Procedure in New Route Cases before the Civil Aeronautics Board

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PROCEDURE IN NEW ROUTE CASES BEFORE THE CIVIL AERONAUTICS BOARD

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INTRODUCTION

Our substantive law, we have been told, sprang from the loins of procedure. That truth of history is not true of today's administrative law in the same way. But even in the administration of the elaborate regulatory statutes of the machine age, where substance and not form is so important, procedure inevitably affects substantive rights. For a right is no right if it cannot be realized. And it can be realized only through procedure.

The most important procedural problem with which the Civil Aeronautics Board has been faced is the processing of the new route case. Between the raw material of new route applications and the finished product of decision a complicated machinery grinds away, affecting at every turn the decision which will emerge. The day is coming when other types of cases will be far more important than the new route case. But that day is still only a graying horizon.

THE BOARD'S PROCEDURE SUMMARIZED

It should be understood that new route cases embrace not only the applications of a new company for a new service or applications of established airlines for entirely new extensions but also applications of established carriers to add new cities to existing routes. The Board's procedure in these cases is not fundamentally new or peculiar. In general, it is a direct descendant from the procedure of the Interstate Commerce Commission, the granddaddy of our whole administrative process.

Typically the new route case takes the following course. The Board seeks in a very general way to set cases for active consideration in the order of their filing. But for at least the last four or five years it is a rare case that can proceed on the basis of a single application
from a single carrier. There may be many other applications from many other carriers which are so related geographically that elementary fairness requires their consideration together. 1

When it has picked the applications which are to be the core of the proceeding the Board ordinarily makes its announcement by setting offices, specifying the applications involved. It is contemplated that the matter for a prehearing conference at the Board's Washington representatives of all interested parties will attend the prehearing conference. It is presided over by one of the Board's examiners. According to the Board's rules this conference is supposed to be for the purpose of discussing and defining the issues, clarifying the position of the parties, and taking other steps to facilitate and simplify the conduct of the case. The Examiner also invites the views of the parties as to the dates to be fixed for further procedural steps, such as the exchange of exhibits, rebuttal exhibits and the hearing.

The Board's rules definitely contemplate that petitions to intervene shall have been filed prior to the prehearing conference. This rule, however, is a dead letter. Usually those who propose to intervene send representatives to the conference, but it is rare that the petitions to intervene are filed prior thereto. 2 It is also generally contemplated by the Board's course of procedure that any applications which will be included in the proceeding will have been filed prior to the prehearing conference. As a practical matter, however, applications will frequently be included in the proceeding though filed subsequent to the prehearing conference.

Therefore at the prehearing conference the Examiner will fix a time, usually a few days in the future, for the filing of all petitions to intervene and of any other applications which any party wishes to have consolidated in the proceeding. The Examiner then files a written report summarizing what transpired at the conference, setting the dates for the subsequent procedural steps, and stating his recommen-

1 For example, a case had its genesis in an application filed several years ago by TWA the effect of which would simply be to put Cincinnati on its transcontinental route. Later TWA was authorized to serve Cincinnati on a cross-cutting route. Were its application granted it would be able to route its aircraft directly between Cincinnati and its transcontinental cities instead of doing so on a dog-leg. But by the time consolidation of other related applications had been completed the case included proposals for new routes all the way from Oklahoma to New York. Hence, though in general the Board makes an effort to start a proceeding with an application or a group of applications which have some claim to priority by virtue of the length of time they have been on file, it is usual for the proceeding finally to include many proposals which are comparatively recent.

2 There are two types of interventions—those involving restricted participation, and so-called formal interventions. A person desiring to intervene formally must petition the Board for leave to intervene which will be granted if certain specified conditions are met. Such an intervener becomes a party to the proceeding and has the same rights with respect to the calling of witnesses, filing of exhibits, cross-examination, oral argument, etc., as any applicant. It may be that a person desires to intervene in a proceeding but can not meet the requirements prescribed for formal intervention. He may still participate in the proceeding on a restricted basis by appearing at the hearing, presenting evidence, and suggesting questions to be propounded by public counsel. Such an intervener may not object to questions addressed to witnesses, and ordinarily will not be served with a copy of the examiner's report, or be permitted to file exceptions to it, or be allowed to participate in oral argument.
PROCEDURE IN NEW ROUTE CASES

RATION to be transmitted to the Board as to the granting or denial of petitions to intervene and as to the applications to be consolidated in the proceeding. This report is served on all persons who attended the conference. Any person is entitled to file exceptions thereto. The Examiner's recommendations are transmitted to the Board, together with the exceptions, and in due course the Board will issue an order acting on the petitions to intervene and consolidating the applications to be included in the proceeding.

Thus, it will be observed, no one knows the scope of the proceeding until the Board's consolidation order is issued. In the meantime time has begun to run for the exchange of exhibits. The Examiner will usually have fixed a time for the exchange of exhibits between the parties which will be about four to six weeks subsequent to the issuance of his report of the prehearing conference. It is generally understood that the Board desires—though it does not require—that all possible evidence be presented in exhibit form. This means that, even though a party may be in the position of simply opposing an application, he is expected to anticipate what the case in support of the application will be and to meet that case in the exhibits he files.

Ordinarily a date about two weeks after the exchange of exhibits is fixed for the filing of rebuttal exhibits. It is contemplated that the rebuttal exhibits will be limited only to material that is in the nature of a reply to evidence submitted in the exhibits of other parties which could not have been anticipated at the time of the original exchange.

The date for the beginning of the hearing will ordinarily have been fixed to come about ten days or two weeks after the date for filing rebuttal exhibits. The hearing is held at a place which is deemed most convenient to the parties. While it often occurs in Washington, it is not unusual for it to occur in other parts of the country. The hearing is presided over by one or two of the Board's examiners. Each party and intervener presents his case, following an order specified in advance by the Examiner, and his witnesses are cross-examined in the usual way.

At the close of the hearing the Examiner ordinarily gives the parties from 45 to 60 days for the filing of briefs. After the briefs are received and studied the Examiner issues a report discussing the applications and the issues and making recommendations as to the decision. Accompanying the report is a notice specifying the time within which any exceptions are to be filed—which is usually about ten days—and the time thereafter when briefs to the Board are to be filed—which is usually a further period of 20 to 30 days.

After the filing of exceptions and of briefs the case is set for oral argument before the Board. The Board attempts to have oral argument within a month after the briefs are filed.

