

Administrative Procedure in  
Government Agencies.

monograph of the  
Attorney General's Committee  
on Administrative Procedure.

Railroad Retirement Board.

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# ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES

MONOGRAPH

OF THE

ATTORNEY GENERAL'S COMMITTEE  
ON ADMINISTRATIVE PROCEDURE

EMBODYING THE

RESULTS OF THE INVESTIGATIONS MADE BY THE  
STAFF OF SAID COMMITTEE RELATIVE TO THE  
ADMINISTRATIVE PRACTICES AND PRO-  
CEDURES OF SEVERAL AGENCIES  
OF THE GOVERNMENT

IN 13 PARTS

PART 8

RAILROAD RETIREMENT BOARD



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SENATE RESOLUTION NO. 248

[Reported by Mr. HAYDEN]

IN THE SENATE OF THE UNITED STATES,  
*April 22, 1940.*

*Resolved*, That the monographs published by the Attorney General's Committee on Administrative Procedure embodying the results of the investigations made by the staff of said Committee relative to the practices and procedures of the Division of Public Contracts, Department of Labor; the Veterans' Administration; the Federal Communications Commission; the United States Maritime Commission; the Federal Alcohol Administration; the Federal Trade Commission; the Administration of the Grain Standards Act, Department of Agriculture; the Railroad Retirement Board; the Federal Reserve System; the Bureau of Marine Inspection and Navigation, Department of Commerce; the Administration of the Packers and Stockyards Act, Department of Agriculture; the Post Office Department; the Bureau of the Comptroller of the Currency, Treasury Department; and the Federal Deposit Insurance Corporation, be printed as a Senate document; and that one thousand three hundred additional copies be printed for the use of the Joint Committee on Printing.

Attest:

EDWIN A. HALSEY, *Secretary.*

## PREFACE

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ATTORNEY GENERAL'S COMMITTEE  
ON ADMINISTRATIVE PROCEDURE,  
DEPARTMENT OF JUSTICE,  
*Washington, D. C.*

This monograph is one of a series of studies submitted to this Committee by the investigating staff working under the Director. The members of the staff are Walter Gellhorn, Director; and Ralph S. Boyd, Kenneth C. Davis, Robert W. Ginnane, William W. Golub, Martin Norr, and Richard S. Salant.

These staff reports represent information and recommendations submitted to the Committee. They are not an expression of committee findings or opinion. The Committee invites professional and lay criticism and discussion of the matter contained in these studies, both by written communications addressed to it at the Department of Justice, Washington, D. C., and by oral presentation at hearings which the Committee will hold in Washington on June 26, 27, and 28 and July 10, 11, and 12, 1940.

The Committee will make its report, setting forth its findings, conclusions, and recommendations after consideration of all the material submitted to it, including these reports of its staff; the record of oral examination of administrative officers; and the briefs, statements, and testimony which may be furnished by members of the bar and the public. These reports are made available in furtherance of this Committee's desire, first, that the information submitted to it by its investigators shall be public and, second, that all persons desiring to do so shall have full opportunity to criticize and supplement these reports.

The members of the Committee are Dean Acheson, Chairman, of the District of Columbia Bar, formerly Under Secretary of the Treasury; Francis Biddle, Solicitor General of the United States; Ralph F. Fuchs, professor of law, Washington University; Lloyd K. Garrison, dean of the University of Wisconsin School of Law; D. Lawrence Groner, chief justice of the Court of Appeals for the District of Columbia; Henry M. Hart, Jr., professor of law, Harvard University; Carl McFarland, of the District of Columbia Bar, formerly Assistant Attorney General; James W. Morris, associate justice of the United States District Court for the District of Columbia; Harry Shulman, Sterling professor of law, Yale University; E. Blythe Stason, dean of the University of Michigan School of Law; and Arthur T. Vanderbilt, of the New Jersey Bar, formerly president of the American Bar Association.

