; Redford, supra note 2 at 17; Hector, New Critique of the Regulatory Agency 15 (1959); Hector, Problems of the CAB and the Independent Regulatory Commissions passim (1959).

the Board, in a rulemaking proceeding, could establish the need for a service and exclude that issue from the evidentiary hearing on applications to render the service. To give a concrete example: Could the Board have held a rulemaking proceeding in the *St. Louis-Southeast* case to determine whether an additional carrier should be certificated on a route running from St. Louis to Miami via Atlanta and Tampa, and then, having held in the affirmative in the rulemaking case, confined the evidentiary hearing to a selection among competing applicants? The question is a genuinely debatable one, depending on whether controlling emphasis is placed on the right of hearing in the application section or on the Board’s rulemaking power stated in general terms elsewhere in the statute. Some decisions concerned with FCC rulemaking suggest that the legal objections to the proposed change have been exaggerated; but the Communications Act is less concerned about competitive entry than is the Federal Aviation Act, and the FCC may therefore have greater latitude in the use of rulemaking which affects entry. Suffice it to say that the CAB has never attempted to use rulemaking in this way, so the question is still an open one. No doubt the legal problem could be avoided by new legislation without raising any constitutional issues.

The practical objection to the proposal for a two-step proceeding is that no clean separation can be made between determination of route patterns and selection of carriers. The *St. Louis-Southeast* case is but one of many illustrations of the interconnection between the two issues. In addition to the diverse route proposals of the various applicants and the different cities which would have been included under each, the economic feasibility of the route might well have turned on the selection of the carrier. Suppose the Board had concluded that only TWA had sufficient back-up traffic to support a competitive service between St. Louis and Miami. Where would such a determination have been made in a two-step process involving rulemaking on route pattern and evidentiary hearing for carrier selection? At best there would be enormous duplication of evidence in the two separate proceedings; at worst there would be mutual frustration.

But this does not mean that a two-step process might not be feasible in some proceedings. In some of its international cases the Board has approximated such an approach, first, by preparing *ex parte* a study of route patterns and outstanding needs, and, second, by introducing the study into the formal route proceedings as a guide to the parties, although not a binding one. Some measure of *ex parte* planning can also be accomplished by developing tentative conclusions and issuing orders to show cause why these conclusions should not be adopted, a practice recently extended to

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8 FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).
route proceedings. Formal hearings might then be directed principally at supporting or opposing the proposals of the Board's staff. Finally, the discretionary judgment involved in setting applications for hearing offers an opportunity for significant planning of route development. The question is whether situations will arise in which these techniques would be inappropriate but in which route patterns could be decided separately from the issue of carrier selection. The consensus seems to be that such situations would be few and far between.

Indeed, viewed from another perspective the problem may prove to be an illusory one. No one denies that the Board can hold a two-step process as long as procedural protections are assured in each. This approach has been adopted in the pending South American route case, in which it is proposed to establish the route pattern and to select the needed carriers. The only point of advocating that the first issue be resolved in a rulemaking proceeding is to eliminate the need for cross-examination on that phase of the case. But why not approach the cross-examination issue directly? There is certainly considerable doubt that cross-examination serves a useful purpose in proceedings based on economic data. But this doubt applies to the selection of carrier as well as to the determination of route pattern. In fact, conventional cross-examination may be more useful on the route question because there are likely to be some complaints about past service based on personal experiences and also controversies about past events. The inquiry, therefore, may more properly be cast in terms of whether cross-examination serves a useful purpose in route cases generally, without distinguishing between determination of route pattern and selection of carrier.

On this issue, opinion is divided. Practitioners and hearing examiners find cross-examination useful in exposing underlying methods and assumptions and in reducing the temptation to make extreme assertions in direct exhibits. Bureau personnel, on the other hand, believe that most of what transpires under the guise of cross-examination is really argument and ought to be reserved for briefs and oral argument. Everyone seems to agree that cross-examination often is excessive and that there appears to be little that can be done to control it. The problem is aggravated by the tendency of each of numerous parties to cross-examine an adverse witness; by the attitude of the examiners in generally supporting the cross-examiner's right to ask questions and in resolving doubts in his favor; and by the formation of judgments about cross-examination which are related more to protecting the abstract legal rights of the various parties to a "hearing" than to examining the utility of this mode of questioning in uncovering facts relevant to route proceedings.11

Undoubtedly, more research is required on this issue. But considering

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the nature of the evidence and the bulk of the record when it reaches Board level, some serious thought should be given to a procedure which severely restricts the right to cross-examine, particularly by shifting the presumption to negative the general right to cross-examine and to require justification for any question sought to be posed. The Administrative Procedure Act compels only "such cross-examination as may be required for a full and true disclosure of the facts." Such an approach, if adopted, should be based on a close analysis of the use and usefulness of cross-examination on various issues rather than upon doctrinaire distinctions between "rulemaking" and "adjudication."

D. Articulation Of Criteria In Initiating Proceedings

In contrast to the Board's extreme caution in employing rulemaking to resolve route pattern questions, the Board exercises a broad, informal discretion in determining when to initiate proceedings on specific applications. This is particularly striking in view of the fact that the statute expressly requires that route applications shall be disposed of "as speedily as possible," and that the refusal to hear an application is tantamount to a denial, at least for the period of refusal. The general acquiescence in this informality, as contrasted with the insistence on formal proceedings on applications actually heard, may be explained by the industry's view of the hearing process that perhaps its function is less to protect applicants from arbitrary government action than to protect incumbents from new entry and to assure incumbents of equitable treatment vis-à-vis one another. Thus blanket denials of applications (by refusals to hear them) are generally accepted, but a hue and cry goes up if any more is made toward grants of applications without a hearing or toward preferential selection of applications for hearing (the *Ashbacker* problem).

Recently the Board has issued a statement of policy making explicit the discretion involved in setting applications for hearing. Intended as an articulation of present practice under which priority of filing has little, if any, influence, the policy statement sets forth a number of general criteria to guide the Board's selection of applications for hearing such as the impact of delay, the time a proposal has been pending and the time it would take to decide the case. In matters relating to operating authority, the relevant factors also include:

1. the reduction that a proposal may have on subsidy or increase in economy of operation;
2. whether an application proposes new service;
3. the volume of traffic that might be affected by the grant or denial of the proposal;
4. the period that has elapsed since the Board considered the service need of the places or areas involved; and

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(5) In defense of the generality of its criteria, the Board stated that "it obviously is impossible to set forth an all-embracing rule that can be applied mathematically in determining the order in which the requests should be set for hearing. The large number of considerations that enter into the determination of public interest, the infinite variations in the factual situations that may arise, and the dynamic and rapidly changing nature of the industry and its problems, make this impossible." 18

The impossibility of more precise formulation is unfortunate from two points of view. First, the absence of any standards which really control the scheduling of route proceedings removes from the Board a significant pressure for route planning. The ability to select applications on an ad hoc basis relieves the Board of the necessity for planning, since obviously some applications can be selected for hearing whether there is a plan or not. If, on the other hand, criteria were formulated to govern the order in which applications should be heard, the Board would be compelled to focus on the standards it had formulated and to abide by them or revise or qualify them as circumstances might require. Undoubtedly some measure of planning can be accomplished under the ad hoc method, as has happened in the past, but there is little assurance that there will be consistent attention to the orderly development of the nation's route pattern.

Second, the lack of objective criteria raises doubts as to the rationality of the Board's docket arrangements and the fairness of its choices as among different applicants. No matter how justly the ad hoc method is employed, there is no way of assuaging doubts that a particular application, long pending on the docket, has been capriciously overlooked or is being studiously ignored. In other agencies, pressures created by such doubts have led to the most rigid ordering based upon priority of filing.

The Board's staff maintains that the development of objective criteria to govern the selection of cases to be heard is so complex and difficult as not to be worth the effort. Presumably the staff does not suggest that planning of route development and selectivity among applications is impossible, since the last thing they are prepared to do is act on applications in the order in which they are filed. Accordingly, it is suggested that a modest beginning be made in this area:

1. By indicating, at the initiation of a route proceeding, the considerations which have led to the institution of the case, emphasizing the factors

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18 14 C.F.R. § 199.38 (1961) [now 14 C.F.R. § 199.60 (1965)].