At the conclusion of the oral argument the case is submitted and in due course the decision is announced with a written opinion. The Board's rules provide for filing petitions for reconsideration. Such petitions have been granted on a number of occasions in the past. If
a petition for reconsideration is granted, it usually will be followed by further oral argument. There are instances of reconsideration without re-argument. Then a further opinion by the Board is rendered, either modifying or affirming its previous decision.

While there are certain details of procedure in new route cases not referred to in this review, it will be seen, as I have said, that the procedure generally follows a basic pattern quite familiar in administrative law.

**The Board's Speed**

In commenting upon this procedure, and in appraising its adequacy, the first question which naturally occurs is that of the speed with which the Board moves from one to another procedural step and the over-all time taken to complete proceedings. The Board, like all other administrative agencies, has frequently been the target of criticism based on the charge that it takes too much time. What are the facts?

It is very difficult to develop any statistics which will fairly reflect the time taken in new route cases. The Board's staff recently made a study of all of the new route cases decided during the calendar year 1946. There were 27 such cases, involving a total of 245 applications. The following table will give the figures for the average case.

| **Number of applications** | 9 |
| **Number of intervenors** | 5 |
| **Number of cities involved in applications** | 90 |
| **Length of transcript of hearing** | 679 pages |
| **Length of exhibits filed** | 1205 pages |

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| **Average time between filing of applications and holding of prehearing conference** | 165 days |
| **Time between prehearing conference and beginning of hearing** | 91 days |
| **Length of hearing** | 6 days |
| **Time between close of hearing and issuance of Examiner's Report** | 99 days |
| **Time between issuance of Examiner's Report and oral argument** | 42 days |
| **Length of oral argument** | 2 days |
| **Time between close of oral argument and decision** | 120 days |

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| **Time between prehearing conference and oral argument** | 238 days |
| **Time between prehearing conference and decision** | 360 days |
| **Time between end of hearing and oral argument** | 141 days |
| **Time between end of hearing and decision** | 263 days |

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| **Average time between filing of applications and decision** | 525 days |

In a very rough way the foregoing figures give an over-all indication of the speed with which the Board disposes of its new route business. There is, however, a serious difficulty with these figures. They lump together not only the cases which involve some complexity but also a number of cases which are so simple that they are almost routine. This is disclosed by the fact that, of the 27 cases, 16 were cases which involved only a single application, and, of those 16, it appears that all but 4 involved applications by foreign flag carriers for permits to oper-
ate to this country which are handled in a very routine fashion and can hardly be said to provide a fair basis for judging the speed with which the Board dispatches its business. If we eliminate all of these single application cases the average figures jump very sharply. Then the average case is found to involve not 9 applications but nearly 21 applications. And on the average a total of 519 days elapsed between the time of the prehearing conference and the time of oral argument.

We will get a more balanced view of the speed with which the Board proceeds if, in addition to the table of over-all averages which I have given above, we take several of the big cases more recently decided by the Board and derive the average figure for those cases. I have selected 11 of the recent big cases. For these cases we find that the average number of applications was 25. The average number of interveners was 16. The average number of cities involved in each case was approximately 270. The average length of the transcript of the hearing in each case was 1825 pages, and the average volume of exhibits in each case was 3164 pages. Obviously this is a very different situation from the over-all average case for which the statistics were given above. We also have quite a different picture appearing in the average time consumed, as will be seen in the following table:

| Average time between filing of applications and holding of prehearing conference | 236 days |
| Time between prehearing conference and beginning of hearing | 183 days |
| Length of hearing | 15 days |
| Time between close of hearing and issuance of Examiner's Report | 276 days |
| Time between issuance of Examiner's Report and oral argument | 85 days |
| Length of oral argument | 4 days |
| Time between close of oral argument and decision | 205 days |

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Time between prehearing conference and oral argument | 559 days |
Time between prehearing conference and decision | 768 days |
Time between end of hearing and oral argument | 361 days |
Time between end of hearing and decision | 570 days |

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Average time between filing of applications and decision | 1004 days |

At first blush this table indicates that it takes almost a scandalously long time between the filing of an application and ultimate decision in those cases which have been the truly important ones and of most concern to the average new route applicant. A moment's reflection will indicate, however, that the Board has moved with rather amazing speed, except for the interval between oral argument and the issuance

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3 The cases are Rocky Mountain States Case, 6 CAB 695 (1946); The Florida Case, 6 CAB 765 (1946); Latin American Case, 6 CAB 857 (1946); Hawaiian Case, 7 CAB 83 (1946); West Coast Case, 6 CAB 961 (1946); New England Case, 7 CAB 27 (1946); Pacific Case, 7 CAB (Order 5035, July 31, 1946); South Atlantic Case, 7 CAB (Order 5073, Aug. 13, 1946); Texas-Oklahoma Case, 7 CAB (Order E-136, Nov. 14, 1946); North Central States Case, 7 CAB (Order E-200, Dec. 19, 1946); Southeastern States Case, 7 CAB (Order E-435, April 4, 1947).
of the decision. That interval was nearly 7 months long. Among all of the 11 cases, that taking the least time between argument and decision was under consideration by the Board for 139 days; that taking the most time was under consideration by the Board for 242 days. Of the 11 cases 7 were under consideration by the Board for more than 200 days. It is apparent, therefore, that the average of 205 days is a fairly representative figure. I shall revert later to the matter of the length of this time interval.

