Problems in Expedition and Disposition of Large Administrative Proceedings at the Civil Aeronautics Board

Edward T. Stodola

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
Edward T. Stodola, Problems in Expedition and Disposition of Large Administrative Proceedings at the Civil Aeronautics Board, 28 J. Air L. & Com. 238 (1962)
https://scholar.smu.edu/jalc/vol28/iss3/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
PROBLEMS IN EXPEDITION AND DISPOSITION OF LARGE ADMINISTRATIVE PROCEEDINGS AT THE CIVIL AERONAUTICS BOARD

By Edward T. Stodola†

I. APPRAISAL OF THE PROBLEM

Assuming that the present formal judicial procedures in the disposition of major administrative proceedings are a sound and necessary system, is the time consumed in litigating and deciding the so-called big regulatory cases at the Civil Aeronautics Board (CAB) unreasonably long? It is no doubt safe to say that no serious student of the administrative process is satisfied with the time it now takes to reach final decision in the so-called big cases in administrative proceedings. Indeed, among the recent attacks on the administrative process, none have been more stringent than the criticisms directed at the time consumed in the disposition of large regulatory proceedings.

Though the expressions “delay,” “inordinate delay” and “undue delay” are almost uniformly associated with the long intervals between the beginning and the end of large administrative proceedings, these descriptions are not in all instances accurate. The expressions are often applied to proceedings which are necessarily time consuming. The word “delay” implies “putting off” or “slowing down.” Cases before regulatory tribunals may take a long time in spite of efficient and expeditious management and in this respect they are no different from cases before the courts. Many of them are just plain big, and as a result they take a lot of time.

It would not be difficult to cite numerous run-of-the-mine cases in each of the several larger federal administrative agencies, including the CAB, the disposition of which has been unconscionably slow. However, it has most often been the big, the complex, and the atypical proceedings which come to public notice and which draw the ire of legislators, the bench, the bar, and the students of administrative law. This is not to say that the censure visited upon the regulatory tribunals in recent years for the time taken in reaching final decisions in major cases has been undeserved, or that the constant recent prodding of the administrative agencies by congressional committees and by others has failed to help in the expedition of many of the large proceedings. On the contrary, much has been accomplished by recent examinations of the shortcomings of the administrative process and there are in the offing even greater improvements in administrative procedures. But it may be wise now to take measure of what has been done and to assess the prospects of further improvements lest a number of radical reforms for complete change in the administrative process currently pressing for acceptance create more problems than we now have and

† Hearing Examiner, Civil Aeronautics Board. Educated at the University of Wisconsin School of Economics, Stanford University and the University of Wisconsin Law School, Mr. Stodola has served with the federal government since 1941. He is a member of the Wisconsin Bar. The analysis and conclusions set forth in these comments are those of their author. They are not to be taken as an expression of the views of any agency of the United States Government.
establish procedures which could be much worse than the present system.

These comments are not primarily concerned with the difficult and volatile question of whether the integration of executive, legislative, and judicial functions within independent federal regulatory commissions is responsible for such deficiencies in the administrative process as may account for the delays in the disposition of their judicial business. Nor is this paper primarily concerned with recent proposals whereby the planning and policy functions of such agencies would be transferred to the Executive Department, their adjudicatory activities to an Administrative Court, and their prosecuting functions to the Department of Justice or some other executive department. For obvious reasons, the latter proposals pose monumental problems. Aside from the mass of complex substantive law which has been developed by the various federal administrative tribunals in a multitude of fields, there has developed since the establishment of the Interstate Commerce Commission in 1887 a whole system of stable legislation and case law in the very important areas of agency powers and procedures and court review of administrative actions. The administrative process has been surrounded by judicial safeguards and made fair and workable. Most of the fears of arbitrary action and other procedural abuses which came from its early critics have thus been put to rest.

Except to note that much of the agitation to truncate the regulatory tribunals and to redistribute their functions has its roots in the failure of those tribunals to do more to simplify and to accelerate their judicial processes, no effort will be made here to add to the considerable volume of literature already available on the broad problem of whether the administrative concept is the best answer to the complex economic regulatory problems of our time. These comments are likewise not concerned with the extent to which numerous ex parte communications to regulatory agencies from either public officials or private citizens often burden the agency and its staff and thereby slow up the disposition of its proceedings. Moreover, the regulatory tribunals are under the policy direc-

---

1 For an extreme view of the current shortcomings of the administrative process, particularly as related to the Civil Aeronautics Board, see Hector, Problems of the CAB and the Independent Regulatory Commissions, 69 Yale L.J. 932 (1960). Mr. Hector's views are contained in the now celebrated Hector Memorandum, as submitted to the President of the United States on Sept. 10, 1959, upon Mr. Hector's resignation as a Member of the Civil Aeronautics Board after nearly two years of service. On March 29, 1960, the Civil Aeronautics Board submitted to the House Committee on Legislative Oversight a document entitled Comments of the Civil Aeronautics Board on the Hector Memorandum to the President consisting of two memoranda: Comments on Hector Memorandum (the Board's analysis of the memorandum) and Analysis and Evaluation of the Hector Memorandum to the President (a CAB staff analysis of the memorandum). Among other excellent literature on the problems raised by Mr. Hector, see Auerbach, Should Administrative Agencies Perform Adjudicatory Functions?, 1959 Wis. L. Rev. 91; Auerbach, Some Thoughts on the Hector Memorandum, 1960 Wis. L. Rev. 183; Friendly, A Look at the Federal Administrative Agencies, 60 Col. L. Rev. 429 (1960); Davis, Dueprocessitis in the Atomic Energy Commission, 47 A.B.A.J. 782 (1961); and, Bernstein, Regulating Business by Independent Commission (1955).

2 Such communications are not necessarily improper since, for the most part, they relate to matters of procedural schedules or routinely transmit material to the agency without comment and as a matter of course are placed in the agency's public correspondence file for all to see. Nevertheless, the receipt, filing, and answering or acknowledgment of such communications are time consuming for the agency and its staff. Thus, a recent major new route proceeding before the Civil Aeronautics Board, styled the Great Lakes-Southeast Service Case, Docket 2356, shows a total of 107 separate communications to the Board or its staff in the public correspondence file of that docket. Other new route proceedings before the Board are similarly involved with inquiries from the Congress, from state and local officials, from municipalities and their chambers or associations of commerce, and from numerous private citizens. It is not unusual for the large new route proceedings to show from 100 to 200 such inquiries and comments, many of which
tion of the Congress of the United States, and the agencies and their
staffs properly and unavoidably spent a great deal of their time appearing
and testifying before congressional committees on matters of appropri-
tions, conformity with existing legislative mandates, proposed legislation,
and related subjects. Further, the ambivalent nature of an administrative
agency such as the CAB, which has promotional as well as regulatory
functions with respect to civil aviation, makes it necessary for the Board
and its staff to take time to meet not only with congressional committees
but with industry groups, state and municipal officials, airport authorities,
and representatives of the general public. These factors are necessarily
part of the whole picture in any fair assessment of the time consumed in
the disposition of proceedings before an agency such as the CAB.