19 Notice of Proposed Rulemaking, Explanatory Statement, PDR-16, PSDR-2, supra. In this same Notice, the Board also proposed to dismiss applications, without prejudice to refiling, if they have not been set for hearing within three years of their initial filing. The objective stated was to clear the docket of "stale" applications and to discourage the practice of continuously amending old applications, instead of filing new ones, in order to retain an early docket number. To the extent that priority of filing might be given weight in setting applications for hearing, the relevant date would be the time of filing of the initial application, even though it had since been dismissed and refiled. This proposal has become effective as 911(a) of the Board's Rules of Practice.
that might bear on other pending applications (such findings should be made irrespective of the particular mode of initiation decided upon).

2. By setting forth, in orders denying expedited hearings, the particular factors that prompted the denial, and also indicating the probable future fate of the application, whether it is being deferred indefinitely pursuant to a policy of general applicability or whether it is slated for hearing in due course in accordance with a plan or system of priorities devised by the Board.

Neither the Board nor its staff would contend that it is incapable of planning or of establishing priorities nor is it reasonable to suppose that plans, once formulated, are incapable of articulation in terms other than the usual affirmation that “at each point along the way all relevant factors will be taken into account.” Hopefully, greater precision in purpose can be achieved if the Board focuses more intensively on the considerations that govern the order in which route cases are heard.

E. Definition Of The Scope Of Proceedings: The Ashbacker Problem

1. Background

One consequence of the Board’s highly discretionary approach to scheduling hearings has been to aggravate the problem of consolidating applications for simultaneous hearing and disposition. If applications are not assured of a hearing in any particular order, or within a short period after they are filed, great emphasis must be placed on hearings together all applications concerned with a common route pattern. Otherwise some applications might be discriminatorily prejudiced by the grant of others filed much later. Thus, the one limitation on Board discretion in scheduling hearings is that whenever one application is set for hearing, the Board must also hear all other applications which would be excluded (or might be excluded) by a grant of the application first noticed. This is the essence of the Ashbacker doctrine as applied to airline route cases.17

The requirement that the Board simultaneously hear all “mutually exclusive” applications is easy enough to grasp in the simple cases but is extraordinarily complex at the borderlines. In the St. Louis-Southeast case, for example, there was little doubt that the Board should consolidate all applications seeking new authority between St. Louis and the major southeastern points by reasonably direct routes.18 But what of applications seeking authority to the north and west of St. Louis which allegedly would be prejudiced by a combination of the new St. Louis-Southeast authority with the applicants’ existing authority—e.g., Braniff’s opportunity for Twin Cities-Miami service, TWA’s opportunity for West Coast-Miami service, Delta’s opportunity for Kansas City-Miami service? In such cases the Board endeavors to make the combination non-competitive with any subsequently authorized through service by imposing a mandatory stop

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18 See also Northwest Airlines, Inc. v. CAB, 194 F.2d 339 (D.C. Cir. 1952).
DOMESTIC LICENSING: THE CAB

at the boundary of the area under consideration; e.g., at St. Louis for TWA's West Coast-Miami flights and at Memphis for Delta's Kansas City-Miami flights. In the case of TWA, the reviewing court insisted on even greater disruption, holding that, on the existing record, only a more severe restriction would suffice to preclude a route competitive with (and potentially exclusionary of) pending transcontinental applications.

The Board is therefore confronted, under the Ashbacker doctrine, with two unattractive courses of action, either (1) expanding the proceeding indefinitely, transforming all significant cases into nationwide monstrosities; or (2) limiting any new authority granted to the area under consideration by imposing mandatory stops or other restrictions, thereby impairing the usefulness of that authority to the traveling public (as by requiring TWA through passengers to change planes at St. Louis). The Board, of necessity, has had to rely on the second course to set some outer limit to the scope of its proceedings. Even then, questions arise as to whether the limitation is effective to prevent the exclusion or potential exclusion of applications seeking authority beyond the area. The courts have recognized the Board's dilemma and have not insisted that the Board guard against every such potential prejudice. The prevention of "mutual exclusion" has had to yield in some cases to the necessities of establishing reasonable limits on route proceedings (as indicated by the Court's rejection of Eastern's protest of the award to Delta in the St. Louis-Southeast case). 10

When the Board is confronted with a motion to consolidate an application alleged to be mutually exclusive with one or more applications already included in a pending proceeding, the following questions must be resolved:

(1) What will be the effect on the scope of the proceeding, and the objectives sought to be achieved thereby, of including the application? 11

The Board must consider, not only the possible expansion of scope and distortion of objectives that might result from this one application, but also the possibility that inclusion of this application will lead to motions to consolidate still others—a "snowballing" effect.

(2) What will be the probable prejudice to the application sought to be consolidated if it is excluded? 12

Here the Board is called upon to make a prediction based upon the economic relationship between routes which may be awarded in the pending proceeding and the authority requested in the application sought to be consolidated. Although this inquiry is couched in terms of finding whether the applications are "mutually exclusive" or not, the issue more often is one of degree: Will a grant of the

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included applications prejudice, more or less, the possibilities of later granting the application sought to be consolidated? Only rarely would a conscientious Board be able to state categorically either that the grant of the included applications would absolutely bar a subsequent award or that their grant would have no impact whatever on the application sought to be consolidated.

(3) What restrictions should be placed on awards made pursuant to include applications so as not unduly to prejudice any excluded applications? Having determined the degree of probable prejudice to excluded applications, the Board must further predict to what extent that prejudice may be reduced by various types of restrictions, weighing the concomitant reduction in the utility of the new route award to the traveling public.

It is important to note that information relevant to these considerations may not be readily available at the commencement of the route proceeding, since the degree of prejudice to excluded applications and the effectiveness of protective restrictions depend in large measure on an economic analysis of the routes in question, the very issues which will be explored on the merits. The answer, moreover, is likely to turn on a balancing of a number of competing factors: the need for route proceedings of manageable proportions, the desirability of avoiding burdensome operating restrictions, the avoidance of prejudice to excluded applications. No absolute priority is accorded to any one factor. An applicant can no more insist on avoidance of all possible prejudice to its pending application than the Board can insist on unfettered discretion in defining the scope of its proceedings.

In addition to exclusion of applications proposing service beyond the area under consideration, the Board may also exclude applications proposing a different type of service, or a different objective, than the included applications. Applications for trunkline service have generally been heard in proceedings separate from local service applications, although both may concern the same area. Similarly, merger proposals have been separated from route applications.

To summarize, the Ashbacker requirement of simultaneous consideration for mutually exclusive applications is met by (1) consolidating all applications (or portions of applications) proposing new service of a given type wholly within an area defined by the Board; (2) imposing limitations on the combination of new authority with authority already held beyond the area so defined; and (3) accepting as unavoidable some measure of potential exclusion of applications proposing new service beyond the defined area and not included in the proceeding. One important

25 Western Air Lines, Inc. v. CAB, 184 F.2d 341 (9th Cir. 1950); Southwest-West Coast Merger Application, 11 C.A.B. 999, 1000 (1950).
DOMESTIC LICENSING: THE CAB

103

facet of the Ashbacker problem is the procedural framework within which these issues arise and are resolved. First, the Board requires that, in the absence of "good cause," all motions to consolidate must be made at or before the prehearing conference in the proceeding with which consolidation is sought. The Board then passes on the motions prior to the hearing. This sequence is probably unavoidable, since there must be a cut-off date after which proposals to expand the proceeding normally will not be accepted; and it is desirable that the scope of the proceeding be defined with some certainty in advance of the evidentiary hearing so that the examiner and the parties will have some guidance as to what is and what is not relevant evidence. The refusal of the Board to entertain motions to consolidate filed after the prehearing conference has been judicially approved.