So far as the other time intervals are concerned, it seems to me that none of them betrays any objectionable delays. Indeed, I for one would suggest that to some extent they show too great haste. The average time between the filing of applications and the holding of the prehearing conference — only 236 days — is surprisingly low. Of course, it is weighted by the presence in any one of these consolidated proceedings of a number of applications which were not filed until it became apparent that a proceeding involving the particular area in question would be held. Indeed, as I have previously pointed out, it is not unusual for applications involving the area to be filed even after the holding of the prehearing conference. Nonetheless, for an applicant for something as important as a new air transport route to have to wait on the average for anything under a year before active consideration of his application begins indicates to me surprising speed in view of the tremendous volume of work confronting the Board, and the serious implications of granting certificates of convenience and necessity especially for brand new routes. The situation, of course, would be quite different if the industry were as stabilized as the railroad industry or even as the motor carrier industry. It must be appreciated, also, that these big cases we are discussing involve very large areas and reflect a situation which, it is hoped, has been abnormal. A veritable flood of applications descended upon the Board in the last several years which could never have been disposed of one by one, or even five by five. When the Board has to devote a particular proceeding to a large area and numerous applications it is inevitable that some have to wait a considerable length of time before any action at all can be taken. If the Board had had the staff to proceed more nearly one by one, the average time before action was started on applications could

4 For purposes of comparison it is of interest to note the average time taken by the Interstate Commerce Commission in the processing of 33 reported cases in 1945 and 1946 involving applications by motor carriers for certificates of public convenience and necessity. These cases represent all of the new route cases involving motor carriers in which an original opinion was rendered during the two year period, with the exception of Tyrell's Common Carrier Application, 44 M.C.C. 552 (1945), which was pending before the Commission for more than four years. For these cases the average time taken between the date of application and decision was approximately 486 days; the average time from application to submission for decision about 284 days; and from submission for decision to decision about 202 days. In comparing these cases with those before the CAB, consideration should be given to the fact that motor carrier cases usually involve only one party, are ordinarily far less complex than the consolidated CAB cases, and involve no such far-reaching issues of policy as those facing the CAB. Hence the CAB's speed compares very favorably with the ICC's.

5 The least time was in the Texas-Oklahoma Case, cit. note 3, supra, and the most time in the South Atlantic Case, cit. note 3, supra.
have been cut materially. But the Board and its staff are not super-

human — it simply has not had the staff to handle quickly the great

bulge of applications confronting it in the last few years.

The next important interval of time is the 165 days transpiring,
on the average, between the prehearing conference report and the
hearing. I have seen no statistical study of the point, but I am sure
from some experience that this period of 165 days does not come very
near to representing the average period which was originally prescribed
by the Examiners in their prehearing conference reports. Often dates
are fixed for exchange of exhibits which then are postponed at the last
minute, leading to postponements in the dates for rebuttal exhibits
and for the hearing. This interval of 165 days is in many respects the
most important interval in the entire proceeding, for it represents the
time that is spent in active preparation of the case by the various parties.
If the case is not well prepared the ultimate task of the examiners and
the Board is made more difficult and the danger of an unwise decision
is increased.

Earlier in my discussion I referred to the time intervals which are
usually prescribed by the examiners for the procedural steps up to the
hearing. The times I cited were short. This is one reason that post-
ponements have had to occur. In any event, when one considers the
nature of the cases with which the Board is dealing, involving as they
do proposed service to an average of 270 cities in each of the 11 recent
cases which I have referred to, it is apparent that a matter of two or
three months for the preparation of original exhibits would be a very
short time indeed, especially when account is taken of the fact that
the research staffs of the carriers involved in these cases have been
literally swamped with work. Unquestionably for some time past the
Board's staff had been over-worked. But the condition prevailing in
the Board is not as bad as the condition prevailing among the car-
rriers. The exhibits and other evidence presented in these cases all
too often betray the weakness of hasty preparation. It would be, in my
judgment, a very great service to the parties involved were the Board
and its staff to be less concerned about haste during the initial stages
of these proceedings and more concerned about their disposition after
the cases are submitted. The Board's staff has kept these cases moving
with amazing dispatch from the time of the prehearing conference on
through the hearing. They have moved too fast. Some of the confus-
ing and disrupting postponements might well have been avoided
had a more deliberate pace been followed.

So far as the other time intervals are concerned, the situation would
seem unobjectionable. The length of the time between the close of
hearing and the issuance of the examiner's report is considerable. It
must be remembered, however, that that interval, averaging 276 days,
includes the time within which briefs to the examiner are prepared.
On the average 74 days elapsed between the close of the hearing and
the filing of the last brief with the examiner. This time is certainly
not unduly long in cases of the type referred to. From the time of filing
the last brief until the issuance of the examiner's report the average period elapsing was 202 days. Coincidentally or not, the case which was under consideration by the Board after oral argument for the shortest time took the longest time for preparation of the examiner's report.

While there have been a few occasions when it seemed that too long a time was taken before the issuance of the examiner's report, they are the rare exception. The examiner's report should be an extremely important document. If it is to serve its function it must be prepared with great care. The size of the records in these cases, as will be seen from the figures I have quoted, and the complicated nature of the questions involved, are such as to demand the most time-consuming and tedious study in order to present a fair analysis of the facts for the benefit of the Board and of the parties. Ideally at least, the work that goes into the preparation of the examiner's report should save the Board a great deal of time when it comes to a decision of the case. These reports sometimes run to two or three hundred pages. They are, in truth, a "short record", abbreviating and summarizing all the evidence. Even were they to be intended as nothing more than a mere condensation of the record, their preparation, if accomplished fairly to all the parties, would be a tremendous undertaking in cases such as the recent big area proceedings.

The Backlog of Cases

Before leaving the general subject of the time consumed by the Board in new route proceedings, we should glance briefly at the state of new route applications upon which no action at all has been taken. It is almost impossible to describe the size of the Board's backlog in statistical terms. For example, circumstances, diplomatic and otherwise, affecting foreign operations may be such as to make quite misleading the figures as to the number of applications to engage in foreign air transportation which at any given moment are pending with no action having been taken. Similarly peculiar conditions affect applications for non-conventional operations, such as operations with helicopters, or with pick-up devices, or with lighter than air craft. If we look solely to the applications to provide domestic service with conventional aircraft, the statistics may be moderately revealing.

On January 1, 1947, there were 162 such applications on file with respect to which no action had been taken—that is, that had not been set for prehearing conference. The oldest of these applications was filed in March of 1941. On the average these applications had been on file for 391 days prior to January 1, 1947.

This time, averaging only a little over a year, is certainly not long. Moreover, there are undoubtedly many of the 162 applications which will never be seriously pressed. This fact affects not only the size of the backlog of applications but also means, of course, that the average time that these applications have been on file is considerably over-
stated. I think it an entirely fair judgment that a Board composed of only 5 members, with a surprisingly small staff, has performed a herculean task in keeping reasonably abreast of its docket. On the whole it has moved too fast, in the light of the staff available to it and the awesomely important nature of the questions it has to decide.