A few more preliminary observations need be made before proceeding
with the discussion as to what has been accomplished in expediting large
cases at the CAB and what is hoped to be accomplished in this regard
in the future. The large proceeding at the Board is highly important. A
major licensing case before the Board can have a momentous effect on
both private and public interests. The private interests of course encompass
the air carriers as well as individual and corporate users of air travel. The
public interest is no doubt a sum total of all interests; but it is primarily
and peculiarly the concern of the community at local, state, and federal
levels as distinguished from that of individual persons or businesses.

To illustrate, the Southern Transcontinental Service Case, recently
decided by the Board, involved potential revenues of approximately
$150 million annually to the successful carriers in that proceeding,
and it affected the air travel needs of every major city in the southern
continental tier of states and the residents thereof. Such a large proceeding
is necessarily difficult to organize; it usually takes a long time to hear;
its record invariably takes an even longer time to analyze; and it is cum-
bersons precisely because it affects so many vital interests. An enormous
amount of time must be spent by members of the agency, its staff, at-
torneys for the government, counsel for the affected air carriers, and at-
torneys for the cities and their chambers of commerce. While this is
hardly time wasted, the large administrative proceeding always presents
a challenge to reduce unusual time and heavy costs incurred in the pre-
paration and in the actual trial of the case. Countless documents and
exhibits of various kinds must be organized and collected. Witnesses must
be examined and cross-examined on lengthy and often highly technical
statistical data. Proposed findings and conclusions of law must be pre-
pared. The examiner's initial decision must be written, oral argument
must be heard by the agency, and its final decision made ready. It is the
sheer complexity and importance of the large administrative proceeding
which on occasion makes the interested litigant and the affected public
wonder whether or not the trier of the case and the agency in command

are answered or acknowledged by the Board or members of its staff. Of course, to the extent such
ex parte communications are inspired by interested litigants, such efforts not only add to the
proximity of the correspondence sections of the dockets in new route cases but constitute clear
violations of professional standards of conduct in adjudicatory proceedings.

3 For the distinctions inherent in the ambivalent nature of regulatory tribunals see Trial by
Agency, Virginia Law Review Association, published lectures of Judge E. Barrett Pettyman given
at the Virginia Law School in March, 1959, p. 9.

4 Docket 7984, Initial Decision served June 20, 1960; CAB Orders E-16500 and E-16860,
served March 13, 1961, and May 26, 1961, respectively.
of it have really spent enough time in organizing and making disposition
of a record which means so much to so many people.

It must further be noted that federal administrative agencies have been
and continue to be quite sensitive to the conflict between the demand
for disposition of cases through expedited procedures and the observance
of "judicial standards" in regulatory proceedings as described by Mr.
Justice Hughes in the case of Morgan v. United States. Rather than risk
procedural error on judicial review, the agencies often provide more than
adequate due process.

II. COURT AND AGENCY EFFORTS AT EXPEDITION

Substantial progress has been made in recent years in planning and
organizing the trial and disposition of large and complex administrative
proceedings. The advent of the Federal Rules of Civil Procedure in the
late thirties paved the way in the courts of law for many of the techniques
which have helped the administrative agencies in handling the big case.
Without setting forth in detail the long, unspectacular but very fruitful
history of efforts of individual judges and various committees to master
the solution to organization, trial, and disposition of the big case in courts
of law, particularly in the antitrust and patent fields, it is notable that
the federal judiciary has hammered out various expediting techniques.
These include use of pre-trial conferences, simplification and clarification
of issue, use and control of discovery, handling and limitation of proof,
use of trial briefs, plan of trial, and numerous related procedures which
have become the dependable bedrock in handling protracted proceedings
in the federal courts. These procedural remedies had their first compre-
hensive compilation in the labors of a Committee of the Judicial Con-
ference of the United States, appointed by the Chief Justice of the United
States Supreme Court in 1949, and in the 1951 Report of the Judicial
Conference of the United States, commonly known as the Prettyman
Report. Assisting the Judicial Conference was the Advisory Committee
on Administrative Procedure, also appointed by the Chief Justice, which
made recommendations with respect to protracted administrative pro-
ceedings. Close collaboration between the bench and bar brought application of
the remedial proposals of the Prettyman Report of 1951 to numerous
actual cases. Of course, many individual and group efforts were involved
in the implementation of those remedies. Among others, the Section of
Antitrust Law of the American Bar Association reported its views and
experience. These various efforts culminated in the Judicial Conference

5 104 U.S. 1, 19 (1918).
6 Report of the Judicial Conference of the United States on Procedure in Antitrust and Other
7 Report of the Advisory Committee on Procedure before Administrative Agencies, submitted
to the Judicial Conference on March 30, 1951.
8 Report of the Committee on Practice and Procedure in the Trial of Antitrust Cases, Section
of Antitrust Law, Am. Bar Ass'n., May 1, 1954. This Report analyzed the recommendations of
the Judicial Conference of 1951 and provided valuable information on the trial of numerous anti-
trust cases. See also, Proceedings of the Seminar on Protracted Cases, New York University Law
Center, Aug. 26-30, 1957, 21 F.R.D. 395; and "Streamlining the Big Case", Report of the
Special Committee of the Section of Antitrust Law of the Am. Bar Ass'n., Sept. 15, 1958, 13
A.B.A. Antitrust Section Reports 183.
Handbook on Procedures for the Trial of Protracted Cases. This Handbook is the Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, under the Chairmanship of Judge Alfred P. Murrah, as adopted by the Judicial Conference of the United States in March 1960. Undoubtedly it will be considered one of the really significant landmarks in the improvement of our judicial procedures.

In the area of administrative law, similar efforts to improve procedures have been in progress for approximately two decades. In 1941, a committee, appointed by the Attorney General of the United States, issued a comprehensive report on administrative law and procedures and recommended corrective legislation. By 1943, the American Bar Association had crystallized its views toward a proposed comprehensive statute for federal administrative practice. The foregoing efforts led to the enactment of the Administrative Procedure Act in 1946.

While individual federal regulatory agencies each made its own efforts to improve and expedite the administrative proceedings, no single post-war across-the-board effort to do so took place until the establishment of the Commission on Organization of the Executive Branch of the Government in 1947, with former President Hoover as Chairman. This was followed by the Conference on Administrative Procedure, called by the President on April 29, 1953, with Judge E. Barrett Prettyman as Chairman.

The Conference studied a series of subjects, including those suggested by the Judicial Conference of the United States, those suggested by the Attorney General, and a number suggested from the floor of the Conference. The Report of the Conference of March 1955, contains numerous recommendations adopted by the Conference designed to simplify, control, and expedite administrative proceedings. Among its significant recommendations were those dealing with the use of prehearing conferences for the specification of issues and simplification of proof, the submission of documentary evidence in advance, the organization of evidentiary data, the use of trial briefs, and numerous other techniques for the elimination of unnecessary delay, expense, and volume of records in administrative proceedings.