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# RAILROAD RETIREMENT BOARD <sup>1</sup>

## I. HISTORY OF THE RETIREMENT ACT

The first Railroad Retirement Act, providing for annuities and other benefits for employees of certain railroad carriers, was passed in 1934 (48 Stat. 1283). Chiefly on the ground that it was not a legitimate exercise of the commerce power, the act was shortly declared unconstitutional by the Supreme Court in a 5 to 4 decision.<sup>2</sup> Intended to answer the objections of the majority of the Court, the Railroad Retirement Act of 1935 was passed, preserving, however, the basic outlines of its predecessor (49 Stat. 967). Again, the act was attacked and the Carriers Taxing Act, which supported the retirement program, was declared unconstitutional by a District Court for the District of Columbia.<sup>3</sup> The District Court case, however, was not carried further; instead, representatives of the railroads and representatives of railroad labor organizations together drafted a new bill, requiring less severe taxation and restricting the creditability of prior service. The compromise bill became the Railroad Retirement Act of 1937 (50 Stat. 307), which now constitutes one of the two basic acts administered by the Board.<sup>4</sup>

### THE RAILROAD RETIREMENT ACT OF 1937

In general, the Railroad Retirement Act of 1937 <sup>5</sup> provides for railroad employees a scheme of social security somewhat similar to that created by the Social Security Act (although in some respects the acts are strikingly different). Employers subject to the act include express- or sleeping-car companies, or carriers by railroad subject to Part I of the Interstate Commerce Act, or any company owned or controlled thereby or under common control therewith and "which \* \* \* performs any service \* \* \* in connection with \* \* \* transportation \* \* \* by railroad." Employees potentially eligible under the act include employee representatives, all individuals who were on August 29, 1935, "in the compensated service or one or more employers" <sup>6</sup> subject to the act, all individuals who were

<sup>1</sup> This monograph was submitted November 1939, finally revised January 1940, and supplemented April 1940.

<sup>2</sup> *Railroad Retirement Board v. Alton R. Co.* (295 U. S. 330 (1935)). Hughes, C. J., wrote the dissenting opinion, in which Brandels, Cardozo, and Stone, J.J., concurred.

<sup>3</sup> *Alton R. Co. v. Railroad Retirement Board* (16 F. Supp. 955 (D. Dist. Col., 1936)).

<sup>4</sup> The act of 1937 did not repeal, but superseded in large part, its predecessor of 1935. Employees who had relinquished their rights before the act of 1937 was passed, and who had become eligible to receive annuities before enactment of that act, are granted annuities under the 1935 act. At the present time, approximately 20,000 persons are drawing annuities under the 1935 act. In addition, where the annuitant elected a joint and survivor annuity, the surviving spouse of an annuitant will receive a survivor annuity for the balance of his or her lifetime. Upon the death of each annuitant, the Board must pay (for 12 months only) to a surviving spouse, or the dependent next of kin, one-half of the annuity which the employee was receiving. Thus it will be some time before the Board will have disposed of its duties under the 1935 act. The discussion which follows, however, is concerned with the 1937 act only.

<sup>5</sup> Hereafter referred to as the act.

<sup>6</sup> This phrase is defined as when the employer has "continuing authority \* \* \* to supervise and direct the manner of rendition of his service, which service he renders for compensation."

in such service after December 31, 1936, and all individuals who, on August 29, 1935, were "in the employment relation"<sup>7</sup> to such an employer.

In general, three types of benefits are payable under the act: (1) Annuities,<sup>8</sup> including joint and survivor annuities; (2) death benefits, where an employee dies before his annuity has begun to accrue, or, where his annuity has begun to accrue, if the amount of accrual does not exceed 4 percent of his creditable compensation subsequent to December 31, 1936; and (3) pensions, under section 6 of the act, to those employees who were, under certain circumstances, on March 1, 1937, and July 1, 1937, on the pension or gratuity roll of an employer.<sup>9</sup>

To maintain the costs of the distribution of the benefits and supply the money for such payments, the Carriers Taxing Act of 1937 provides (1) for an income tax on employees, as defined in that act,<sup>10</sup> increasing from 2¼ to 3¼ percent of each employee's wages (not exceeding \$300 per month). This income tax is initially collected by the employer, who deducts the sum from the wages due; and (2) for an excise tax of similar percentage, on the employer. The taxes are collected by the Bureau of Internal Revenue and paid into the Treasury. Congressional appropriations are made to the Railroad Retirement Account in amounts sufficient as annual premiums to provide for the payment of claims.