THE PREHEARING CONFERENCE

The prehearing conference has lamentably failed to serve its asserted purpose. The Board's rules plainly contemplate that the prehearing conference will be an important procedural step at which issues will be defined, limited and clarified, and real progress made toward simplifying and expediting proceedings. When the Board first adopted its rule for prehearing conferences there was an obvious impression that a distinctly progressive step in administrative procedure was being taken. Indeed, the Attorney General's Committee on Administrative Procedure commended the Board for adopting this procedural device.  

However the only really constructive purpose of the conference has been that it has provided a convenient means for educating attorneys and parties who are unfamiliar with the Board's procedure. In the recent past there have been cases where many of the parties were new to the Board's way of doing business, and this means of education was useful. Such cases will not be so frequent in the future. In any event, this educational process can be accomplished without making it necessary that everybody concerned in a case have someone in Washington for a prehearing conference.

The first and foremost reason that the prehearing conference has failed to serve its purpose is that in a case of any complexity no one knows at the time of the conference what will be involved in the case. The Board's consolidation order has not been issued, petitions to intervene have not been filed, and applications for new service which will

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6 What happened in two recent cases illustrates the fact that applications on file may never be seriously pressed. One of these cases, the Boston-New Orleans Case, Docket 730, was probably fairly typical. The other case, the Air Freight Case, Docket 810, was an unusual type of proceeding.

In the Boston-New Orleans Case, in which the hearing was held last June, the oldest of the applications which actually went to hearing was filed in July of 1943. But the oldest of the applications which was dismissed without going to hearing, because of want of prosecution or otherwise, had been filed in March of 1942. At the time of the prehearing conference there were 11 applications which fell within the scope of the proceeding, but of those 11 only 5 were ever carried on by the parties as far as the hearing. Subsequent to the prehearing conference 7 more applications were filed which were heard.

In the Air Freight Case an even more extreme situation was presented. The oldest application which was ultimately prosecuted to the hearing, which was held last fall, was filed in November, 1944. But the oldest application falling within the scope of the hearing had been filed in December of 1942. As of the date of the prehearing conference there were 21 applications within the scope of the proceeding, but 18 of those fell by the wayside for want of prosecution or otherwise, only 3 being prosecuted to a hearing. Subsequent to the prehearing conference 21 more applications which would have come within the scope of the proceeding were filed, but of those additional 21 only 11 were prosecuted on to the hearing. Thus of a grand total of 42 applications within the scope of the proceeding which the Board was ready to deal with, only 14 actually survived to be heard.

later be included in the case have not even been prepared. It borders on the ridiculous, in such circumstances, to think of the prehearing conference as a means for either defining or limiting issues.

The prehearing conference has also failed because the parties have not actually been required to discuss the issues in the case and their position with respect to those issues to any helpful extent. This has not been true in all cases, but it has usually been true. It is easy to say that the examiners have failed to make the parties comply with the Board's rule, but, with the prehearing conference held at such an early stage in the proceeding, it is difficult indeed to see how the examiners could follow any course other than the somewhat passive one which they have pursued.

In my judgment, the Board should amend its rules so that the scope of a proceeding is clearly defined prior to the holding of any prehearing conference. It should also be provided that the examiner in charge of the case will determine whether a prehearing conference is necessary. As a practical matter I suspect it will be found that the need for a prehearing conference would be exceptional. The examiner's discretion should also apply with respect to the stage in the proceeding when a prehearing conference is to be held. Undoubtedly an occasional case might arise when real time could be saved at the hearing and a real effort made to define, limit and clarify issues if the conference is held after the exchange of exhibits, and after all parties, including the examiner, have been able to give them some attentive study. I can imagine that in some cases an examiner, equipped with some considerable familiarity with the exhibits, could profitably call a conference of all parties a couple of weeks prior to the holding of a hearing, and by diplomatic and forceful use of powers delegated to him could shorten and simplify the hearing and see to it that evidence supplementary to the exhibits to be brought out at the hearing would be directed at the really important issues in the case.

This suggestion implies two things: (1) that the examiners will be able presiding officers, which must be assumed, and, (2) that a general course of procedure is going to be followed which does not push the parties into a hearing before the ink is dry on the exhibits.

I need hardly say that an examiner can fix the dates for the various procedural steps without calling people to Washington to have a conference. If the views or suggestions of the parties are desired—and they would not be too important if more time were to be given between procedural steps—the examiner could get such views by correspondence.

**Consolidation Orders**

A proceeding should be begun by a consolidation order. I would suggest that the Board first make public a notice indicating the general scope of the proposed proceeding, which would be roughly comparable to the present notice calling a prehearing conference. A time should then be fixed by which all applications to be included in the
proceeding and petitions for consolidation are to be filed. The Board should adhere firmly to that date and should never permit consolidation of a tardily filed application in the absence of the most compelling and unusual justification. So far as petitions to intervene are concerned, their filing could be invited before the actual consolidation order is issued, although, technically, an opportunity to intervene would have to be given after the announcement of the consolidation order. Again, however, there should be a very strict requirement that any petitions to intervene should be filed within a brief time after the consolidation order is issued.

Only after the issuance of the consolidation order should there be any further steps in the proceeding. Only then is the proceeding defined. And even then a very considerable time should be allowed before the filing of exhibits is required in order to afford some leeway for the consideration of any petitions to reconsider any portion of the consolidation order.

A course along these lines would not only be fairer to all concerned than the present procedure, but also would promote the intelligent and helpful preparation of a case. As matters now stand it is possible — and sometimes happens — that a few days before the filing of exhibits it is discovered that the scope of the proceeding has been changed by the consolidation order.

Before leaving the question of consolidation orders, note should be taken of the policy to consolidate into one proceeding a great many applications involving service of all types within a large area.

There is hardly a more knotty problem in procedure under the Civil Aeronautics Act than the determination of what new route applications should be consolidated for hearing purposes. It has happened that a carrier's application was denied on the ground that the particular route involved in the proceeding was wholly disassociated from its existing system. Of course, such a proposal was simply a portion of a larger proposal which would have been connected with the existing system but which had to be presented in disjointed form just because of the accident of consolidations. In order to confine proceedings within some coherent area, even an extensive area, it is sometimes necessary that the Board consolidate only a portion of an application. To avoid injustices of this nature occurring to a greater extent the areas embraced within a given proceeding have been quite large. But the very size of such areas has been such in a number of cases as to make the proceeding so complicated as to be almost a mockery. The administrative hearing is a fairly legitimate descendant of the common law trial, and, generally speaking, the similarity to a trial which it has retained guarantees in the long run a fairer and wiser result than would be probable under a very different procedure. But the unwieldy nature of the famous wartime sedition trial is only an extreme example of what can happen with this type of procedural treatment when parties get numerous, issues complex, and the range of the evidence out of hand. In some of the Board's new route cases involving, as they have, service to hundreds
of cities, it is very difficult indeed to retain any coherence whatsoever at the hearing or in the evidence. Issues of great economic importance get lost in a maze and are never adequately treated. With proceedings of this nature the wonder is not that the Board makes mistakes but that the Board has not made a great many more serious mistakes than even an unfriendly critic would attribute to it during the past few years.