More recently three other important events have drawn attention to the procedures of the federal administrative agencies in an effort to improve their functions. The first was the Landis Report on regulatory agencies of December 1960, to the President-Elect, in which Mr. Landis proposed a reorganization of the major regulatory tribunals and recommended a reconstitution of the Administrative Conference of the United States similar to that which the President called on April 29, 1953. The second
event was the establishment of the Administrative Conference of the United States as set up by Executive Order No. 10934 of April 13, 1961, to assist the President, the Congress, and the administrative agencies and executive departments in improving administrative procedures. The third event involved the Presidential plans submitted to and in some cases approved by the last Congress for reorganization of several of the major administrative agencies.

Reorganization Plan No. 3 of 1961 recently became effective for the CAB. Under this authority the Board may delegate functions to a division of the Board, an individual board member, a hearing examiner, or an employee or employee board. The Board retains authority to review any action so taken. In addition, Plan No. 3 transfers from the Board to its Chairman certain functions with respect to the assignment of personnel to perform such duties as may have been delegated by the Board.

In order to implement the objectives underlying Reorganization Plan No. 3 of 1961, the Board on September 12, 1961, issued a Notice of Proposed Rule Making to the effect that the Board had under consideration proposed amendments of the Rules of Practice in Air Safety and Economic Proceedings, which would expressly delegate to hearing examiners the Board’s functions of making agency decisions.

On January 23, 1962, for effect on February 1, 1962, the Board promulgated new procedural regulations (PR-58 and PR-59) amending Parts 301 and 302 of the Board’s Rules which expressly delegate to hearing examiners the Board’s function of making agency decisions and prescribe appropriate procedures for discretionary review by the Board of examiners’ decisions made pursuant to such delegation. The major purpose sought to be achieved by the Board is the substitution of certiorari type review procedures, which will give the Board discretion to determine when review is appropriate, in lieu of the former practice by which the Board gave de novo consideration to each and every issue raised by exception to an examiner’s decision.

Under this delegation, the examiners will render initial decisions from which an appeal to the Board will not lie. The Board will, however, retain a discretionary right to review such decisions, upon petitions for review or upon its own motion if two or more Board Members vote for review. Under the new procedures, appeals will no longer automatically be passed upon by the Board. Where Board review is had, it will be limited to those issues specified in the Board’s order exercising review. It is the Board’s belief that these procedures can appreciably expedite the final disposition of formal Board proceedings.

Regulatory Agencies. The Report was also submitted to the Congress of the United States and is available as a Committee Print of the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate.

**Footnotes:**

14 The Conference, with Judge E. Barrett Prettyman as Chairman, consists of a Council of 11 members each named by the President, and of a general membership chosen by the Council in accordance with Executive Order No. 10934 and the by-laws of the Conference.


17 14 C.F.R., Parts 301 and 302.
III. Expediting Proceedings at the CAB

Perhaps the most useful way of approaching the problem of handling the large case in administrative practice at the Civil Aeronautics Board is to catalogue the techniques that the Board and its examiners have already developed to organize and control such a proceeding. Except for enforcement matters, which go to hearing directly upon complaint or petition, these techniques have been used in most types of proceedings, including licensing cases, mail rate proceedings, and cases involving the unification or merger of air carriers. Except for periodic modifications, the basic arts of expediting the large proceeding, such as pre-trial, investigatory and subpoena procedures for the production of proof, submission of documentary evidence in advance, requirement of the "written case" and delegation of some authority to hearing examiners over interlocutory matters arising during the course of the hearing, have been a part of Board procedures since shortly after its creation in 1938. Obviously, the techniques hereafter analyzed cannot in all respects be utilized by other administrative agencies whose problems are different from those of the Board.

A. Prehearing Procedures

It is a commonplace to say that the most important aid to the expeditious organization of the large case is proper organization. To this end state and federal courts have instituted the device of the pre-trial conference, with some jurisdictions making pre-trial procedures mandatory in every large civil case. In spite of the extraordinary success with pre-trial techniques in both state and federal courts in handling protracted cases, the federal administrative agencies have, with few exceptions, been slow in adopting and utilizing pre-trial and related techniques for the control, organization, and expedite of large proceedings.

The Rules of Practice of the Civil Aeronautics Board have provided for the use of pre-trial conferences in formal cases since 1940 under a rule modeled after Rule 16 of the Federal Rules of Civil Procedure. In its present form the same Rule of Practice also gives examiners authority to entertain offers of settlement of issues as provided for in sections 5(b) and 7(b) of the Administrative Procedure Act.

While a great deal has been accomplished by the Board's examiners in the two score years of experience with the pre-trial techniques, their functions in the pre-trial stages of proceedings have been somewhat confined because of the interlocutory participation of the agency. Whereas the examiners have the responsibility for the formulation of issues (except for permissive appeals of their rulings to the Board) in most types of proceedings, the Board still establishes the scope of the proceeding and the issues therefor in the largest category of formal cases—i.e., applications for new air routes. The examiner's role in the latter type of proceedings as to the definition of issues is largely the dual task of mediation between the parties and thereafter recommending proposed issues to the Board.

Obviously, until the issues are settled, the complete organization of a trial at the prehearing conference is not possible. The practice of having the Board make final rulings on proposed issues in new route cases after
the initial pre-trial conference not only consumes much time in itself but it often necessitates a further pre-trial meeting. It would be most desirable to give the examiners full authority with respect to the formulation of the issues to be tried in any type of proceeding before the Board. There is no sound reason why the general rule of law that agency rulings on interlocutory matters are not ripe for judicial review until final decision should not also apply to review by the agency of interlocutory rulings of its examiners.

Unlike the situation in certain other federal administrative agencies, the examiners at the CAB have the authority to sign and issue subpoenas for both the attendance of witnesses and the production of documentary evidence except in the one situation noted below. Similarly, rulings of CAB examiners on most matters of procedure may not be appealed to the Board prior to its consideration of the entire proceeding except in extraordinary circumstances and then only with the consent of the examiner. One notable exception to the consent rule relates to compulsory testimony by Board personnel. Since Board regulations prohibit its officers and employees from disclosing official CAB information without Board approval, an examiner's ruling granting a motion for testimony by Board Members, officers or employees, or the production of documents in their custody is reviewable by the Board on its own motion. On the other hand, rulings by CAB examiners on motions to quash subpoenas other than those involving Board personnel or records may be appealed to the Board only with the examiner's consent.

Perhaps the most effective authority of CAB examiners for asserting major control over a proceeding lies in the power to compel proof through subpoenas and other processes provided for in the Federal Aviation Act and the Board's Rules of Practice. As in the courts, the pre-trial conference in an administrative proceeding is primarily a device for controlling and organizing the proof. But no court has the exploratory powers which are available to CAB examiners in directing and marshalling the probable proof in a proceeding. After a settlement of the issues of fact and of law, it is the examiner's function to prescribe the basic areas of probable proof, direct the manner in which such proof is to be organized and indexed, and provide for the further necessary procedures for its orderly reception in the record.