In addition to provision for benefits, the act also provides for the Board's making "proper adjustments" in the case of erroneous awards, whether of under- or over-payment. Where the payment was accepted "without fault," however, and recovery would be inconsistent with "equity and good conscience," recovery of overpayment may be waived.

It is estimated that there are more than 2,100,000 individuals who have accumulated rights under the act.

#### JUDICIAL REVIEW UNDER THE RETIREMENT ACT

Section 11 of the act, entitled "Court Jurisdiction," provides that "An employee or other person aggrieved" may apply to any United States District Court where the Board has established an office" (1) to compel the Board to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant, or (2)

<sup>7</sup> A person is "in the employment relation" "when on furlough subject to call for service . . . and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability; all in accordance with the established rules and practices" of the employer.

<sup>8</sup> To be eligible for an annuity under the act the individual, in addition to satisfying the requirements set forth in the last sentence of the preceding paragraph, (1) must have reached the age of 65; or (2) must have become totally and permanently disabled for regular employment for hire and have completed 30 years of creditable service; or (3) must have reached the age of 60 and have completed 30 years of creditable service; or (4) must have reached the age of 60 and have become totally and permanently disabled for regular employment for hire. An annuity falling within either of the last two categories is reduced one one-hundred-and-eightieth for each calendar month that the annuitant is under age 65 when the annuity begins to accrue. An annuity awarded on the basis of age 65 or on the basis of age 60 and 30 years of service will be paid only if the applicant relinquishes rights to return to the service of his last employer; no annuity is payable for any month during which an annuitant renders compensated service either to any employer under the act or to the last person by whom the annuitant was employed before his annuity began to accrue. In computing the amount of the annuity, all compensated service rendered to employers under the act rendered prior to January 1, 1937, is creditable only if the individual was either in active service or in the employment relation on August 29, 1935, and then only in an amount sufficient to total, together with creditable service rendered after December 31, 1936, 30 years. Compensated service rendered as an employee in any calendar month, no matter how brief the service, is a month of service, and 12 such months, whether consecutive or not, constitute 1 year of service. In no case is service creditable which is rendered after June 30, 1937, by an individual who is 65 years of age or over (but the compensation earned for such service is taken into account in computing the average compensation).

<sup>9</sup> In no case may an employee receive both a pension and an annuity.

<sup>10</sup> The definition is similar to the Railroad Retirement Act's definition.



to take action or to make a decision necessary for the enforcement of a legal right of the applicant." No Board decision is subject to judicial review unless suit is commenced within 1 year after the Board decision has been entered and communicated to the party involved. The jurisdiction conferred upon the Federal courts by this section—

Shall not be exclusive of any jurisdiction otherwise possessed by such courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provision of this Act or the Railroad Retirement Act of 1935.

The precise scope or nature of judicial review provided by this section is subject to some doubt. It may be possible to interpret it as a provision for mandamus, so that the Board's discretionary acts—its adjudications—will remain undisturbed unless arbitrary, fraudulent, or capricious. The section does not in terms provide that the court shall review the decisions of the Board upon the record as made before the Board, but it is the Board's position that the correct interpretation of this section is thus to limit judicial review.

## II. THE RAILROAD UNEMPLOYMENT INSURANCE ACT OF 1938

The second major statute entrusted to the Railroad Retirement Board for administration is the Railroad Unemployment Insurance Act of 1938 (52 Stat. 1094, as amended by Public, No. 141, 76th Cong.), whereby the Board is vested with the duty of determining eligibility for and entitlement to unemployment insurance, and paying such insurance. The Unemployment Act, in general, provides for payments for each day of unemployment suffered, under certain conditions, by railroad employees, such payments to be for each day of unemployment in excess of 7 during any half month beginning after June 30, 1939. The financial arrangement for this act differs from that under the Retirement Act. The employer is required to contribute 3 percent of the compensation (not exceeding \$300 per month) payable to employees under the act, such contribution to be collected by the Board itself, rather than by the Bureau of Internal Revenue. The funds so collected are to be deposited with the Secretary of the Treasury. Ninety percent of these funds are to go into a Special Railroad Unemployment Insurance Account in the Unemployment Trust Fund available to the Board without further appropriation. The remaining 10 percent of the money collected is to comprise a Railroad Unemployment administration fund, to be continuously available to the Board for its expenses.