Unquestionably one of the reasons that the Board has embraced such wide areas and so many applications within single proceedings in recent years has been its consciousness that speed is important and its sensitivity to criticism on the ground of slow transaction of business. We lawyers who are so often in the forefront of those criticizing administrative agencies as slow, cumbersome bureaucracies, must bear our full share of guilt for fostering what I believe to be an undue self-consciousness on the part of the Board lest it be accused of proceeding too slowly. It is to be hoped that the Board will find some means in the future for keeping individual proceedings within narrower bounds. Perhaps one answer is to hold more proceedings more nearly contemporaneously instead of trying to dump everything within the framework of a single record.  

One particular phase of this problem which has contributed to difficulties was the Board's determination to include within the same proceedings both trunk-line and feeder-line applications. It is often difficult to draw a clear distinction between a trunk-line and a feeder-line proposal, and it is with some hesitation that I suggest that in the future a sharp distinction be made between these two types of proposals for purposes of consolidation in single proceedings. But I believe that most attorneys who have sat through the oral arguments before the Board will agree that, as matters finally turn out, it would have been far better had the trunk-line proposals been considered in one proceed-

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8 Striking illustration of how difficult is the problem of consolidation of applications for hearing purposes, and of the possibility of easing the problem through conducting proceedings more or less contemporaneously, is found in a series of pending cases. The North Central Case, 7 CAB (Order E-200, Dec. 19, 1946), covered the area centering more or less on Wisconsin, Minnesota and Iowa. It was decided on December 19, 1946. But in it were two applications for an extension of existing routes from Chicago or Milwaukee to the Twin Cities which would result in a Twin Cities service to eastern cities. Decision of these two applications was deferred pending consideration of the Detroit-Washington Case, Docket 679. In that case one of the applications involves an extension of a route from Detroit to Washington which would result in giving the Twin Cities a service to eastern points almost identical to the service contemplated by one of the two deferred applications in the North Central Case. The Detroit-Washington Case was argued on May 12, 1947. But it includes a number of applications very closely related to other applications involved in the Middle Atlantic Case, Docket 674, which more or less centers upon the mid-Atlantic area. That case was argued on July 7. Yet it includes applications, notably for service between Washington and New York, which are directly related to application included in the Boston-New Orleans Case, Docket 730, and which includes applications for various services in the area all the way from Boston to New Orleans, including one that would provide a service from New York to Dallas. As a practical matter it would appear likely that all of these cases will have to be decided together—or in relation to each other. And overlaying all these cases—as well as others—in the Pan American Domestic Case, Docket 1803, pending before an Examiner and involving Pan American's proposal for a nation-wide grid of routes connecting all the main traffic centers, which would profoundly affect the competitive balance and economic welfare of the entire domestic network.
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ing and had the feeder line proposals been kept in an entirely separate proceeding. The waste of time and money that has resulted to those interested in trunk-line proposals simply to have to sit around while feeder proposals were receiving attention, and vice versa, would, if added together, build several good airplanes, I am sure.

ORAL ARGUMENTS

The oral arguments before the Board have generally been regarded as of great importance. But one of the consequences of the policy of consolidating a great many applications over a wide area into one proceeding is that the oral argument has been inadequate. In some of these so-called area proceedings argument lasts for many days, not because any one party or even a few parties are able to say very much but because there are so many advocates that even with the very strictest limit upon time allotted to each it becomes humanly impossible to get through the list in any reasonable time. Arguments have occurred within the recent past where there were as many as 78 people participating.

Such an argument has no coherence. It is impossible for the order of appearance to be worked out so that the issues in the proceeding are developed logically and systematically. From one presentation to the next the Board's attention is directed first here and then there in a perfectly chaotic manner. The Board is subjected to brutal punishment.

One consequence of having such an endless parade of advocates is that each advocate's argument often bears rather closer similarity to a testimonial in a revival meeting than to a lawyer's argument.

The amount of business the Board has to transact, coupled with the size of some of these proceedings, combine to require that time allotted to each party's argument is very short. Typically an applicant will have 30 or 45 minutes and an intervener 10 minutes. This time would be ample if the cases were simple. But it is totally inadequate in many cases, such as the recent area proceedings, where numerous applications and very complicated issues are involved. It must be remembered that a given applicant must use his time not only for presenting the merits of his particular application but for opposing other applications which affect him, and the case is not unusual where a particular applicant will have just as large a stake in defeating other and perhaps entirely unrelated applications as he has in pleading for his own application. Within the time available he can hope to do no more than to try to get over one or two general points. Any really detailed discussion of evidence is quite impossible. And it is equally impossible to cover all of the issues or even all of the important issues.

LAPSE OF TIME BEFORE DECISION

I have already noted the length of time that transpires between the close of oral argument and the decision of the case. This very passage of time tends to defeat the purposes of the oral argument and to detract from its value. Especially in cases which are complicated, with a great many different parties involved, is this true. It may be seriously ques-
tioned, I think, whether, by the time the Board gets around to a decision of the case, the effect of having held oral argument has not been almost completely dissipated.

It must be recognized—in justice to the Board—that its practice has been to consider a case immediately after argument and it can be assumed that that practice is adhered to reasonably well. The difficulty is that when cases are complicated much time is bound to elapse between initial consideration and ultimate determination. For that time to have been lengthened simply because argument was held before the Board’s immediate calendar of work was such as to permit it to proceed reasonably continuously from initial consideration to determination is the only legitimate grievance one can entertain. And one must hesitate even to express that grievance since the content of the Board’s calendar is often quite beyond its control. Doubtless, however, there have been instances where a postponement of argument until other pending matters had been disposed of would have been the preferable course.