While asserting control over and organizing a proceeding presents the greatest opportunity for leadership on the part of the examiner, it is also the area of most difficulty. Effective control over a proceeding requires study, planning, and guidance on the part of the examiner. In failing to lead the pre-trial conference in the search for the nature and limits of the probable proof and in allowing one or more of the parties to dominate the discussion as to what the issues require in the way of evidence beyond that which can be officially noticed or incorporated by reference, the examiner often fails to obtain agreement from the parties or to make adequate prescription on his own for the limits of the proof necessary to a fair trial of the issues. Except in compliance and various types of investigatory proceedings, the available proof for the typical rate, route, or air carrier unification proceeding at the Civil Aeronautics Board is quite standard and pretty well institutionalized. Such proof is largely concentrated in the files of the agency or in the records of parties
to the litigation. In such circumstances, it is not generally difficult to organize a complete evidentiary case with regard to each issue and to delineate its substance and boundaries in a succinct pre-trial order or report. It is the unusually complex and atypical proceeding that requires special procedures and techniques to insure a manageable and expeditious hearing and record.

Although not widely used even in the largest of CAB proceedings, trial briefs, as the last written step in pre-trial preparations, have been utilized in several large cases at the Board. Reduced to concrete practice, a true trial brief should set forth a party's theory of its case and a brief resume of its proposed proof. The principal value of trial briefs in large and complex proceedings lies in the more thorough preparation of counsel for trial in advance of the hearing through a clear statement of his client's position in the proceeding. Moreover, the trial brief also helps the examiner and each counsel to understand the theory of each party's case and the areas of proof which each party deems important. It compels a more ready comprehension of the multiplicity of problems that arise in the hearing stage in connection with arguments on motions, objections, admissibility of proposed proof, and the not infrequent requests at the hearing for further evidence. To be of maximum value without burdensome extra paper work, the trial brief must avoid the evidentiary detail already submitted in exhibit form and analyses of the law more appropriate for later briefs.

With all the current emphasis on the organization, control, and writing of the proposed evidence in an administrative proceeding, it must, however, be borne in mind that it is quite possible to over-organize, over-control, and over-write an administrative record. During the early months of 1953, the Federal Communications Commission amended its rules relating to practice and procedure governing the trial of comparative qualifications in broadcast proceedings to provide for the submission of "specific points of reliance" by various parties to the proceeding. The announced purpose of the new rule was to "develop and sharpen the genuine issues of a broadcast hearing sufficiently in advance of the adducing of proof, to eliminate, in the largest part, the element of surprise, the introduction of unnecessary and cumulative evidence, and the waste of time during the course of the hearing." After the exchange between the parties of such "reliance points" the examiner assigned to the prehearing conference was to rule upon the significant areas of difference between the applicants upon which to go to trial. Not only did this unusual procedure require the exchange of very voluminous preliminary information, much of which was never received in the evidentiary record, but the very task of deciding at the pre-trial stage of a case on satisfactory points of reliance and significant areas of difference between the applicants for trial purposes proved to be unmanageable. During a protracted prehearing conference in one proceeding, nine days were spent ironing out proposed procedures under the "points of reliance" system. This system was abandoned after approximately one year of experience.

19 FCC Public Notice 53-199, Feb. 9, 1953 (47 C.F.R. § 1.841 (1954)).
21 For a critique of the "points of reliance procedures" see comments in the Report of the
Under current practice of the examiners at the CAB, the preparation of the written case by each party is controlled by specific ground rules or principles of practice which are explained at the prehearing conference and made a part of the written order or report thereof. Those rules or practice guides set forth the requirements on the part of each party regarding the preparation and organization of its written case, uniform rules relating to authentication of documents, regulations governing the submission and exchange of written exhibits and proposed written testimony in advance, limitations on the kind of expert testimony allowed, and certain controls over the direct and cross-examination of witnesses.\footnote{In most situations, it is possible to obtain agreement among the parties to the procedures noted above. Even in the absence of agreement, the parties are bound by the provisions of the order or report on the prehearing conference, unless upon exception thereto particular procedures are modified or relaxed to prevent injustice or unfairness.}

B. Hearing Procedures

Having organized the presentation of the written case and prescribed the rules for the conduct of the hearing, the critical tests of procedures designed to expedite a large proceeding come at the hearing. On the whole, CAB examiners have had admirable cooperation from both the regular practitioners before the Board and from the many attorneys representing civic groups from whom a pre-organized proceeding before an administrative agency is often a new experience. Nevertheless, even better organization of the trial at the pre-trial stage and tighter controls both in the participation of the written case and at the trial stage can be had without offense in any way to the requirements of due process and a fair hearing.

Cross-examination of witnesses on the huge volumes of written material submitted for the evidentiary records in large Board proceedings consumes an estimated ninety-five per cent of the total hearing time. Although much less now than several years ago, the CAB practitioner still has a tendency to over cross-examine. Can cross-examination be limited by the presiding officer in an administrative proceeding without unfairness or legal error?

An arbitrary time limit on the cross-examination of witnesses is impractical and would inevitably lead to unfairness. Absent the unlikely agreement of all counsel to a proceeding, such a limit would constitute possible legal error. Aside from the usual devices of stipulating facts through agreement of counsel and sharpening the issues to avoid the prolixity of proof which a mere paraphrase of the ultimate issues invariably invites, the task of controlling and reducing the volume of cross-examination is almost wholly a matter of the skills and personality of the presiding officer. He should know well the substantive subject of the case over which he is presiding; he should know the law of evidence and its application in myriads of varying situations; and, above all, he must be able, ready, and willing to rule. The examiners' failure to rule promptly, firmly, and clearly is the most familiar lament of practitioners before federal administrative agencies.

Cross-examination, of course, should not be controlled or reduced merely because it will produce a shortened record. A public hearing in an

\textit{Committee on Communications to the Administrative Law Section of the American Bar Association, 6 Ad. L. Bull. 173, 184 (1954).}
administrative proceeding is not a contest as such; the primary purpose of such a hearing is to search for the truth. Nevertheless, the presiding officer in a large administrative proceeding is usually faced with attempts at a great deal of broad, hit-or-miss and manifestly useless cross-examination. There is a tendency among practitioners to over cross-examine, particularly in the case of the practitioner not prepared for his task or unlearned in the art of asking simple, direct, and relevant questions. It is this overly broad, random, haphazard, or unusually methodical cross-examination in administrative proceedings which causes problems for the presiding officer.

Through individual study and experience and through frequent staff meetings on the subject with the Chief Examiner, the examiners of the Civil Aeronautics Board have developed and used rules and practices which for years have helped to cut down on unnecessary cross-examination and have thereby shortened records. For example, the so-called "policy" witness has in recent years been excluded as a witness in that guise. Such witnesses have usually been high executives of airlines and their testimony was often argumentative and as broad or broader in scope than the ultimate issues to be decided. In lieu of the so-called "policy" witness, counsel for the carriers are permitted to make a brief statement in the carrier's written case of the basic position of his client in the proceeding. Where trial briefs are required, the briefs set forth each party's position. Except in rare instances where examination on such a statement of position would produce relevant and material information regarding possible inconsistency in a party's position, cross-examination is not allowed on these statements.