### STATUTORY PROCEDURE UNDER UNEMPLOYMENT INSURANCE ACT

The machinery for the administration of the Insurance Act has very recently been completed. At the present time, the appellate machinery is in final process of formation, and the rules and regulations governing the administration of the act are in tentative form. The statute, however, outlines the methods and procedures for determination of questions under it.

The Board is vested with the duty of determining any benefits due under the act. It may, however, delegate all its powers, except the power to issue rules and regulations, to any member, officer, or employee of the Board. The statute apparently contemplates that the initial determination on applications shall be made by subordinates in

a manner somewhat similar to the Board's practice, described below, in adjudicating claims under the Retirement Act. No hearing in the first instance is apparently contemplated. If, however, a claim for benefits is denied upon an initial determination, such claimant "shall be granted an opportunity for a fair hearing before a district board." The Railroad Retirement Board is directed to establish such district boards "as it may deem necessary to provide for such hearings." Each district board is to be composed of three members, chosen by the Board. One member is to be representative of, and recommended by, the employees; one is to be representative of, and recommended by, the employers.<sup>11</sup> The third member, who is to act as chairman, is to be the representative of the Retirement Board. The chairman may hold hearings and may make determinations in the absence of the other two members, but these two members cannot so act without the chairman.

Under the Unemployment Insurance Act, the Board may also provide for "intermediate review" of the district board's decision, and it is now tentatively planned that such review will be permitted by the appeals council. The Railroad Retirement Board may (i) on its own motion review a decision of a district board or intermediate reviewing body "on the basis of evidence previously submitted in the case" and may also direct the taking of additional evidence; and (ii) permit "such parties as it finds properly interested in the proceedings" to take appeals to the Board. In the absence of appeal, the district board's decision is final.<sup>12</sup> Thus, an applicant may have as many as four separate administrative considerations of his claim before denial becomes administratively final.

Further, any claimant or labor organization of which the claimant is a member may, after exhausting all administrative remedies, obtain a review in the United States District Courts if he so petitions within 90 days of the Board's decision. The Board's fact findings are conclusive, on such judicial review, in the absence of fraud and if supported by evidence. Presumably, the district court's decision is reviewable by the circuit court, and the circuit court's decision, in turn, on certiorari to the Supreme Court. In all, therefore, there is a possibility of seven considerations by seven bodies of any application under the Unemployment Insurance Act.

The statute provides that rules of evidence applicable to judicial proceedings shall not be controlling in Board cases involving the Unemployment Insurance Act. It is required that a full record of the proceedings and testimony must be kept. The Board's final determination, together with its findings of fact and conclusions of law, must be communicated to the claimant within 15 days of such determination.<sup>13</sup>

The Board is forbidden to charge any fees when its services are invoked. All other fees—of attorneys or representatives—must be approved by the Board. Provision is made for the Board's, or its subordinates', issuance of subpoenas to compel the attendance of

<sup>11</sup> Provision is made for the selection of alternates for these two members. The two members, other than the chairman, are to be paid on a per diem basis.

<sup>12</sup> The "initial determination" is also apparently final where the application is granted. Nothing in the statute, however, precludes administrative review.

<sup>13</sup> The act's requirement in this respect applies also to a decision of the district board or other intermediate reviewing body.

witnesses and the production of books and documents. The privilege against self-incrimination does not obtain, but there shall be no prosecution based on testimony adduced at Board proceedings.

The Board is empowered to appoint national or local councils to advise it in general matters relating to the administration of the Unemployment Insurance Act.

#### MACHINERY ESTABLISHED UNDER UNEMPLOYMENT INSURANCE ACT

Although, as stated above, the appellate machinery is now in the process of final formation under the Insurance Act, the act has been in operation since June 30, 1939, and the procedure for initial determination of applications and for collection of employer contributions has been established. Over \$2,000,000 in small sums ranging up to \$12 or \$15 have been distributed by the Board.