Second, there is some question as to whether a Board refusal to consolidate is immediately reviewable. The Court of Appeals for the District of Columbia has entertained protests based on Ashbacker prior to the conclusion of the pertinent proceeding before the Board. An applicant refused consolidation may seek immediate judicial review of the Board's decision. Review seemingly is granted if the Court agrees with the disappointed applicant on the merits of the Ashbacker question, but rejected as premature if the Court disagrees with the applicant. The Board contends that consolidation orders ought to be considered interlocutory and non-reviewable in all cases because (a) their review at the outset tends to delay the course of the Board's proceeding, and (b) the whole problem may be mooted by Board denial or limitation of the application with which consolidation is sought. On the other hand, if an application is improperly refused consolidation, judicial reversal at the conclusion of the Board's proceeding may prove to be a pyrrhic victory for the excluded applicant. The record will be reopened to hear the evidence of the applicant previously excluded, but an award already will have been made to another applicant, expectations based on that award will have been created, and the Board may be under some constraint to resolve the reopened proceeding along the same lines as the original proceeding. In view of the slow pace of Board proceedings, it seems entirely feasible to permit judicial review of the consolidation question in advance of the conclusion of the Board's proceeding without disrupting that proceeding in any way. This can be accomplished by depriving the reviewing court of power to stay

20 Rules of Practice 12(b), 14 C.F.R. § 302.12(b) (1963) [hereinafter cited as Rules of Practice].
22 Delta Air Lines, Inc. v. CAB, 228 F.2d 17 (D.C. Cir. 1955).
23 Eastern Air Lines, Inc. v. CAB, 243 F.2d 607 (D.C. Cir. 1957); United Air Lines, Inc. v. CAB, 228 F.2d 13 (D.C. Cir. 1955); Eastern Air Lines, Inc. v. CAB, 178 F.2d 726 (D.C. Cir. 1949). Also treating denial of consolidation as interlocutory and non-reviewable: Western Air Lines, Inc. v. CAB, 184 F.2d 545 (9th Cir. 1950).
24 Since route awards do not necessarily follow the authority requested in particular applications, there is additional difficulty in predicting whether the Board's decision will prejudice an excluded application. However, the scope of the proceeding would indicate whether there was a significant possibility of a prejudicial award.
the Board’s proceedings in these cases, requiring instead an expedited court
decision in advance of the Board’s decision—a seemingly easy undertaking.

Third, the same Court of Appeals has held that, where a prima facie
claim of mutual exclusion is asserted, the Board must follow one of three
courses: "(1) set [the two applications] for hearing and thereupon decide
the issue of exclusivity as a separate preliminary issue; (2) proceed to a
comparative hearing upon the two applications without further ado; or
(3) set for hearing and thereafter decide the merits of the two applica-
tions and also the issue of exclusivity." While recognizing the necessity
of evidentiary materials to resolve airline Ashbacker problems, the Board
contends that these courses of action are all unsatisfactory. The first re-
quires an extra hearing which would cover much the same ground as the
hearing on the merits while the third requires a full hearing of all applica-
tions and results in no saving if the Board ultimately decides that the applica-
tions are not mutually exclusive. The pressure, therefore, is to surrender
to the assertive applicant and follow the second course. The Board has
adopted still another approach which consists of rejecting applications for
consolidation at the outset of a proceeding but permitting participation by
the rejected applicant in that proceeding with the opportunity to present
evidence on the exclusivity issue and to renew its claim of mutual ex-
clusivity on the basis of the record made. This course of action has met
with judicial approval.

Finally, the Court of Appeals for the District of Columbia apparently
requires that mutually exclusive applications be consolidated for simul-
taneous hearing, and considers that separate hearings, with simultaneous
consideration of the two records by the Board, is inadequate. The Board
contends that this is an unreasonably rigid application of the Ashbacker
doctrine, not warranted by the theory of mutual exclusion. The Board’s
position seems sound as long as the separate records are based on hearings
in which the excluded applicants are permitted to intervene, adduce evi-
dence and cross-examine adverse parties. This approach is particularly
desirable where two proceedings overlap, as the St. Louis-Southeast and
Great Lakes-Southeast cases did. The main issues in each proceeding were
dissimilar but each involved the common Atlanta-Miami stem.

The Board has proposed legislation (1) postponing judicial review of
consolidation orders until after the conclusion of the Board proceeding;
(2) eliminating the need for any preliminary hearing on mutual exclu-
sivity; (3) obliquely equating consolidation for hearing with other forms

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21 Delta Air Lines, Inc. v. CAB, 228 F.2d 17, 22 (D.C. Cir. 1955).
23 Southeastern Area Local Service Case, E-14714, 18 Dec. 1959; Pacific Northwest Local
Service Case, E-13945, 28 May 1959; Great Lakes-Southeast Service Case, 27 C.A.B. 829 (1958);
Eastern Air Lines, Inc., Motion for Immediate Hearing, 21 C.A.B. 804 (1957); Dallas to the West
24 Eastern Air Lines, Inc. v. CAB, 271 F.2d 752 (2d Cir. 1959), cert. denied, 362 U.S. 970
(1960); National Airlines, Inc. v. CAB, 249 F.2d 13 (D.C. Cir. 1957).
of contemporaneous consideration. The Board’s proposals, while reflecting some genuine difficulties, appear to be too sweeping on the matter of judicial review. At the same time they do not make any effort to carve out areas of relative certainty where Ashbacker issues might be resolved with greater predictability. The area proceeding, with its mandatory stops at the boundaries, has been an effective tool in meeting Ashbacker problems. The continued use of this device by the Board should be protected against the undermining effects of decisions such as that of the Court of Appeals in the St. Louis-Southeast case. The infrequent occasions on which a mandatory stop at the boundary might not provide complete protection against prejudice to excluded applications appears to be outweighed by (1) the speculative character of all judicial estimates of such prejudice, (2) the loss in certainty in fashioning Ashbacker solutions at the Board level, and (3) the inconvenience inflicted upon the traveling public by requiring disruptions greater than mandatory stops.

2. Recommendations

It is recommended that the Federal Aviation Act be amended to provide:

a. That contemporaneous consideration of applications, when required, may be accomplished by assigning applications for separate evidentiary hearings and then consolidating them for simultaneous decision by the Board.

b. That contemporaneous consideration of applications is not required when the Board institutes a proceeding to consider applications for a particular type of service within a defined area or over a described route segment and excludes applications (or portions of applications) not proposing service of the particular type within the area or over the segment so described, provided that new authorizations granted in any such proceeding are subject to a mandatory stop at any point common to any application (or portion) excluded from the proceeding.

c. That the Board shall not be required to hold a preliminary hearing on the issue of consolidating applications, nor be compelled to decide the issue prior to the initial decision in the proceeding with which consolidation is sought.

d. That a party unconditionally denied consolidation, after timely request, shall be permitted to seek immediate judicial review of such denial, but the courts shall not have authority to stay Board proceedings in any such case. When a request for consolidation has not been definitively adjudicated by the Board within three months following the initial decision in the case, the request shall be deemed to have been unconditionally denied.

3. CAB Discretion in Scheduling Hearings

Even more far-reaching restrictions of Ashbacker might be possible if the Board relinquished its unfettered discretion over scheduling hearings.

First, there is obviously an area of compromise involved where the need to consider proposals for new route authority in a proceeding of limited scope must be balanced against possible prejudice to excluded applications and also possible prejudice to the public through imposition of operating restrictions designed to confine the proceeding. The three factors to be considered are all closely related to the conduct of the Board’s work and the realities of the airline situation. They are not matters that courts are particularly well equipped to handle. Nonetheless, courts, while probably influenced by the “procedural” character of the question, sometimes appear to be unusually willing to substitute their own judgment for that of the Board. Consider the court’s treatment of the grant of TWA in the St. Louis-Southeast case and the outcome of the subsequent Southern Transcontinental case. It might be well to reaffirm the view, generally accepted in the abstract, that consolidation questions are primarily within the Board’s discretion and judicial intervention should be withheld except in instances of clear abuse.

Second, it is far from obvious that the traveling public should be prejudiced in any case solely to protect the interests of an excluded applicant. If the need of St. Louis for expanded air service to Miami requires prompt consideration, and if that consideration results in an award which also improves service between Miami and the West Coast (or Kansas City or Minneapolis-St. Paul), why not give the public the benefit of the improvement (assuming, of course, that limitations on the new authority are not imposed for other reasons)? Excluded applicants might be prejudiced. But then again there are many circumstances in an imperfect world which work a prejudicial effect; the private interests of the applicants would have been incidentally affected in promoting the overall public good. But this assumes that the adverse effect upon the excluded applicants is haphazard and unplanned, not the result of favoritism to included applicants. Probably no such assumption would be accepted as long as the Board continues to select applications for hearing on an ad hoc basis. The danger of preferential treatment for favorites, and of arbitrary exclusion of unpopular applicants would be too great. In all likelihood the same factors would influence a court in refusing to defer to the Board’s discretionary judgment on doubtful matters.