To avoid cross-examination on irrelevant or incompetent data and argument on later motions to strike, rulings on the admissibility of a party's written case are made at the close of the examination of witnesses on direct. Except for government counsel who plays the role of the public defender, cross-examination is limited to witnesses whose testimony is adverse to the party desiring to cross-examine. Cross-examination is likewise limited to one round of questions except on a showing of good cause and then only with the permission of the presiding officer. Moreover, cross-examination of any particular witness, or presentation of any motion or objection and answer thereto at the hearing is limited to one attorney for a party, except on a showing of good cause and with the permission of the presiding officer. Similarly, oral presentation of any motion or objection is limited to the party making the motion or objection and the party or parties against whom the motion or objection is made except with the permission of the presiding officer. Further, clarifying or qualifying questions by a non cross-examiner, which often mar and delay the conduct of many administrative hearings, are not allowed at the CAB except on a showing of good cause and with the permission of the presiding officer.

In addition to the foregoing methods and procedures, the successful presiding officer in administrative proceedings must insist on a much stricter application of the rules of evidence than has characterized the typical administrative proceeding in the past. The abomination of "letting it in for what it's worth" is the classic manner of a weak presiding officer. Either an item of data or information is worth something to the record
LARGE CASES AT THE C.A.B.

or it should not be admitted at all. Allowing the reception of proffered evidence subject to a later motion to strike often leads to a duplication of argument on such motions and consequent waste of time.

Failure of examiners to organize their case at the pre-trial conference, including failure to use readily available discovery procedures for the assembly of a complete written case before trial and the lack of clear methods in the handling of documentary evidence prior to hearing, likewise cause confusion and avoidable delays in the hearing stage of the proceeding. On the other hand, a clear organization of the proof at the time of pre-trial, prompt rulings on discovery motions and objections, limitations on the type and time duration of the proposed proof, the proper indexing and sequential organization of the written case, the occasional use of trial briefs, a pre-arranged trial schedule, and an index of the transcript as the hearing proceeds all help to make for an orderly and expeditious record.

The techniques to be employed by the effective examiner will of course vary from case to case. A number of the practices already discussed would not apply to a simple, single-issue proceeding lest such devices cause more organizational control and more paper work than necessary.

As is no doubt true of other agencies, the examiners of the Board are constantly badgered with suggestions as to means for shortening records. While innovations which promise probable good practice are to be encouraged, the examiner must proceed with caution.

Thus, limitations on argument with respect to motions and objections are often feasible. Offers of proof may well be submitted in writing, thereby saving the time it takes to make them orally on the record. Limiting the testimony of expert witnesses to the specific narrow factual issues determined at pre-trial, an advance identification of such witnesses and the rejection of proposed expert testimony in violation of pre-trial arrangements are necessary controls in the areas of proof of technical data. Similarly, the requirements of written memoranda on points of law will often aid the examiner in controlling the proposed examination of witnesses.

Tight reins are essential in the case of requests for further evidence at the hearing stage which were unforeseen at the time of pre-trial, particularly as to demands for proof which may be frivolous or at best for data which may be only marginally probative. Further, a requirement that counsel submit to the examiner in advance the proposed scope and nature of any proposed cross-examination is also a practical technique for controlling the course of a hearing in a big and unwieldy proceeding.

On the other hand, various proposals for controlling the hearing and reducing the time spent in the examination of witnesses may well be impracticable or undesirable. For example, a requirement for presenting all evidence relating to each issue at one time would probably waste more time and effort than it would save. Such a procedure might necessitate the call and re-call of witnesses from time to time. It would jumble a transcript. Moreover, the inconvenience to out-of-town witnesses of such a procedure is readily apparent.

It has been suggested that the examiner should have the right to assess costs against a losing party (other than the administrative agency) so that the proffer of irrelevant data or the use of frivolous defenses be dis-
couraged. But aside from the additional time this procedure would consume, such a disciplinary measure in the hands of the examiners seems unnecessary and contrary to the public interest. It has further been urged that examiners (as well as agency members) be given contempt powers as an aid to the solutions of the problems of delay. While even justices of the peace have such powers, contemptuous conduct on the part of practitioners in administrative proceedings is rare, and less drastic means are available in such situations. Nor is such power necessary to insure the production and submission of relevant testimony and evidence at hearings. Rarely is the CAB obliged to go to court for the enforcement of subpoenas.

Finally, it has been suggested that the agency promulgate, in addition to its procedural regulations, strict standards of practice which the examiners would use in managing the large proceedings as a uniform system for litigating all the large cases. This would be most impracticable. It has been the author's experience that even very large proceedings vary as to how much organization and control they require at pre-trial; that what works well in one type of a proceeding may be practically useless in another; and that on occasion some of the techniques already described, such as the use of trial briefs and advance written notice of the proposed areas of cross-examination, be better omitted if only for the reason that a large administrative proceeding is already burdened with much paper work.

C. Post-Hearing Procedures

The time between the conclusion of a hearing and the Board's final decision in most cases represents a substantial part of the total time consumed in large administrative proceedings at the CAB. Some of this represents avoidable delay.

Aside from removing other causes of delay at this stage of the proceedings, better organization, indexing, and control of the proposed evidentiary record at pre-trial would hasten the task for both counsel for the litigants and the examiners in locating the evidence after the hearings close, particularly through a daily index of the transcript of testimony cross-referenced to exhibit material exchanged before trial. A digest or a summary by one or more of the litigants of the evidence immediately after trial was attempted at the CAB but was discarded after understandable attacks of bias or inaccuracy. Similar digests or summaries accompanying proposed findings and conclusions to the examiner are of dubious value to an examiner hearing the evidence and relying on his own digest of the record. This latter technique is avoided at the CAB by a rule of practice limiting proposed findings to 50 pages in length—a rule which may be relaxed only in exceptional circumstances.

In many of the Board's large proceedings, the examiners' initial decisions are much too long. Since it is much more difficult and time consuming to organize and write a shorter and more succinct set of findings on a huge record than a longer report, this prolixity in the examiners' findings is in part due to pressures for rendering "expedited" initial decisions after hearing. Hardly a large CAB proceeding in recent years has failed to have an "expedited" tag in the order initiating it. Moreover, with the closing of the record (which, at the CAB, not uncommonly consists of ten to twenty or thirty thousand or more pages of written material inclusive of the transcript of hearing) the examiner is often in dire need
of statistical or other analytical assistance for the testing and organization
of complex technical data. While such help has been available heretofore
on a somewhat sporadic basis, a better organized system of statistical and
analytical assistance to examiners in large proceedings has recently been
instituted at the Board. This assistance is provided through the Office of
Carrier Accounts and Statistics, a branch of the Board completely in-
dependent of other offices and bureaus of the Board.