In general, the chief characteristic of the machinery under the Insurance Act is diffusion (coupled with centralized control) as contrasted with the more completely centralized procedure, described below, under the Retirement Act.<sup>14</sup> Under the Insurance Act, 12 regional offices and a large number of district offices have been established. The basic work is performed in the regional offices; the district offices are not engaged in adjudication or award work, but are rather "contact" offices.

#### PAYMENT PROCEDURE

A chief task under the Insurance Act is clerical; that is, the task of registering the unemployed and the days of unemployment. The Board found it not feasible either to set up its own offices for registration or to utilize State unemployment bureaus, since the former method would involve too great an expense while the latter involved the risk that a state agency might give preference to its own problems at the expense of the Railroad Retirement Board's problems. Rejecting those possibilities, therefore, the Board has made contractual arrangements with each carrier, whereby the carrier designates from its own employees—usually gang bosses or supervisory employees—claims agents. At present, there are approximately 42,500 claims agents, and an equal number of alternates. When a railroad employee becomes unemployed, he reports to a claims agent, usually his own foreman, although, because it may become necessary for him to "go down the road" in search of employment, he may report to any claims agent. The claims agent fills out a registration form, marking, in spaces provided on the form, each day in which the employee is not employed. The agent's task is to some extent clerical; he has no duty of ascertaining whether or not the person was actually unemployed. Even if the agent has no knowledge of the case, or actually knows the claimant was not unemployed on the day or days claimed, he must fill out the form and sign it. He is, however, required to note his information that the executed form contains untruths, and to note other relevant facts on the "explanation of exceptions" form. The claims agent is selected because of the fact that in most cases he will be in a position to have first-hand knowledge of certain essential facts affecting the claimant, and he is expected to make full use of

<sup>14</sup> As suggested below, it may be feasible to utilize some of the Unemployment Act's field forces in cases arising under the Retirement Act.

such information as he possesses, although not required to make an investigation.

At the end of 15 days (compensation is for unemployment for more than 7 days in any half-month period), the claims agent submits the registration form to a second employee designated by the carrier, known as the countersigning agent. Again the latter's task is chiefly mechanical, his function being to certify that the claims agent is authorized to act. Even if the registration form shows on its face that no benefits are due—for example, even if less than 8 days are marked—the countersigning agent submits the form to the Board's regional office. For each registration form so submitted, regardless of the ultimate disposition of the case, the carrier is paid 50 cents as reimbursement for costs. The claims agents and countersigning agents are not paid by the Board.

When the registration reaches the regional office, a "certificate of benefit rights" is sent to the employee recording the information given by the employer (in the latter's quarterly report) concerning the employee's compensation in the preceding quarter. The employee is thereafter sent a "certificate of waiting period credit." The individual's application for benefits is completed when he presents the latter certificate to the regional office. On his original claim form the employee has submitted statements certifying to various facts concerning other employment and similar matters which condition eligibility to receive benefit payments. The claim, as thus shaped, is then passed upon by adjudicators in the regional office. The adjudication is ordinarily of the simplest type, based on certificates, employer reports, and the registration forms. Only if the statements appear inconsistent is there field investigation or further development of evidence. Doubtful legal questions and claims involving disqualifications and interpretations of the "day of unemployment" are submitted to Washington.

The actual award, however, is made in the regional office before the file is sent to Washington. Except for the one in Richmond, Va., each of the regional offices is located in the same city as a Treasury disbursing agent. The regional office certifies that payment is due, and submits the certificate to the disbursing agent, who transmits the money.<sup>15</sup>

#### COLLECTION PROCEDURE

As pointed out above, the Railroad Retirement Board itself collects the contributions due from employers under the Insurance Act. No serious questions of procedure for determination of "coverage" have arisen, since the definition of "employer" in the Insurance Act is identical with that in the Retirement Act, and, as described below, many of the coverage questions as to particular employers have been determined under the latter act, while approximately 98 percent of the employee coverage questions have already been determined.<sup>16</sup>

In the Federal Register for October 26, 1939, the Board's rules and regulations, effective as of October 1, 1939, in regard to collection of contributions under the Insurance Act, were published. The procedure for employer's quarterly contribution reports on certain forms

<sup>15</sup> It may be noted that little appellate work is expected.