**Nature of Evidence**

The Board and its staff have made a very commendable effort to encourage the production of evidence in written form. A number of the Board’s bar have resisted this effort, and often the exhibits of the parties, which are exchanged in advance, do not cover all of the essential points which the parties intend to bring out through their evidence. If the Board and its staff were firmer in insisting that a complete case be presented in the exhibits, hearings could undoubtedly be expedited. Theoretically, and probably as a practical matter, it is certainly possible in nearly all new route cases to present every matter of fact in written form and to include such material in the initial exhibits or in the rebuttal exhibits. To accomplish this would necessitate greater time intervals for the production of the exhibits.

A considerable amount of the oral testimony at the hearings amounts to a “speaking brief”. At first blush this kind of testimony—which is really the giving of argument and the drawing of conclusions from factual data—is offensive to the common law conception of litigation. The function served by such testimony is supposed to be served by lawyers’ briefs and arguments.

On the other hand, in administrative proceedings testimony amounting to a “speaking brief” is certainly not unusual, and the Board’s examiners in permitting such testimony have probably sinned no more than have other agencies. Indeed, the Board’s examiners have done relatively well in keeping such testimony within reasonable bounds.

Likewise it must be recognized that there is a good deal to be said in favor of a “speaking brief” from the standpoint of getting a point over to the examiner. The written briefs themselves are necessarily limited in length and in a case of any complexity, and we are dealing with very complex cases, it is next to impossible to cover everything in a brief. Furthermore, with so many parties in a single proceeding, the
sheer volume of all the briefs laid end to end presents the examiner with a forbidding amount of reading. The oral discussion of a reasonably well informed witness can be quite helpful.

From this point of view such a "speaking brief" would better serve its function were it possible for the examiner to enter into the discussion more actively than he ordinarily does. Probably because it is difficult for an examiner to become thoroughly familiar with the exhibits prior to the time the hearing is held, and probably also because of the examiner’s feeling that the parties should be given considerable leeway in presenting their cases in their own way, active and aggressive questioning of a witness by the examiner is unusual. This is unfortunate. I suspect that most parties would welcome more extensive questioning by the examiner if only because that would disclose what points are obscure and what points the examiner deems important. More active questioning by the examiner might be one desirable consequence of affording a greater lapse of time between the filing of exhibits and the holding of the hearing.

One result of oral testimony amounting to a "speaking brief" which is probably inevitable, though undesirable, is that a considerable amount of cross-examination consists of a sheer dialectical exercise which by no stretch of the imagination can add anything to the evidence in a case. Cross-examining lawyers sometimes put a series of questions ostensibly designed to bring out "the position" of the company represented by the witness. From the standpoint of evidence it surely sheds no light upon the merits of the case to inquire whether a representative of a given carrier "favors" one or another course of action. This kind of questioning often takes the following form:

"Does your company feel that it is in the public interest for XYZ Airlines to be certificated between A and B?... Would your company feel that it is in the public interest for ABC Airlines to be certificated between X and Y?..."

and so on. Most questioning of this nature, if it has any real purpose at all, is obviously an effort to "trap" the witness in some seeming inconsistency. However, since an inconsistency, if developed, usually demonstrates at most only that a given company would like to be authorized to provide a service but would like to prevent others from providing either the same or similar service, it is difficult to see how such questions add to the store of evidence or even informed opinion that will assist the Board in reaching a proper decision. The examiners have been making commendable progress in minimizing this kind of evidence—but there is room for much improvement.

Another troublesome point in connection with testimony is the problem of "canned" testimony. Canned testimony has become accepted in many administrative proceedings. It is inevitable. In cases such as new route cases it is almost impossible to deal with complicated traffic data and analyses in the traditional and impromptu question and answer form suited to bringing out the facts concerning an automobile accident. The testimony has to be carefully rehearsed and the state-
ments thoroughly checked and rechecked, both in order to develop the point effectively and clearly and in order to avoid mistakes. But this means that the preparation of the testimony is almost never actually undertaken by the witness. Typically the testimony is a group product of the carrier's research staff and attorneys, as well as of the witness and often members of the witness's own personal staff within the company.

With testimony of this nature it is pertinent to ask whether there is any conceivable justification for giving it orally. It would at least be interesting to see an experiment in new route cases of absolutely requiring each party to present all of his evidence in written form at the time of the exchange of exhibits and rebuttal exhibits with any oral testimony strictly confined to matters in the nature of surrebuttal. To accomplish something of this nature, very considerable time for preparation of the exhibits and rebuttal exhibits would have to be allowed and it would be quite foolish to proceed to the relatively brief oral hearing which would be required until sufficient time had elapsed for the examiner to give the case careful study.

In any event, the present practice in the Board hearings is most unsatisfactory. There is a kind of unwritten rule to the effect that testimony is not to be read into the record. But enforcement of this rule has been spotty, to say the least. There is a subsidiary rule to the effect that if testimony is going to be read, or if its reading is not to be permitted and it is to be put into the record in written form, copies thereof must have been circulated to the parties in advance. The trouble with the practice has been that the examiners have not been sufficiently severe in requiring advance distribution in ample time for intelligent study for the purpose of cross-examination. It is almost a joke to be confronted with written testimony, often very voluminous and complicated, even as much as two or three days in advance of the time it is to be offered—and it is not unusual that the testimony is furnished only a day before the time of offering. This may serve the function of diminishing the amount of cross-examination but it is hardly fair.

One difficulty faced by the lawyers in presenting written testimony reasonably in advance of the time of its offering is that oftentimes one does not know until his opponent's case has been presented what he himself will desire to offer. This makes it necessary that written testimony be prepared at the last minute. One reason that it sometimes has to be read into the record is that there literally is not the time for preparing the necessary number of copies for distribution.

Of course, this difficulty could be avoided if there were an effectively enforced rule making it necessary that all parties present their testimony in writing well in advance and then strictly confine their oral testimony to limited rebuttal of the others' case. Even then difficulty would remain in that cross-examination of one party would elicit information which would have to be utilized by a party appearing later. Again, however, if the examiners were to assure good faith compliance with a clear rule on the subject, this difficulty could be considerably lessened.
The subject of the nature of evidence cannot be closed without reference to the evidence presented by cities and other public bodies. No one is more legitimately interested in a new route case than a city. Yet the cities have failed—and failed most lamentably—to avail themselves of the opportunity to present effective evidence, save for a very few notable exceptions.