With the issuance of his initial or recommended decision, the function
of the examiner in a proceeding usually ends. But there seems to be no
reason why agency members should not utilize the examiners' knowledge
of the record in their deliberations on the evidence over which he has
presided. Individual Board Members simply do not have the time to read
in detail and master each of the many smaller formal records upon which
they render decision and much less so the massive volume of intricate
evidentiary data in the larger cases. The Board's reliance upon staff advice
in most hearing cases is a sheer necessity. Institutional decisions, arrived
at by the agency in consultation with its advisory staff including the
person who heard the evidence, may in the end be more sound than those
arrived at by an agency isolated from its experts. This is particularly the
case in licensing and rate making proceedings involving highly compli-
cated technical data, numerous conflicting statistical forecasts, and ramifi-
cations for good or evil extending far beyond each individual case.

It has long been clear that consideration of all the Board's functions
by the agency en banc has placed an intolerable strain on its time and
efforts. Given the mass of minor and routine matters all of which hereto-
tofore required disposition at the agency level, the recent delegation of
authority for final decision in such cases to examiners and the substitution
of discretionary review for the right of automatic appeal from an ex-
aminer's decision in all cases, should free a great deal of the Board's time
for the larger formal proceedings on its calendar which it decides to
review. It has also been clear that significant time improvements in the
disposition of the total functions of the Board lie not only in the speeding
up of the proceedings at the examiner level and delegating responsibility
in routine matters; but also in shortening the time between the examiner's
decision and the Board's final decision in those cases in which the Board
exercises its discretionary power of review.83

The Board has for many years now had a target date system for assessing
the examiners' productivity in preparing initial decisions. Under these
internal arrangements, each examiner reports to the agency a proposed
target date for the issuance of his initial decision after the conclusion of
hearings. This system, which provides in effect a tailor-made standard of
production subject to the Chief Examiner's approval in each case, has been
thought to be superior to a single standard for all cases because of varia-
tions in the size and complexity of CAB proceedings.

Numerous management time studies have been made at the CAB of the
time consumed in the preparation of initial decisions as well as final
decisions by the agency. Significantly, for the survey period July 1, 1953,
to September 1, 1957, the average time between the submission of cases

83The Board's delegation of authority to examiners does not extend to proceedings arising
under § 801 of the Federal Aviation Act which require Presidential approval of the Board's action
and in which proceedings the examiner renders a recommended decision.
to an examiner for decision (the date proposed findings were filed, or, if proposed findings were waived, the date hearings ended) and the service on the parties of the examiner's initial decision has been about the same as the average time consumed between the submission of cases to the Board for decision (last day of oral argument, or, if no argument, the date oral argument was waived) and the date of the Board's decision. The arithmetic average time for examiners' initial decisions was fifty-one days and that for Board decisions was fifty-eight days.

The foregoing survey of all proceedings inevitably included a large number of relatively simple cases. In order to obtain an average for more complex cases during the same survey period, a separate study was made consisting only of those cases in which there was oral argument before the Board. This showed an arithmetic average of 139 days from the date of hearing to initial decision; eighty days from the filing of proposed findings to the date of initial decision; and seventy days from the date of oral argument to Board decision.\(^\text{24}\)

In the large complex economic proceedings, it is understandable why the examiner may take more time in writing his initial decision than the Board does in preparing its final decision. It is the examiner who initially combs the record and organizes and writes findings and conclusions. By the time the record reaches the Board most, if not all, of the sifting and winnowing of the relevant facts and applicable law has been accomplished. On the other hand, the Board has numerous other functions to perform in addition to the disposition of formal adjudicatory proceedings.

Whatever limitations of statistical measurement the foregoing surveys may have, they do point roughly to the substantial amount of time spent on the decisional processes in CAB proceedings. While the process by which a court of law hears the evidence and then decides an ordinary law suit is usually much faster than the process by which an examiner and his agency decide their complex proceedings, it must be remembered that the large economic proceedings before the Board are more akin to anti-trust and similar protracted proceedings in the federal district courts than they are to the run-of-the-mill litigation in either state or federal trial courts.

Since the law provides that each party to an adversary proceeding before the Board must be given full opportunity to be heard, including the rights to notice, cross-examination, the submission of proposed findings, exceptions, and oral argument on exceptions, the further steps to shorten records and cut down time of hearing must be accomplished within the framework of existing law and established judicial procedures. The recent Reorganization Plan No. 3 for the CAB offers the hope of some solution to this problem through effective delegation of the function of decision making and discretionary review by the agency which should obviate two separate sets of proposed findings, often identical if not substantially repetitive, and the delays inherent by rendering decision through a trial examiner and then later de novo through his agency. However, there are other procedures that offer promise of even greater streamlining in the disposition of decisions of the CAB.

\(^{24}\) The above time periods are inclusive of week-ends and holidays. These time periods also included the time required to cut stencils and the publication and service of the initial and final decisions.
IV. SUGGESTED FURTHER IMPROVEMENTS IN FORMAL PROCEDURES

A. New Route Cases

As hereinafter discussed in more detail, it has been suggested that federal administrative agencies utilize non-hearing procedures in the disposition of their duties, particularly in non-adversary situations. The bulk of CAB proceedings continue to involve major new air route awards. It is difficult to see how such proceedings could be processed fairly under informal Board or executive procedures. Indeed, Board proceedings in the area of substantial air route revisions are not only adversary in the true sense of the word; the adversaries involved in such proceedings (including both air carriers and cities vying for new or additional air service) are generally the more contentious of litigants in CAB proceedings.

Those of us who have known ex parte pressures to intrude upon the decisional process in major new route cases in spite of carefully followed judicial procedures shudder at what these pressures might be like if decision in such cases were left to more informal procedures at either the Board or some executive department. This is not to say, however, that Board procedures in this area cannot be simplified and shortened within the framework and protections of trial-type judicial procedures. The following suggestions are not made with the idea that they constitute the only sound solution to the vexing problem of expediting large new route proceedings at the Board. It is hoped that they will draw other and perhaps more expert attention to the problem.

1. As a first step, the Board through its technical staff should establish projected route patterns for the various areas of the country prior to any formal Board proceeding. Most of the critical decisional facts involving proposed new route awards are already lodged in the Board files in the way of required filings of traffic statistics, the carriers' operating data and numerous economic indices from federal or local government sources. Concurrently with the order initiating a new route proceeding, the projected route pattern plan, buttressed by data already available to the Board's staff, could be circulated to all prospective air carrier parties, including those with pending applications for additional service within the area of inquiry and to all cities within that area, either in the form of an order to show cause or a simple order of investigation. With an operating air route network already covering the entire country and all major international air lanes, it should no longer be necessary to take to trial every conceivable proposed improvement of the over-all air route system on an ad hoc basis. With a tentative proposal in the hands of the prospective parties, reliance should then be placed wholly upon the examiner to take the proceeding through its pre-trial, hearing, and initial decision stages.