<sup>16</sup> In at least one case a carrier maintained that he was not covered by the Insurance Act, although he was covered by the Retirement Act. His claim was rejected on the basis of the finding under the latter act, since determinations under one act are regarded by the Board as settled for purposes of the other act.

is set out. Contributions are due and payable at the time fixed for filing reports, without assessment or notice by the Board. If payment or reports are late, the Board may assess monetary penalties; in all cases of delinquency, interest accrues. If the employer fails to pay within 10 days after notice and demand, the Board may collect by distraint and sale. The Director of Unemployment Insurance is authorized to make assessments, give notice and demand, and perform other acts necessary to collection.

### III. ADJUDICATION UNDER THE RETIREMENT ACT: ORGANIZATION

#### THE RAILROAD RETIREMENT BOARD

Section 10 of the Railroad Retirement Act provides for the creation of the Railroad Retirement Board, to consist of three members with overlapping terms of 5 years.<sup>17</sup> The members of the Board are appointed by the President with the advice and consent of the Senate, and receive annual salaries of \$10,000. One member is to be recommended by the carriers; one member is to be recommended by representatives of the employees; the third, who is to act as Chairman, is to be the public representative and "shall not be in the employment of or be pecuniarily or otherwise interested in any employer or any organization of employees."

The desirability of a representative or "tripartisan" board may be open to some question where, as here, a board is engaged in the adjudication of cases, rather than in their mediation or arbitration. The payment of benefits to entitled individuals, upon the basis of subsidiary determinations of coverage under the act and of like questions, is a function which calls for utter objectivity, rather than for predispositions. Advisory bodies representative of variously affected groups are no doubt useful adjuncts of government; but there may be more question whether decisive bodies, in approaching their tasks, should not so far as possible be freed from affiliation with those whom their decisions may affect. In the case of the present Railroad Retirement Board's members, it is only fair to say, the agency's employees are unconscious of differing viewpoints. The Board has consistently acted as a unit, and its members have brought to its deliberations special experience, rather than special and irreconcilable points of view. In addition, it is to be noted that the present Federal system supersedes the numerous private pension plans which have been the rule in the industry, so that it is regarded as natural that labor and management should be given separate voices in the administration of the new method. Finally, it is suggested that the tripartisan composition of the Board enables it to secure a higher degree of cooperation and confidence from the interested parties than could a board whose entire membership was drawn from outside the railroad industry.

<sup>17</sup> The Railroad Retirement Board employs approximately 2,700 persons, roughly one-half of whom are in the field where they are engaged in activities under the Insurance Act. Section 10 (b) of the Retirement Act provides that in the selection of employees for the administration of that act under the civil service laws, the Board "shall give preference over all other to individuals who have had experience in railroad service, if in the judgment of the Board, they possess the qualifications necessary for the proper discharge of the duties of the positions to which they are appointed." At present, the Washington personnel is housed in four buildings scattered throughout the city. The Appeals Council is a mile away from the building where the adjudicators, the General Counsel's staff, and the Board itself are quartered. On the completion of the new Social Security Building, the Railroad Retirement Board hopes to be gathered together in a special section to be known as the Railroad Retirement Board Building.

In accordance with the provision of the act authorizing the Board "to delegate to any of its employees the power to make decision on applications for annuities or death benefits in accordance with the rules and regulations prescribed by the Board," the Board has distributed the duty of adjudication in its various levels, to several divisions and bodies. Pursuant to the act, however, "any person aggrieved" by decisions of subordinates has the right to appeal to the Board.

#### RETIREMENT CLAIMS DIVISION

Initial determination of applications is made by the Retirement Claims Division, headed by a Director.