F. Board Initiative In Instituting Proceedings

As previously indicated, the Board recently has turned to initiating proceedings by means of orders of investigation and orders to show cause. These have the advantages of placing the initiative for defining the scope and objectives of the proceeding squarely with the Board. Private parties may challenge the Board’s order and suggest revisions, but they do not, by their applications and motions, initially seek to shape the proceeding.

A recent amendment to the Board’s rules accords formal recognition

38 United Air Lines, Inc. v. CAB, 228 F.2d 13, 16 (D.C. Cir. 1955).
40 Rules of Practice 915.
to this additional method of instituting proceedings, i.e., by orders of investigation and orders to show cause. The impression among the Board’s staff is that this method will soon become the principal vehicle for instituting route proceedings. The new rule provides for objections to the initiating order and answers thereto, but does not indicate who will bear the responsibility for making recommendations to the Board on their disposition. This is currently a matter of dispute within the Board, recommendations having been made by the Bureau in some cases and by the examiner in others.

It is hoped by Board personnel that one consequence of greater Board initiative will be to lessen the impact of Ashbacker problems. Certainly consolidation issues can be more intelligently handled if the scope of the proceeding is clearly defined at the outset. But it is doubtful that the major Ashbacker problems will be resolved by this technique since even when the scope of the proceeding is defined with clarity, there remains the difficulty stemming from combining new grants with existing authority to make possible a new service beyond the scope of the proceeding. In addition, the basic factor underlying Ashbacker, the unrestricted discretion of the Board in selecting applications for hearing, is in no way alleviated.

There is much to be said for the Board’s view that it ought to be able “to establish the scope of the proceeding and the issues to be determined therein on the basis of public interest requirements as developed by the Board’s studies and long-range policy planning.” The reasoning is similar to that supporting Board discretion in selecting which applications should be heard. If the Board is to achieve fully the objectives it has in mind, it would be desirable to base the institution of proceedings upon something other than ad hoc exercises of discretion.

If a particular proceeding is based upon a study, presumably the study would provide reasons to support the initiation of an investigation here rather than elsewhere. If cases are heard pursuant to “long-range policy planning,” the planning should be articulated as a justification for taking up individual cases in a particular order. Perhaps the need for such explanation diminishes as the Board moves away from any semblance of application-oriented proceedings to a process dependent wholly on Board initiative. But then it would be only candid to dispense with the entire application framework, to discard it as an obsolete fiction. It is unlikely that the Board is prepared to go this far, for one of the fundamental premises of the Civil Aeronautics Act was that entry into commercial aviation would remain open, conditioned only upon a showing by an applicant that its proposed services are required by the public convenience and necessity.

Board initiative in instituting proceedings may do less to solve the Ashbacker problem than to disentangle it from the prehearing conference. But this would itself be a gain. With the scope of the proceeding inde-

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pendently determined, the prehearing conference could be devoted more intensively to expediting a decision on the merits of the applications involved. Earlier definition of the scope of the proceeding may also serve to lessen interventions prompted by uncertainty as to whether matters may be encompassed in which the interviewer has an interest.

Whether the use of Board orders to initiate proceedings will contribute to increasing the efficiency and effectiveness of the licensing process is difficult to judge at this time. If they can be prepared expeditiously by the Bureau, and if the objections of the parties can be anticipated and resolved largely in advance on an *ex parte* basis, the device may work a significant improvement. On the other hand, the Bureau may not sufficiently anticipate objections of the parties. Then the initiation of proceedings may be slowed down because of the need to have two full-scale considerations of consolidation issues, one prior to the instituting order and one immediately thereafter. Similarly, if the tentative conclusion announced in a show cause order is poorly considered, its presence probably will result in confusing and slowing down the proceeding.

The efficacy of these devices clearly turns on the quality of the Bureau’s product. The “show cause” technique is, in part, a modest experiment in the *ex parte* Board planning so many CAB critics have advocated. Its use will provide a means of judging whether the Board really has the resources to proceed effectively with greater emphasis on *ex parte* planning or whether it must continue to rely heavily upon private parties to produce the evidence it needs to decide route cases (or to decide the contours of route cases).

G. The Role Of The Hearing Examiner In Shaping And Conducting Formal Proceedings

In a number of ways, the CAB has sought to expedite the processing of route cases. Its efforts should be encouraged and extended.

1. Prehearing Conference and Consolidation Issues

The Board was a pioneer among the administrative agencies in developing the prehearing conference. As previously noted, the efficacy of the conference may be improved by resolving consolidation issues elsewhere. Ideally the sequence should be: (1) Board initiation of proceedings by noticing applications or issuing orders of investigation or orders to show cause; (2) establishment of a limited period within which parties might object to the initiating order or move for a change in the scope of the proceeding; (3) review by the examiner (or Bureau) of objections and motions directed to the initiating action and an internal recommendation as to their disposition; (4) Board order disposing of such objections and motions, based on the internal recommendation or otherwise; and (5) convening of a prehearing conference for consideration of methods to expedite the proceeding. Two factors may lead to disruption and delay in the development of this sequence.

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44 *Supra* note 3.
First, the feasibility of separating the prehearing conference from consolidation issues depends in large measure on the definiteness and soundness with which the issues are originally formulated. If the original noticing of applications is completely vague, then a "chain reaction" is likely to ensue, one broadening motion leading to another still broader in scope. Under such circumstances a conference format may be desirable, since it permits proposals and counterproposals to be made more or less simultaneously. If the use of the conference is dispensed with, there may be occasions when a substantial and unanticipated change in response to the first series of motions may require a second opportunity to file motions and objections.  

Second, the time required for disposition of consolidation issues by the Board has been quite long, over seven months on the average for major route cases closed in fiscal 1961. If the prehearing conference is delayed until consolidation issues are resolved, there is the substantial risk that considerable time prior to the conference will be completely wasted. Even with consolidation issues outstanding, a prehearing conference held at the outset can make a beginning on the preparation of exhibits and the like. The Board’s examiners contend that one way of resolving this difficulty is to give them authority to pass on consolidation issues in their own right, with or without discretion in the Board to immediately review their consolidation orders. But consolidation issues are so vital to the processing and ultimate outcome of the case that Board control at this stage is probably essential to control of the process as a whole and effectuation of such Board control by the medium of formal examiner decisions subject to discretionary review invites the delays incident to filing petitions for review, briefs and other formal measures.

Perhaps an adequate solution would be for the examiner to prepare an internal memorandum, as he does now, but with the additional discretionary authority to add the following legend in appropriate cases: "This order does not appear to present unusually complex consolidation issues; unless otherwise advised within twenty days, I will publish the order in behalf of the Board." Control by the Board could be assured by limiting its consideration of proposed consolidation orders to instances where the examiner felt that unusually complex consolidation issues were involved, or the Board, on advice of its staff, directed the examiner not to publish a consolidation order the examiner considered routine. If the delays encountered in resolving consolidation issues are to be effectively remedied, this procedure would have to be coupled with the provision of some assistance for the Special Counsel for Routes so that review of consolidation orders can be handled more expeditiously in the General Counsel's office.

As previously indicated, there is a dispute as to the identity of the Board
personnel who should pass on objections to the scope of proceedings based upon Bureau planning (orders of investigation and orders to show cause). The Bureau contends that, since it was initially responsible for planning the proceeding, it is in the best position to judge what impact various objections will have on the plan. The opposing argument is that the Bureau is hardly in a position to give dispassionate advice about objections challenging the soundness of its own handiwork. There is merit in both points of view, and also in the Bureau’s supplementary point that its utility as an advisor to the Board is diminished if it is restricted to the public forum and the submission of formal pleadings. A sensible resolution of this dispute would be to have the examiner pass on the objections, but permit the Bureau to submit a different recommendation to the Board, if it so desires, via the same internal channels. No additional work is involved in allowing this Bureau recommendation, since the Bureau would have to consider objections to the orders in any case; and no additional time need be consumed, since the Bureau could be working parallel to the examiner and could utilize in addition the time required for the General Counsel’s office to review the examiner’s recommendation.