It is risky to make categorical statements about any matter relating to the Board. But I believe it can be stated categorically that the Board is not swayed by one iota by a city presentation which contains nothing more than a general plea that the city has many industries, needs air service, and is dissatisfied with its existing service. The Board assumes all these things to be the view of all cities in the country. It does not make the view clearer or the evidence more impressive to have it stated by a mayor or other official.

Early in its administration the Board adopted a rule permitting parties to appear at a hearing on a limited basis simply for the purpose of making a statement. This rule probably was designed primarily to give cities and other public bodies a channel for giving these valueless statements without complicating matters by full-scale intervention. The Board would have adopted a course which would have saved the taxpayers a great deal of money had it never provided such a channel but instead had insisted that cities (as well as all others) be required to produce real evidence and nothing else.

The low repute of city evidence has resulted in misunderstandings. Some seem to have assumed that the Board is antagonistic to city participation in new route cases. The Board's tolerance of and patience with inept and useless presentations by cities clearly evidences the groundlessness of that assumption. In fact it makes one writhe sometimes to hear a city attorney or official at oral argument before the Board blithely "testify", with no regard for the limits of a record, to recent personal experiences with air service—without any reprimand or curb from the Board.

Actually effective and intelligent participation by cities or other public bodies in new route cases is welcomed by the Board. Once in awhile a city's participation is of a high quality. And certain few cities are doing a consistently good job. Sometimes this results from an able, trained traffic official on the city's staff. Sometimes it results from an unusually capable city attorney or from the retention of special counsel. These instances gain added weight from the very fact that they are so exceptional. Such instances of effective presentation are rather more frequent latterly. It is to be hoped that they will multiply—for the general level of city presentation is still very low.

City participation also presents the problem of the extent to which the carriers should assist the cities in preparing their cases. This has been a controversial subject for years. Carrier "assistance" leading merely to an artificially induced display of city "interest", without any real evidence being presented, is properly to be condemned. It still

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9 See note 2, supra.
occurs, despite some stern expressions of Board disapproval. But car-
rier assistance amounting to a good faith effort to furnish fact and argu-
ment to a city, assuming the city not to be a mere front for the carrier,
should be regarded as altogether legitimate. And there is no reason that
effort to provide such facts should be furtive.

A matter somewhat related to city evidence is evidence from pri-
vate users of transportation. There have been relatively few instances
where any substantial evidence from this source has been forthcoming
—although such evidence is quite frequent before the Interstate Com-
merce Commission. As cargo air transportation develops, evidence
from private users will doubtless become more frequent. It is to be
hoped that the Board and its staff will insist on real evidence and rule
out mere testimonials that service has been “good” or that service has
been “bad.”

THE STIPULATION

A practice has grown up of having the parties in each case stipu-
late that there shall be included as part of the record the carriers’
monthly reports filed up to the time of decision, the publications of rail-
way and airline schedules, various census data, certain of the studies
made by the Federal Coordinator of Transportation, traffic surveys
made from time to time by the Civil Aeronautics Board, and other
material of this nature. In new route cases the stipulation has become
fairly uniform.

The Board might consider the possibility of providing by regu-
lation that material of the nature usually covered by the stipulation
would be part of the record in every case in the absence of some specific
objection by one of the parties. This would eliminate the bother of
executing a stipulation in each case.

In any event, it would appear that most of the material, other than
the carriers’ monthly reports, included in the usual stipulation, is
within the scope of judicial notice. Whether the matter is to be handled
by stipulation or by a regulation, it should be made clear that it is not
intended that other data, appropriately the subject of judicial notice,
are to be excluded from the scope of judicial notice. It should also be
made clear that all of the Board’s traffic surveys are to be treated as a
part of the record, or as subject to judicial notice, even though such
surveys have been made and the material collated subsequent to the
hearing. 10 Likewise from time to time there are certain other publica-
tions issued by the Board incorporating some of its staff’s studies which
have not been included in the stipulation.

10 This matter has become of some significance recently. No full-scale traffic
survey had been made by the Board for a number of years until September, 1946.
The September, 1946, figures are not yet formally published, although they are
generally available. Indeed, the Board has already begun referring to them in
its opinions in currently decided cases. Yet stipulations heretofore entered into,
many of which were executed long before the September, 1946, survey was under-
taken, specifically included only the past surveys. Despite this fact there seems
to have been a tacit understanding between the Board and its bar to the effect
that the September, 1946, figures can be referred to in briefs and opinions. This
is obviously the practical and desirable course.
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Whether the matter is to be handled by a general regulation or by the more cumbersome procedure of having a stipulation executed in each case, the Board's staff should review the statement of items usually included in stipulations heretofore so as to be sure that they are sufficiently comprehensive.

EXAMINERS' RULINGS ON EVIDENCE

In the conduct of the hearings the examiners have displayed a gratifyingly high level of performance. The large and complicated proceedings which have been so frequent during the last few years have presented a very trying problem to the presiding officer. There doubtless have been a few instances where an examiner has been unable to keep confusion and wrangling from getting out of hand, but such instances have been so few that they have simply emphasized the surprisingly smooth course which the hearings generally have taken. At most the examiners can be only mildly criticised for being somewhat too hesitant to cut off repetitious and argumentative testimony and cross-examination.

Their rulings on matters of admissibility of evidence have been particularly sound. The breakdown in the old common law rules of evidence which has necessarily occurred in administrative proceedings has not been repaired by any coherent body of rules susceptible of general statement. Therefore, the examiners have to rely on their own good sense as instances for ruling arise. In making these rulings their good judgment, fairness and dignity have won the respect of the Board's bar. I doubt that many of the lawyers practicing before the Board could count on the fingers of one hand instances where an examiner's ruling has materially prejudiced the case of any of the parties.

EXAMINERS' REPORTS

The quality of examiners' reports has been rather more spotty. The examiners usually do a commendable job of stating the matters of fact and of summarizing the arguments which the respective parties make. But an examiner's report should go much further.

One recent examiner's report seems to me almost a model of the treatment which the examiner should attempt to give to these cases. I refer to the report in the Detroit-Washington Case, Docket 679, in which the examiner not only presented a complete factual analysis and a fair summary of the arguments presented by the several parties, but also endeavored through analysis of the precedents of the Board to ascertain and weigh the considerations which the Board has felt pertinent in determining new route cases and to apply those considerations to the case at hand.