2. As a necessary second step, examiners of the Board should be authorized to pass upon all interlocutory matters. Questions such as the scope of the issues, proposed interventions, conflicts with pending applications for additional service within the area of inquiry and to all cities within that area, either in the form of an order to show cause or a simple order of investigation. With an operating air route network already covering the entire country and all major international air lanes, it should no longer be necessary to take to trial every conceivable proposed improvement of the over-all air route system on an ad hoc basis. With a tentative proposal in the hands of the prospective parties, reliance should then be placed wholly upon the examiner to take the proceeding through its pre-trial, hearing, and initial decision stages.


4. In several recently instituted new route proceedings the Board has utilized the order to show cause technique much in the manner outlined above. However, certain difficulties have arisen with these procedures, primarily because the orders to show cause fail properly to anticipate all of the issues to be litigated.
tions, *inter alia*, should be initially decided by the examiner subject to review by the Board in its final decision.

3. As an indispensable third step, more rigid control should be imposed upon the type of proof submitted for new route proceedings. Most importantly, it simply is not necessary to go through the laborious process of cross-examination on all the minutiae which currently seem to concern the CAB practitioners. With the tentative proposals for new route improvements as a starting point, the examiner must then make much more effective use of pre-trial procedures. For example, air carrier applicants continue to present considerable proof on various criteria of air carrier choice such as alleged pioneering, the historical interest of the applicant in the area under inquiry, elaborate scheduling plans which at best can only be tentative, proposed lower fares and an alleged superior sales effort, each of which should bear no or at best but very marginal weight as matters of decisional preference in the selection of air carriers. Similarly, the civic parties to new route proceedings continue to present a substantial volume of virtually fruitless "boiler-plate" type of information regarding utilities, recreational facilities, school enrollments, and other general economic data, none or little of which helps to measure a community's need for new or additional air service.

4. As a logical fourth step, the course of the proceeding should be drastically changed. Instead of going to hearing after the exchange of direct and rebuttal exhibits, as is now the case, the parties would exchange written interrogatories, requiring, if need be, explanations and corrections in the exhibit materials already exchanged. These interrogatories would be answered in a further or third exchange of exhibits along with any surrebuttal materials to answer possible new matters which may have arisen. On a certain day following the exchange of written replies to the interrogatories and surrebuttal materials, the parties would be directed to exchange requests for specified areas of cross-examination on each other party's case. Perhaps two or at the most three witnesses would be allowed to sponsor each party's complete case in the formal hearing to follow. A short time prior to the formal hearing, however, a further pre-hearing conference could be held for the purpose of obtaining agreement on the waiver of cross-examination in the various areas of proposed evidence, further stipulation of agreed facts for the record, and the necessary clarifications of remaining procedures. The formal hearing would be strictly limited to areas of cross-examination not waived or limited at the second prehearing conference, the reception of written exhibit materials including proposed written testimony, and offers of proof. Following such formal hearing, the remaining procedural steps could be further shortened or expedited.

5. Thus, as a final step, two further types of procedures could be utilized to speed up the disposition of new route awards. In the smaller proceedings, the steps already taken would very likely enable the examiner to announce his decision orally on the record in the manner of a court after trial. In such situations, the parties could be asked to present proposed findings and an order which the examiner could work with to expedite his initial decision. In the larger proceedings, considerably shorter limits of time than now allowed would be set for the filing of proposed findings and conclusions and briefs. Extensions of this time for the latter
filings would be allowed only in exceptional circumstances. Moreover, the proposed findings, conclusions, and briefs in the major proceedings should be limited to those areas of proof which were contested at the formal hearing.

B. Proceedings Other Than New Route Cases

In addition to the proposed improvement in formal cases involving new route issues, the formal procedures now in use in other areas of the Board’s functions warrant change in various limited ways. However, it bears repeating that any type of formal procedure in these latter areas will necessarily be time consuming because the proceedings are also of the type that are very large and affect substantial vital interests of both the public and the industry. Moreover, it is also well to bear in mind that elaborate management procedures such as pre-arranged pre-trial, trial, and initial decision schedules which can be relaxed only with the permission of management or a management committee, often look better on paper than they work out in actual practice. Such procedures in themselves are bothersome and time consuming. Finally, because formal proceedings at the Board are not alike in priority or importance, strict management schedules for one proceeding may destroy flexibility in the assignment of proceedings to the examiners. Tying an examiner down to an inflexible assignment in one proceeding may make him unavailable for the numerous intermediate procedural tasks in other cases that can be normally accomplished when the examiner is assigned to four or five or more proceedings at one time. Nevertheless, there are places where further streamlining is possible in the Board’s process in the several functions other than new route proceedings.

1. Without exploring the economics of the problem here, it is now quite obvious that the air transport industry may soon require a merger of certain of its weaker units with its stronger ones. While the Board cannot compel air carriers to combine against their will, the Board does not have to wait until a carrier in extremis asks that the highest bidder be allowed to buy its operation. There is nothing to prevent an over-all study of those possible unifications which make the most sense for both the public and the industry. Such a tentative study, either in the form of an order to show cause or an order of investigation, served upon all interested carriers and cities, should not only help to induce desirable air carrier mergers but also provide a basis for much shorter formal proceedings in the event the arrangements tentatively arrived at by the Board are accepted by the affected carriers.

2. The Board has long had an informal mail rate conference procedure17 whereby most of the Board’s mail rate proceedings are settled through non-hearing procedures. The Board also utilizes the system of establishing class rates of mail compensation for both domestic trunkline and local service carriers.

With respect to those mail rate proceedings not settled through the informal conference procedure, there is not much that can be done outside of applying the moral procedures of expedition of pre-trial, a written record, and the other techniques of the kind now used in new route proceedings. As a matter of fact, such mail rate proceedings are very few.

---

in number and more likely than not involve problems that are sui generis. For example, the Transatlantic Final Mail Rate Case\(^2\) of several years ago, involved the final rates of mail compensation for the transatlantic operations of American flag carriers for a past period of eight years. The very recent Reopened Pan American Mail Rate Case\(^2\) involved, inter alia, an inquiry into the carrier’s past accounting procedures for its system-wide operations and a re-examination of the rates of mail compensation heretofore established for this carrier for a long period of time. The nature of the latter two and similar mail rate proceedings necessitates proof on a large volume of highly complex issues and detailed and painstaking cross-examination thereon is hardly avoidable. For this and other reasons, the shortened procedures suggested herein for large new route proceedings cannot be suggested for all of the more complex mail rate proceedings at the CAB.\(^3\)

3. Across-the-board changes in domestic passenger fares and cargo rates present special problems. The Board has the authority to suspend and investigate such fares and, after notice and hearing, to order changes. But because of changing general business conditions and the growing and volatile nature of the industry, it is obvious that “one-shot” judicial proceedings which are necessarily prolonged are hardly the best system for establishing such fares and rates on a prospective basis. Rather the problem of appropriate fares and rates is one that requires continuous internal agency surveillance and study. The prescription of such fares and rates might well be better done through a type of informal conference procedure now utilized by the Board in most mail cases.