2. Presentation of Evidence

One of the great problems in Board proceedings is that the standards governing route awards are so many-sided and open-ended that it is extremely difficult to curtail the scope of evidence presented. The voluminous records which result may serve only to impede a clear judgment on the most important issues. The Board, therefore, has been well-advised to announce the types and forms of evidence which it considers most helpful in resolving particular controversies, limiting certain classes of evidence, previously described, not considered to be particularly persuasive, and standardizing the manner of presenting evidence, as in the case of local service carrier costs. These techniques are worthy of further implementation, although each instance, including those already proposed or adopted, must be judged on its own merits.

In addition, the scope of the record can be usefully contained by efforts on the part of the Board to clarify, to the extent possible, the standards applicable to route awards, particularly as to relevant factors. All this is but a concrete illustration of the need to establish as much of a consensus at the Board level as is practicable in light of the divergent individual views of Board Members. To the extent that individual views preclude such a consensus, and they will to some degree, the scope of the record invariably will expand to include materials relevant to all individual views, real or imagined.

3. Continuances, Postponements, and Delays

The Board’s practice of requiring advance submission of direct evidence

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46 See Part I, notes 179-81, 10 J. Air L. & Com. at 144.
in the form of written exhibits\textsuperscript{48} has eliminated one basis for requesting continuances; \textit{i.e.}, that the adverse party needs time to study the direct evidence and to prepare cross-examination and rebuttal. However, other causes for delay exist. The problem of passing on consolidation issues has already been mentioned. It must also be recognized that most Board proceedings involve one or more of a limited number of air carriers, particularly the eleven trunklines and the thirteen local service carriers. This means that counsel for individual carriers are likely to be involved in several proceedings at one time, a situation productive of conflicts which can be resolved only by changing time schedules in one or more proceedings. Some coordination on matters relating to postponements is attempted by the Chief Examiner,\textsuperscript{49} but apparently there is still considerable variance among individual examiners.

There has also been dissatisfaction with the time required by some examiners to prepare their initial decisions. This has led to proposals within the Board to "program" individual proceedings, establishing deadlines for the completion of various stages of the case. Perhaps this will have some psychological effect upon examiners, but it is difficult to see how a deadline can be enforced against an examiner unprepared to render his decision by a particular date. It should be noted that the Chief Examiner now endeavors to promote expeditious rendition of decisions and otherwise encourage speedy disposition of pending matters.

4. Personnel Policies

The problem, in part at least, boils down to agency control over examiners. In general, the considerations pertinent to ICC control over examiners in its Bureau of Operating Rights are applicable here also and need not be repeated,\textsuperscript{50} although the smaller number of examiners at the Board minimizes the problem considerably. The basic issue is whether there is any significant reason why, in licensing cases unrelated to enforcement policies, the agency should not have authority to remove examiners with which it is dissatisfied and to influence examiners more effectively in the expeditious disposition of matters pending before them.

It should be emphasized that, on the whole, the Board is quite pleased with the performance of its examiners, and the examiners themselves seem quite active in suggesting improvements in Board procedures. The examiners hold weekly meetings to discuss problems among themselves, they have in preparation a manual for use by CAB examiners and they have participated on committees designed to improve Board procedures.\textsuperscript{51}

One other personnel matter deserves mention. Some examiners have

\textsuperscript{48} Rules of Practice 24(b); Judicial Standards of Practice, 14 C.F.R. § 300.1, 2 (1961).
\textsuperscript{49} Rules of Practice 17.
claimed a need for assistance, either in the form of law clerks or of economic analysts assigned to the hearing examiner group. On the latter, it seems unnecessary and undesirable to duplicate economic analysts in different departments of the Board. Rather, the solution would appear to lie in breaking down the barriers that now exist between many hearing examiners and the Bureau of Economic Regulation. An overly fastidious regard for separation of functions has led to a reluctance on the part of many examiners to seek technical assistance from the Bureau. For reasons more fully stated in a subsequent discussion of the relations between the Board and the Bureau, this attitude should be abandoned except as to Bureau personnel directly participating in the proceedings. With respect to law clerks, the problem might be solved by changing policies relating to recruitment of examiners so that the Board might establish an examiner training program under which apprentice examiners might serve for limited periods as assistants to full-fledged examiners while becoming familiar with the demands of their future positions.

H. Delegation Of Decisional Authority In Formal Proceedings

Reorganization Plan No. 3 of 1961" conferred power upon the Board to delegate decisional authority to hearing examiners subject to provision for discretionary review by the Board. Effective with proceedings in which hearings were commenced after 1 February 1962, the Board has delegated such authority" to its examiners in all domestic route matters (and in most other proceedings), providing only for discretionary review of such decisions by the Board."

A petition for review may be filed within twenty-five days after service of the initial decision. It is limited to twenty pages in length and may be based on one of the following grounds:

1. a finding of a material fact is erroneous;
2. a necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules, or precedent;
3. a substantial and important question of law, policy or discretion is involved; or
4. a prejudicial procedural error has occurred. Comments accompanying the new regulation make it clear that a carrier may "ask the Board to exercise its discretion by reviewing issues which have an important economic impact upon the petitioner although they are not necessarily significant in the formation of Board policy."

Within fifteen days of service of the petition any opposing party may file an answer limited to fifteen pages. The Chief Examiner is empowered

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54 Rules of Practice 27, 28.
55 Rules of Practice 28 (a) (1).
56 Rules of Practice 31 (c) (3).
57 Rules of Practice 28 (a) (2).
58 Supra note 53.
59 Rules of Practice 28 (b).
DOMESTIC LICENSING: THE CAB

...to make adjustments in any date and page limitations that may prove inequitable in a particular situation.  

Review will be granted, on affirmative vote of two Members, without regard to whether any of the enumerated grounds have been established.  

Review may be denied, despite the existence of one or more of the enumerated grounds, if at least two Members do not find that review is in the public interest.  

And review may be had, in the absence of any petition therefor, if two Members vote for review within thirty days of the initial decision.

If review is granted, the Board will "specify the issues to which review will be limited," specify the portions of the examiner's decision that are to be stayed, and designate the parties to the review proceeding.  

Petitions for reconsideration of orders relating to review are limited to "the single question of whether any issue designated for review and any issue not so designated are so inseparably interrelated that the former cannot be reviewed independently or that the latter cannot be made effective before the final decision of the Board in the review proceedings."  

There is some uncertainty within the Board as to the practical effect of the new regulation. Some consider that review will always be granted in any case of significance, since it is only necessary that two Members indicate an interest. Others feel that the delegation will be broadly applied, freeing Board Members of a substantial share of their current caseload. The latter view is almost always linked with the idea that, on a petition for review, the Board will consider the merits of the examiner's decision and, if it agrees, review will be denied; or, if it agrees in large measure, review will be granted only on a limited number of issues.

The feeling among practitioners before the Board is that the delegation is too broad and sweeping; that the kinds of policy choices involved in major route cases should be made by the Board and not by the hearing examiner; and that, to the extent the Board reviews the merits in passing on petitions for review, the new procedures are inappropriate in that they impose narrow time and page limits upon petitions and answers. There is also the fear that denial of review will be used as an easy expedient in avoiding decisions on highly controversial matters, or in succumbing to political pressures favoring the result reached by the initial decision.

One of the difficulties which confronted the Board in attempting to exercise the delegation power granted by Reorganization Plan No. 3 was the problem of establishing classifications and separating into different categories the cases that would be reviewed as of right and those which

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60 Organization § 3.3(a); Delegation of Function to Hearing Examiners, supra note 53.
61 Rules of Practice 28(d).
62 Ibid.
63 Rules of Practice 27(c), 28(d).
64 Rules of Practice 28(d) (1).
65 Rules of Practice 28(d) (2).
66 Rules of Practice 28(d) (3).
67 Ibid.
68 The threat of judicial reversal would probably compel Board review in some cases, but not in the more numerous instances where policy judgments are paramount.
would be subject only to discretionary review. The task proved so resistant to solution that it was abandoned in favor of the sweeping delegation of decisional authority in all cases. Critics of the Board's proposal have not suggested any workable method of separation, and it may be assumed that useful categories are difficult to formulate. Still, it does not appear that the Board has reached a satisfactory result.