It probably would not be desirable or even feasible for the Board in new route cases to give to the examiner's recommendations the weight given by an appellate court to the decision of a lower court. Nevertheless, examiners' reports which are more than a mere condensation of the record are to be encouraged. Reports such as the one recently made in the Detroit-Washington Case serve two very useful
functions. In the first place, they focus the attention of the parties upon
the significant considerations of policy in order that the Board may be
helped most effectively from the further briefs and arguments which the
parties will present directly to the Board. In the second place they
serve as a healthy check upon the validity of the body of doctrine which
the Board's decisions are building up.

It is not to be expected that the Board can be absolutely consistent
in its decisions from one case to another. Yet, in the interest of fair-
ness, consistency should be a goal. Moreover, inconsistencies in the
reasoning expressed in opinions usually appear because the considera-
tion moving decision is something deeper and perhaps less articulate
than the reasons expressed. The effort to achieve consistency has the
beneficial effect of bringing such unexpressed reasons to light where
both the Board and the parties can subject them to critical scrutiny.
One of the most helpful functions which examiners might perform is
that of critical analysis of the Board's precedents bearing on the case at
hand. The value of having that kind of aggressive and critical treat-
ment by the examiners is that they, unlike the lawyers for the parties,
are in the best position to appraise the Board's precedents from the
point of view most helpful to the Board—a point of view unclouded by
the narrow interest of a litigant. By all means, examiners should be
critical and independent in their approach. They should not simply
attempt to guess what the Board will do.

**Briefs**

The matter of filing briefs with the examiner has been the subject
of some difference of opinion in the past. About a year ago the Board
issued a press release to the effect that the privilege of filing briefs with
the examiner would be discontinued except in unusual cases where the
examiner requests briefs. However the announcement seems to have
been ignored—or forgotten—and probably the Board itself no longer
adheres to the view indicated in its announcement. The denial of the
privilege of filing briefs would probably be inconsistent with section
8 (b) of the recent Administrative Procedure Act. If the examiner's
function in preparing recommendations and making a report is im-
portant, as I think it is, it is equally important that the privilege of fil-
ing briefs with him be allowed.

Generally speaking the briefs to the examiner would seem to be
more important than the brief filed with the Board after the examiner's
report is issued. It is surprising that the brief to the Board is so often
mere regurgitation of the brief to the examiner. The constructive func-
tion of the brief to the Board should be to provide a brief summariza-
tion of the issues, or a presentation of supplementary material (often
necessary in the light of traffic surveys or other analyses becoming avail-
able only after the close of the hearing), or, more rarely, a restatement
of the argument to the examiner in a form more effective than was pos-

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31 60 Stat. 242, 5 USCA 1007 (b) (Supp. 1946).
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sible in the original briefing. Yet all of us have been more or less guilty of virtually reprinting large portions of the brief to the examiner.

Exceptions

There is one procedural step which certainly should be abolished. The Board’s rules call for the filing of exceptions to the examiner’s report, after which briefs to the Board are filed. The filing of exceptions is a perfectly useless act, especially in new route cases. An examination of the Board’s rules indicates that when drafted it apparently was contemplated that specific exceptions would be taken to specific findings made by the examiner with specific citations to the record and specific reasons stated in support of each exception. According to the Board’s rules, if taken literally, exceptions to an examiner’s report would not be dissimilar to the old-fashioned bill of exceptions which used to be so generally required in the case of an appeal from a lower to an appellate court.

It is rare that the exceptions actually filed with the Board take any such form, and, when they do approximate the form apparently contemplated by the rules, they represent thoroughly wasted effort since the entire substance of the exceptions will be repeated in the brief to the Board. Therefore, the parties generally have resorted to the practice of making the filing of exceptions sheer formality and of stating their exceptions so generally—as well as so briefly—that they mean nothing. This practice has been tolerated by the Board. This tolerance seems to me to demonstrate that the practice of requiring exceptions should be eliminated. I would be surprised if the exceptions filed in the usual new route case are ever read by anyone, including the lawyers for the parties. I understand that steps were taken several years ago to eliminate the requirement of exceptions but were not pursued because of protest from several of the Board’s bar. Perhaps we are all sadder and wiser now.

Public Counsel

The function of Public Counsel in new route cases seems no longer to be useful. Some years ago the Board provided for the participation of Public Counsel in all proceedings before it. He functions entirely independently of the examiner. He participates actively just like one of the parties, producing evidence and cross-examining witnesses, briefing the case to the examiner and briefing and arguing the case to the Board. His independence is supposedly preserved throughout the process so that he has no more to do with the Board’s decision of the case than any of the parties.

About a year ago the Board provided that in new route cases the participation of Public Counsel would be much more limited and that in briefs and argument he would confine himself to points of law that might arise. Since this announcement, in the normal new route case, Public Counsel has played a relatively passive role, culminating usually in a very brief presentation to the Board by brief or oral argument of some so-called legal point which he deems to be involved. I am
clined to believe that this limited participation by Public Counsel is of no value.

In some new route cases of an unusual nature, involving some question of a new type of service or a new kind of equipment, or involving a situation which will not be fully controverted by intervening parties, extensive participation by Public Counsel surely should be provided. In the more usual type of case it is possible that some troublesome question of law might arise with respect to which it is desirable to have the recommendations and argument of some qualified member of the Board’s staff other than the examiner. This would be very rare and when it does arise the views of the Board’s General Counsel’s office, it would seem, could be presented in a brief memorandum to the examiner circulated to the parties. In any event, I should think that the entire question of participation of Public Counsel in new route cases, including the extent and nature of such participation, might profitably be delegated to the Chief Examiner, to be determined by him in each instance.

CONCLUSION

It is appropriate that the Board’s procedure be critically appraised at this time. The procedure in new route cases has been tested by abundant experience. Lessons revealed bear careful attention for in the next few years problems will be coming to the Board which range over a wide field, many of them entirely new. The Board, its staff, and its bar are unfamiliar at this time even with the terminology in which some of these problems will be dressed, particularly in the domain of regulation of cargo service. Procedure will be more important than ever. Since Congress apparently refuses to increase the Board’s staff and facilities at a rate commensurate with the growth in the volume and variety of its work, neither the Board nor those affected by its regulation can afford a procedure which is less perfect than it is humanly possible to devise.