V. NON-HEARING PROCEDURES FOR THE CAB

The suggested greater use of procedures of a non-judicial nature for the settlement of cases, particularly in situations where there are no adversaries, also offers opportunity for speeding up the Board’s functions. To this end the Board, again under the powers it recently acquired under Reorganization Plan No. 3 of 1961,\(^4\) broadened the scope of its earlier delegations of authority in nonhearing matters to various members of its staff. Among other things, these delegations give the staff authority to grant or deny intervention in formal proceedings, approve or deny applications for approval of certain interlocking relationships, approve or disapprove certain agreements between air carriers, administer the Board’s accounting regulations, and compromise certain civil penalties imposed for the violation of the Board’s air safety regulations.

Although further non-hearing procedures in some instances may require amendment of the Federal Aviation Act allowing the parties to waive even a pro forma hearing, there seems to be no reason why—if

\(^{2}\) Docket 1706 \(et\) al. (Orders E-8833 and E-9530, dated Dec. 20, 1954 and Aug. 30, 1955, respectively).

\(^{3}\) Docket 1706A \(et\) al.

\(^{4}\) As a matter of fact, as these comments were being written, and following 54 days of formal hearings, the proceedings in Docket 1706A were settled through the Board’s informal mail rate conference procedure. Order Nos. E-18018 and E-18072, dated Feb. 13, 1962, and March 5, 1962, respectively. To what extent the formal hearings, which had approximately three more weeks to go, aided in producing a settlement cannot be deduced from aforesaid orders.

\(^{5}\) Part 385 of the Board’s Organization Regulations (Regulation No. OR-1) adopted on Dec. 18, 1961, for effect on Jan. 20, 1962.
hearings can be waived—informal disposition could not be made of other important types of proceedings arising at the CAB, including, among others, applications for minor improvements in the air route pattern or proposals for suspending or abandoning service at single points, foreign permit proceedings, air carrier equipment lease agreement cases other than contested proposed unifications of carriers, and certainly industry-wide changes in domestic passenger and cargo rates. Indeed, as already noted, the Board is already handling the bulk of its mail rate proceedings through its informal mail rate conference procedure. Moreover, where no real issue of fact is involved, summary judgment procedures modeled after the Federal Rules of Civil Procedure could well be utilized. There are various proceedings at the Board which could well go to decision after the filing of pleadings, with or without supporting affidavits. Further, informal procedures could also be utilized to determine the very frequent problem of whether air services between two or more points need additional competition with the choice of carrier to provide that competition left to formal hearing procedures. Obviously, without intensive effort at the settlement of proceedings through informal non-judicial procedures, it cannot be known how much of the Board's business can be settled at the conference table rather than at prolonged trial-type proceedings.

If informal conference procedures fail to arrive at satisfactory solutions in the public interest, resort can always be had to the formal hearing process. The important problem in processing matters through non-judicial procedures, even in the so-called non-adversary proceedings, is provision for adequate representation of the general public. Though the public interest could no doubt best be protected through a public or consumers' counsel housed as a separate independent agency, such an arrangement would be a considerable departure from present practice. Absent such an arrangement, there is no reason why this cannot be done as well informally as it is now performed through government counsel in the trial-type cases.

VI. MISCELLANEOUS MATTERS

As a further matter, a great deal can be done to expedité proceedings at the CAB through tidying and tightening existing procedures. In our concern to provide adequate due process, we often invite proliferation and delay.

1. The Board has recently adopted a new Rule of Practice which amends its procedural regulations to prohibit the filing of unauthorized documents, including various documents which are now filed as informal correspondence rather than documents of the type contemplated by the rules. The Board and its staff have been particularly plagued by the practice of parties in economic proceedings in the filing of a multiplicity of responsive documents in the form of unauthorized answers, replies to such answers, and even replies to such replies. The new prohibition is

---

23 It is unlikely that this country would ever entrust the oversight of its regulatory agencies to one man or office, as is the case of the Ombudsman in the Scandinavian countries. Nor is it clear that such a potentially autocratic system would be desirable. However, see Jägerskiöld, The Swedish Ombudsman, 109 U. Pa. L. Rev. 1077 (1961); Cf. Davis, Ombudsman in America: Officers To Criticize Administrative Action, 109 U. Pa. L. Rev. 1057 (1961).

designed to curb such unnecessary responsive pleadings and improper informal filings. For example, while the Board’s regulations presently provide for petitions for reconsideration, re-hearing, or re-argument with respect to final orders of the Board, the practitioners before the Board have frequently violated the rule against successive petitions for reconsideration. Under the new rule change improper filings would not be accepted by the Docket Section of the Board and the sender of such documents as well as other parties to the proceeding are to be notified of the Board’s action thereon. Moreover, another of the Board’s recent amendments of its procedural regulations formalizing the manner in which civic groups may make requests for expedition of Board proceedings should reduce the huge volumes of *ex parte* communications to the Board requesting such expedition which has theretofore been the practice in new route proceedings.\(^{24}\)

2. Substantial delays are also occasioned by the liberality in granting continuances on the part of examiners and the Board after the initiation of proceedings. When this practice extends to piecemeal hearings on various portions of proposed evidence over protracted periods of time, the resulting “trial by interval” unavoidably delays the disposition of cases. While inflexible time schedules for each case imposed by management at the time cases are started is not the answer to this problem, careful organization of all phases of proceedings at the pre-trial conference, an over-all target date for final decision, and less liberality in granting continuances at the intermediate stages of a case would make for significant time savings in the administrative process.

3. While CAB examiners have had a manual to guide them since the inception of the agency, this handbook needs revision in the light of recent progress made in handling trials in large proceedings, particularly in terms of the techniques developed by the courts in the disposition of protracted cases. Equally useful would be an attorney’s manual for the guidance of agency counsel. There is no reason why these two projects should not be undertaken through informal meetings and with the cooperation of the agency’s practitioners. The latter efforts might go a long way toward achieving more uniformity in practice in CAB hearings as to those basic procedures of expedition which are utilized in most of the agency’s large cases.

VII. Conclusions

In the final analysis, the kind of expedition an administrative proceeding receives is but a reflection of the competence and efficiency of the persons concerned with it. This is not to say that the many substantive functions of an agency like the CAB cannot be considerably expedited through numerous improved and shortened procedures which have long proven themselves both in courts and in the administrative field. But the study of the adequacy of the procedures of administrative agencies must be a continuous process; care must be taken that proposals in improved procedures do not create more problems than they solve; and if new procedures are tried that do not work, then the agency should not hesitate to try again with procedures that show more promise in actual practice. With

respect to the latter comment, it might be well in some cases to experiment with drastic changes in established procedures by pilot programs rather than through wholesale across-the-board substitutions in current procedural regulations for all types of proceedings.