With respect to route cases, it is recommended that, as a supplement to its new procedure, the Board adopt a system of ad hoc notices of review to be made at the time of its consolidation order (or other order issued at the outset of the proceeding). Then, the dimensions of the proceeding would be known, and the Board would be in a position to determine with reasonable accuracy whether it would be a major or a minor route proceeding. As to minor route proceedings, the Board might well make its new review procedures applicable, but with a strong presumption that review would not be granted. As to major route cases, however, a notice of review should be issued at the time of the consolidation order, making Board review automatic (at the option of a losing party) in accordance with pre-existing procedures. But even as to such major route cases the Board could, if it later agreed with the examiner's decision, summarily affirm and adopt as its own the opinion of the examiner. This, however, is a review on the merits, carried out under procedures designed for such review.

The advantages of adding the recommended procedure to the one adopted by the Board are:

(1) The issue of review is largely disentangled from the results in particular cases and related more closely to the nature of the case.

(2) As to minor route matters, examiner decisions ought to be dispositive most of the time and they will not often present major policy choices. Review could be granted where important policy issues unexpectedly arose or where the examiner committed a blatant error. Otherwise, review could be consistently denied, thereby discouraging even the petitioning for review.

(3) As to major route matters, petitions for review would be a virtual certainty under the Board's new procedure. Denial of petitions could hardly be based on the nature of the issues, but would have to turn either on a detailed consideration of the merits or on factors outside the record. Where review is granted, the Board would be faced with the necessity for considering the same case twice, once on the petition for review and once on the full-fledged hearing on the merits. All of this is avoided by establishing reviewability at the time of the consolidation order.

The wisdom of delegating decisional authority to examiners, and of limiting review to discretionary interpositions, is clearly related to the probability that the examiner's decision will be accepted unchanged. In major route cases, the prospect of this happening is virtually nil. In each of the six major route cases closed in fiscal 1961, as in the *St. Louis-Southeast Service Case*, the Board made significant changes in the examiner's decision.
This typical showing is the inevitable result of the shifting and uncertain changes in emphasis among the competing policy considerations weighed by the Board, the intervention of events between the time of the examiner’s decision and review by the Board and the many-sided character of these cases, providing so many possible grounds for differences of opinion. In some cases, too, the examiners are considerably out of step with the Board. Under such circumstances discretionary review has alternative implications. If review petitions in major route cases are largely denied, there is a substantial abdication of the role formerly played by the Board; if, on the other hand, such petitions are largely granted, the procedure, in major cases, becomes a time-consuming futility.

The Board, it is believed, has uncritically adopted a review procedure unsuited to the route cases which come before it. Its new procedure might make sense if the problem were selecting the few significant decisions out of a large mass of examiner opinions not otherwise distinguishable, but this is not the Board’s problem. The Board’s licensing cases are relatively few in number; and it is possible, at the outset of their processing, to identify those in which Board review should be granted and those in which review presumptively will be denied. The suggested modification in review procedures is based on a recognition of these distinctive characteristics.

I. The Decisional Process At The Board Level

By the time a case reaches the Board, particularly a major route case which the Board itself should decide, the proceeding is encumbered by an enormous record and numerous briefs and other argumentative materials. The conflicting pressures upon a Board Member’s time admit of only two practical alternatives: either this mass of material must be ignored in the decision-making process, a gross waste of all that has gone before and a complete abandonment of the process by which Board decisions are supposed to be reached, or the record must be made intelligible to the Board Member by effective staff assistance. The discussion which follows is based on the premise that effective staff assistance is preferable to Board decisions reached without regard to the record.

1. Personal Assistants

In some other agency determinations, effective staff assistance is rendered by one or more personal assistants. With respect to the Board’s major route cases, this is unfeasible. The personal assistant of a Board Member has insufficient time to familiarize himself with the records of route proceedings and with the other materials bearing upon their determination. An expansion of the personal offices of Board Members to permit such individual office review would be grossly inefficient, resulting ultimately in the creation of five staffs instead of one.

The personal assistant can, however, play an important role in the determination of route cases. He is familiar with the Member’s policy views and is in a position to implement these policy choices by seeing that his superior is supplied with the particular factual materials he requires to
decide the case. Indeed, it is doubtful that one personal assistant can adequately fulfill this function in light of the numerous other administrative duties he must perform. Consideration should be given to assignment of an additional personal assistant to each Board Member, preferably an economic analyst, because the complexity of route cases is such that some measure of expertise is required to propound the proper questions and evaluate the responses.

2. Hearing Examiners

At present, the hearing examiner makes his contribution through the medium of his initial decision. This can be a particularly valuable contribution if the initial decision adequately and accurately summarizes the arguments and evidentiary presentations of the various parties and organizes and analyzes the considerations relevant to decision of the case. It is questionable whether exclusive reliance on this formal opinion realizes adequately the full potential of the examiner.

Of all the Board's personnel, the hearing examiner is undoubtedly the individual most familiar with the details of the record. Yet the examiner's familiarity is almost completely wasted once the initial decision is filed. Only rarely is he consulted thereafter. While it might not be practicable to have the examiner attend sessions of the Board concerned with reviewing an initial decision he has prepared, the examiner's familiarity with the record should be more extensively utilized by the opinion writer. Accordingly, it is recommended that opinion writers be encouraged to consult more frequently with hearing examiners about matters of record in the proceeding under review. It would also be desirable to draw the examiner into the Board's decisional process so that he might be kept abreast of developments in agency policy. In this connection, it might be feasible to use the Chief Examiner as a conduit for the informal transmission of agency views to the examiner corps.

3. Bureau Personnel

The role the Bureau should play in the decisional process depends in large measure on the aspect of the Bureau's work which receives the greatest emphasis; i.e., whether the Bureau should be a militant advocate or a more neutral advisor to the Board.

Recognizing that the issue is one of degree, rather than black-and-white characterization, the Bureau at present seems to be more the advocate than the advisor in formal route proceedings. It participates in shaping the record, it formulates a "position" at or near the conclusion of the proceedings and it urges its position to the examiner and to the Board in briefs and oral argument. Attorneys in the Bureau appear to conceive of themselves as litigators rather than counselors, and their "client" seems to be the Bureau rather than the Board, although they may also claim to repre-
sent the general public. Under such circumstances it is probably appropriate to exclude Bureau personnel from Board deliberations and to limit their presentations to briefs and oral argument in the public forum. Yet, such an arrangement seriously impairs the potential of the Bureau as an effective advisor to the Board. To exclude the Bureau from Board deliberations on formal route cases has two harmful effects. First, the Board is deprived of the on-the-spot advice of its principal policy-making arm. The Bureau cannot possibly resolve in advance the policy implications of every conceivable course of action the Board might have under consideration. Moreover, Bureau personnel may be expected to have a high degree of familiarity with record materials and be able to make a contribution in this area as well. Second, the Bureau has a continuing need to be familiar with the thinking of individual Board Members and with the various policy approaches they are interested in entertaining. The value of the Bureau's advisory services, and the performance of its many day-to-day administrative functions, could be much improved by increasing the Bureau's contact with Board deliberations.

Defining an appropriate role for the Bureau in the Board's decisional process is admittedly a difficult task. Perhaps the most advisable course lies in shifting the emphasis of the Bureau's role from that of an advocate to that of an advisor to the Board. This might be accomplished by:

(1) Instructing Bureau personnel to place less emphasis on developing a Bureau "position" and more emphasis on exploring the policy implications of the various major alternatives presented by the record. The Bureau also should continue to act to assure a complete record.

(2) Requiring the Bureau to make its points on the record, as it now does, by its participation in the hearing and by its briefs and oral argument, again with greater emphasis on exploring alternatives than on defending a Bureau position. The Bureau should not be prevented, however, from advising the Board on the course of action which, on balance, it considers to be the preferable one.

(3) Inviting Bureau personnel to participate in Board discussions to this limited extent: supervisory officials, not counsel of record or his witnesses, should be permitted to listen to Board discussions, to respond to queries from Board Members, and to correct any misapprehensions about record facts that emerge in the course of discussion. Bureau personnel should not be permitted to reargue their case or state new views, although they may be requested by Board Members to answer questions from vantage points other than the one for which they publicly expressed a preference.

With such a reformulation of the Bureau's role, there would seem to be little question about the legality of the proposed arrangement. Section 5(c), the "separation of functions" provision of the Administrative Procedure Act, does not apply at all to "initial licensing" which would encompass the bulk of the Board's airline route cases. The portions related to

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compulsory modifications or suspensions of existing routes could be excluded from Bureau commentary if necessary. Further, if the Bureau acts as advisor rather than advocate, it is clearly not engaged in "investigative or prosecuting functions" and is therefore not within the ambit of section 5 (c) at all.\textsuperscript{71}

The limited role accorded the Bureau does not appear to create any significant degree of unfairness to the private parties concerned.

First, the Bureau is not in the same position as other parties concerned with route proceedings; it has no pecuniary interest in the outcome of the proceedings and no selfish objectives to pursue, nor is it an enforcement body with the outlook of a prosecutor. Enforcement aspects of route licensing proceedings should be handled by separate Board personnel.

Second, the informal role proposed for the Bureau in the Board's decisional process is extremely restricted. The Bureau will be limited, not only by the Board's description of its functions, but also by the presence of Board Members and other staff, some of whom are likely to be antagonistic to Bureau views in a particular case, or to the Bureau in general, and who may thus be relied on to keep the Bureau in its proper place.

Third, the establishment of closer contact between the Bureau and the Board in formal proceedings should tend to strengthen the advisory role of the Bureau and to cause it to operate more nearly as an arm of the Board in policy matters, rather than as a semi-autonomous unit. This may require, in addition, a change in outlook on the part of the Bureau's legal staff. Lawyers, after all, have traditionally served as counselors as well as litigators.

4. Opinion Writers

As a source of assistance to the Board, the opinion writer has both strengths and weaknesses stemming from a common source. The opinion writer has had no prior contact with the case, so his participation cannot be challenged on the ground that he may be partial. By the same token his potential contribution is likely to be limited. He lacks the hearing examiner's and the Bureau's familiarity with the record. Indeed, his review of the record usually does not begin in earnest until after the Board has made its tentative decision. He also lacks the Bureau's contact with the day-to-day implementation of Board policy and its continuous involvement in policy determinations. The average opinion writer has only the most attenuated contact with the Board whose views he is asked to depict (to be sure, the opinion writer's superiors in the General Counsel's office are not so limited). These weaknesses can be remedied to some extent by recasting the role of the opinion writer. Such a change is particularly desirable if the Bureau is not admitted to the Board's decisional circle, but some reformulation should be accomplished in any event.

First, the opinion writer should become thoroughly familiar with the record, exceptions and briefs before the Board's tentative decision rather

\textsuperscript{71} See generally 2 Davis, Administrative Law Treatise 213-223 (1958).
than afterwards. He should also be encouraged to fill any gaps that might appear in the coverage of the examiner and the Bureau, or to raise issues that may have become submerged in the general discussion.

Second, the opinion writer and his superiors should be present during the Board's deliberations and should be prepared to respond to queries about the record or relevant precedents. Probably the opinion writer's potential contribution in this area is less than is likely in the case of the Bureau, but it need not be negligible. The opinion writer's superiors may be able to provide assistance from a broader fund of knowledge and, of course, the opinion writer's observation of the Board's discussions can be of significant value in preparing an appropriate opinion.

5. Board Deliberations

As previously indicated, Board Members may require assistance on a particular case at various times during the decisional process, including the period of Board discussion and deliberation. When the Board meets, questions emerge from the cross-fire of individual Member comments. And even more significantly, whole new series of questions may be generated if the Board makes a radical departure from the basic approach of the hearing examiner. How are such queries to be answered? At various times in the past, the Board has had present at its sessions the hearing examiner, Bureau personnel and opinion writers. Now the Board endeavors to proceed without any of them. The recommendations made above suggest that the Bureau and the opinion writer be readmitted to the Board's deliberative sessions; that they need not participate in Board discussions unless invited to do so; but that they should be available to respond to queries seeking information on record facts, economic or statistical analysis, or Board precedents. Unless such knowledge is brought to bear at this final stage, much of what has gone before will have been wasted.

Having two staff components present may seem like unnecessary duplication, but there are a number of justifications for going this far. First, both staff components will profit from what they learn at Board sessions. Second, the two components can serve as a check upon one another, freeing the Board from possible undue influence from any single quarter. Third, the staff units are potential substitutes for one another. In view of the uneven quality of Government personnel, it should not hurt to have different staff representatives present with varying degrees of familiarity with both the record and the general background of Board licensing. Fourth, the participation required is not so extensive for any single staff member as to result in a substantial interference with the performance of his other duties. Indeed, one of the by-products of such an arrangement almost certainly would be a heightening of morale and interest among the staff and their greater confidence and efficiency in the execution of Board policies.

6. Preparation of Opinions

As stated above, presence at Board deliberations has a particular value
for the opinion writer. It is his task to state a rationale for the Board as a whole. The object should be to embody in the opinion, as clearly as possible, those points on which there is a consensus. On other matters, resolved by a coincidence of conflicting views or by a compromise reflecting no consistent position, generalities will have to suffice and are clearly preferable to the assorted "make-weight" considerations that are often inserted because they happen to support the result. The fact that a complete consensus is impossible should not deter the opinion writer from reflecting as much agreement as actually exists, for to the extent that a consensus is achieved and is clearly stated, the examiners are given guidance for the future, both in conducting proceedings (on evidentiary issues particularly) and in reaching results; and the regulated interests, the public, and the bar are given similar light.

The desirability of maximizing the consensus achieved is perhaps the best justification for maintaining an Opinion Writing Division rather than distributing the opinion writers among the offices of individual Board Members. Maintenance of the Division as a unit also permits economy in use of personnel, development of expertise and supervisory personnel, and consistency and completeness of opinion coverage. The recent tendency to assign Board Members individual responsibility for opinions would point in the opposite direction if it were carried to its logical conclusion.

Many values have been advanced in support of the "personalized" opinion. Individual Member responsibility for opinions is supposed to lead to (1) higher quality opinions, resulting from Member sensitivity about poor opinions appearing under their respective names; (2) greater Member familiarization with the record, with which they presumably must grapple in preparing opinions; (3) bolder and clearer opinions, since Members can take stands that subordinate opinion writers would hesitate to adopt; and (4) greater rationality of result, because the Member is forced to rethink the opinion in preparing its justification. On the other hand, the indiscriminate use of personalized opinions in major airline route cases also may have some unfortunate results:

1. To the extent that personal Member views are reflected in Board opinions, there is the danger that the maximum Board consensus will not be achieved. The failure of an opinion, or group of opinions, to accurately reflect the area of actual agreement among Board Members is a serious loss to all concerned.

2. To the extent that a personalized opinion exerts pressure on a Board Member to improve its quality or style, it obviously exerts pressure on this fully occupied individual not to do something else. It is difficult to assert that, in each and every case, the quality of opinions is deserving of

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priority over all other matters of concern to Board Members. Yet the implicit assumption is that above all else a Board Member ought to spend his time rewriting an opinion that might clearly reflect the extent of Board consensus but be overly long, ungracefully written, or otherwise distasteful to this particular individual.

(3) It seems reasonably clear that Board Members have more sense than this; that the work product of the opinion writer goes through very often with little, if any, change; and that many of the Members' changes are of the most innocuous sort. Under these circumstances, the "personalized" opinion not only fails to achieve the purposes for which it was instituted, but it involves an element of deception that cannot help but be uncomfortable to the participants in the process. As Board Members become hardened to seeing their names appear over opinions of varying sorts, the only aspect of the process that remains is this element of deception.

The practical limitations on the prudent use of Board Members' time require a more selective use of the personalized opinion.

First, it seems desirable to continue individual Member responsibility for particular opinions. The opinion writer should have someone with whom he can consult, and the Board should be able to look to one of its Members to supervise, and assume responsibility for, the preparation of particular opinions.

Second, the responsible Board Member should have the option of advancing the completed product as his own or as an opinion "by the Board." In either case the opinion should satisfy minimum standards. Beyond that it seems proper to leave to individual Board Members, whose substantive decisional authority is vast, the rather incidental decision as to whether intensive personal work on the opinion is warranted in view of the other pressures on a Member's time. Only if an individual Member has made a substantial personal contribution to the preparation of an opinion should he advance it as his own.

Third, individual Board Members need not be secretive about their views. Given a Board opinion that covers all the details of the case, states clearly the extent of Board consensus, and masks the remainder in generalities, individual Members would be in an ideal position to note their personal views more specifically. Such views are now stated in dissenting and concurring opinions and in speeches. Why not a two-paragraph opinion by Member Doe which begins: "I concur fully in the opinion of the Board, but I wish to emphasize the considerations that particularly impelled me to join in the majority view." Surely this is preferable to the addition of often trivial personal touches to opinions identified as emanating from one Board Member but prepared in large measure by an opinion writer.

7. Summary

The organization of the Board's decisional process is perhaps the most essential aspect of the entire licensing sequence. Without an adequate job
at this level, the remainder of the process becomes an exercise in futility. The proposals made here reflect an effort to adjust the significant tensions in that process to facilitate its effective working.

a. Individual Members Versus a Board Consensus—The individual Member is given ample opportunity to intelligently reach his own conclusions, and to state them, through recommendations for an additional personal assistant if needed, staff memoranda designed to canvass major alternatives rather than to support particular positions, availability of all knowledgeable staff for individual queries, and statements of individual Member views appended to opinions "by the Board," and other personalized opinions at the option of individual Members. The attainment of the maximum consensus practicable has been encouraged by recommendations that offices of individual Members be limited to several personal assistants and that the staff continue as the primary source of assistance, that such assistance be available to the Board as a whole as well as to individual Members, that the Opinion Writing Division be retained intact, and that the personalized opinion, on behalf of the Board, be made optional with the responsible Board member.

b. Individual Members Versus Staff Reliance—There is always the fear that important policy decisions will be removed from the Board and lodged in the staff. While some of the recommendations propose an expansion of staff participation, the enlargement is believed to be conducive to an expansion—not a contraction—of Board control. Only if the staff weeds out the details can the Board control the major policy issues; only if all three components are equally available—hearing examiner, Bureau personnel, and opinion writer—is the Board freed of the weaknesses and prejudices of any one of them; only if knowledgeable staff members are present at Board discussions to resolve controversies within their ken—record facts, problems of statistical analysis, history of past Board practice—can the Board effectively exercise its control over policy in a meaningful way. A change in Bureau attitude has also been suggested with a view to presenting the Board with the best alternatives rather than emphasizing a single Bureau position.

c. Staff Participation Versus Private Interests—Many of the suggestions will be viewed as expanding the role of the staff at the expense of the private parties, but the expansion of the staff's participation is not necessarily detrimental to private interests. First, the role of the private parties predominates throughout the whole proceeding. They produce most of the evidence, submit most of the briefs, consume most of the oral argument. Unless this material reaches the individual Board Member in an intelligible way, their efforts have been in vain. Second, a licensing controversy is not a contest between staff and private parties but among the private parties themselves and to the extent a staff view prejudices one private party it is almost certain to favor another. The staff's contributions, as a whole, are neutral in the general run of licensing cases. Third, unlike the private parties, the staff is not pecuniarily interested. This makes it
more likely that it will assume a role of assisting the Board rather than fighting for a particular cause. The suggestion made with respect to Bureau Counsel’s attitude reflects this view of the staff’s role.

Of critical significance is the present tendency in the decisional process to separate the Board from its staff and to separate the staff components from one another. Unless this trend is reversed, the Board may succeed in bringing about its own dissolution. Once the practicability of separation is established, the arguments for further fragmentation are strengthened and proposals for administrative courts and separate public counsel seem to be but logical successors of existing arrangements.

XI. SUMMARY OF RECOMMENDATIONS

There are three sets of recommendations: those calling for new legislation, those proposed for adoption by the Board, and those requiring further study.

A. Legislative Recommendations

It is recommended that legislation be proposed to the Congress providing for clarification of the authority of the CAB to consolidate applications for new route authority. A suggested approach is set forth supra, at p. 105.

B. Recommendations For The Board

It is recommended that the Board:

1. Make more particularized findings reflecting the reasons for instituting, or refusing to institute, a route proceeding, with a view to developing factors of general applicability bearing on the Board’s responsibility for planning development of the nation’s air transportation network.

2. Empower hearing examiners to publish consolidation orders within a limited time after their preparation, except for such internal review as, in individual cases, may be requested by the examiner or directed by the Board.

3. Provide assistance to the Special Counsel for Routes so that internal review of consolidation orders may be more expeditiously completed.

4. Adopt procedures, supplementary to its recent delegation of decisional authority to hearing examiners, which would provide for issuance of notices of review in major route cases at the time of the Board’s consolidation order (or similar procedural step); such notices should make Board review available, at the option of a disappointed party, in all major route cases, while reserving the Board’s discretionary authority to review, or decline to review, other route matters.

5. Instruct the Opinion Writing Division, as a general practice, to complete its review of exceptions, briefs and record prior to oral argument, and to supply the Board, in advance of that time, with any commentary required by reason of deficiencies in the initial decision or the presentation of the Bureau of Economic Regulation.
6. Instruct Bureau Counsel to emphasize the selection of major policy alternatives in pending cases, and the considerations applicable thereto, rather than the development of a single Bureau "position," but this should not exclude the expression by Bureau Counsel of a preference, on balance, for one of the several alternatives considered.

7. Eliminate the routine identification of Board opinions with individual Members, while retaining individual Member responsibility for supervising the preparation of individual opinions, encouraging individual Members to append supplementary personal comments to opinions "by the Board" and providing for personal identification of any majority opinion to which a Board Member has made a substantial individual contribution.

8. Provide for unrestricted consultation between personnel of the Bureau of Economic Regulation and Board decisional personnel at all stages of a route proceeding, except for cases in which Bureau personnel are concerned with establishing prior misconduct by a party and Bureau counsel of record in the route proceeding and his witnesses.

9. Invite members of the staff to attend Board sessions concerned with route proceedings in which they are involved, including opinion writers and personnel of the Bureau of Economic Regulation not barred from consultation with decisional personnel.

10. Endeavor to establish some measure of contact between the decisional process at the Board level and the Board's hearing examiners by encouraging opinion writers to consult with hearing examiners and informing hearing examiners, through the Chief Examiner, of developments in Board policy relative to their functions.

C. Recommendations For Further Study

Further study is recommended for the questions:

1. Whether restrictions should be imposed on the right in cross-examination of CAB route proceedings.

2. Whether additional areas exist in which restrictions on admissible evidence might be imposed, or in which evidentiary presentations might be standardized or simplified.

3. Whether hearing examiners appointed pursuant to section 11 of the Administrative Procedure Act are necessary in licensing cases not involving enforcement aspects, or whether substitute personnel policies should be devised.

4. Whether Board Members each should be provided with an additional personal assistant, preferably an economic analyst.

XII. CONCLUSION

The Civil Aeronautics Board has manifested great interest in improving its licensing processes. The Board's procedure committee and subcommittees, its hearing examiners and other personnel, the Executive Director, and the Practitioners Advisory Committee have all been active in sug-

Supra note 51.
gesting and evaluating procedural reforms. Unfortunately some of the reforms adopted, such as the mandatory personalized opinion and the plenary delegation of decisional authority to hearing examiners, bear little relation to the actual needs of the Board in route cases, even though they may be useful or fashionable in other administrative circles.

While some beneficial changes can be made in purely procedural matters, the really significant potential for improvement lies in the area of substantive policy. The greater the consensus that can be achieved in this area, either by the Board itself or by Congressional action, the more practicable it becomes to curtail the record by exclusion of irrelevant evidence and unhelpful cross-examination, to delegate authority and to concentrate the attention of Board Members on policy issues of more manageable proportions. Can a policy for air transport regulation be devised that is sufficiently intelligible that it can be applied by the Board with some measure of predictability? Would such a policy be accepted by a general public capable of understanding its implications? If these issues can be satisfactorily resolved, the procedural problems will largely take care of themselves.