This division, in turn, is composed of several separate units, divided according to the nature of the question involved. One unit handles death claims (joint and survivor annuities, death benefits, and annuities accrued but unpaid at death); a second unit deals with cases involving disability claims; and a third unit has the duty of passing upon other annuity claims. These three divisions, known respectively as the Survivors Claims Section, the Disability Section, and the Annuity Section, are each headed by a chief, responsible to the Director of Retirement Claims. The initial adjudication in each of these sections is made by adjudicators and reviewers,<sup>18</sup> who ordinarily adjudicate the entire case which falls into their particular category.<sup>19</sup> Particular types of questions are, however, withdrawn from these adjudicators and reviewers and placed in the hands of specialized groups for consideration, although the adjudicators and reviewers determine the remaining questions. In cases involving claims of disability, the "rating" question—whether or not such disability exists, whether examination is necessary, and if so, what type—is determined by the Disability Rating Board, which is composed of six doctors and three lawyers, sitting in sections of three. In "missing records" and cases of "insufficient service," the determination of an average compensation has been placed in the hands of adjudicators in the Special Unit.<sup>20</sup> Finally, where in a particular case the problem of an employer's rules

<sup>18</sup> Minimum requirements for adjudicators and reviewers are that they be high school graduates who have had 5 years' experience with a carrier or as the representative of the employees of a carrier, and who have a knowledge of railroad practices relating to seniority, occupational classifications, and wage schedule agreements. Adjudicators' salaries are about \$2,300 per annum and reviewers' \$2,600. There are 100 adjudicators and 28 reviewers in the Retirement Claims Division; 4 adjudicators are ordinarily assigned to 1 reviewer.

<sup>19</sup> An alternative method might be to have each division decide the part of the case which is peculiar to it, and have a "pool" of adjudicators determine the other questions which are common to all cases. As a matter of artistry, continuity, and responsibility, the present method of resting the entire adjudication in the hands of one adjudicator, instead of parcelling the case out, seems preferable. In any event, it is probable that the particular questions relating to the three types of cases are sufficiently specialized to justify handling by three separate groups. The problem of coordination must be met by occasional checks and general instructions (the method now employed) as insurance against aberrations in the several divisions. As will be noted from the discussion below, the work of adjudicators and reviewers is to a considerable extent paper work, and not essentially legal in character. Their task is roughly analogous to that of a jury—to make findings of fact and resolve conflicting evidence.

<sup>20</sup> Instructions from the Board to the staff, dated January 10, 1938, directed the following types of cases to be referred to the Special Unit:

"(1) Missing records cases: (a) Where carrier's records for compensation earned during the base period are available for less than half the service performed, if no change in occupation in the base period is reported either by the carrier or the employee; and (b) where carrier's records for compensation earned during the base period are available for less than seven-eighths of the service performed, if a change in occupation in the base period has been reported either by the employee or the carrier.

"(2) All cases where no service has been performed in the base period by employees eligible under the 1937 act, and all cases where no service was performed in the base period by employees eligible under the 1935 act, if the regular unit finds that carrier records are not available for all the service performed by these employees.

"(3) All cases of insufficient service, that is, (a) all cases certified under the 1937 act where less than 48 months' service was performed in the base period; and (b) all cases certified under the 1935 act where less than 12 months' service was performed in the base period."

or practices becomes relevant,<sup>21</sup> determination of the existence or type of rules and practices on the carrier is made by the Employment Relations Unit, composed in large part of persons detailed from the Retirement Claims Division and planned soon to become attached thereto.

#### APPEALS COUNCIL

Exercising a general appellate jurisdiction over all decisions by the Retirement Claims Division is the Appeals Council. It is composed of five members, appointed by the Board. Section 260.02 (a) of the regulations provides that of the five members of the Council, one "shall have legal training and shall be the chairman."

Each other member shall have a background of experience in the railroad industry calculated to familiarize him with the practices, procedures, and conduct prevailing in the railroad industry; two of such members shall have a background of experience in the representation of employee organizations, and two shall have had experience calculated to familiarize them with the problems of railway management.

### IV. ADJUDICATION UNDER THE RETIREMENT ACT—PROCEDURE

#### IN GENERAL

Cases coming before the Board may be divided into three general classes: (1) Individual claims for awards;<sup>22</sup> (2) questions involving "class status"; and (3) cases involving overpayments and waiver of recovery. The second class of cases, known as coverage cases, deals with the problem whether a company is an "employer" under the act, and, even where it is settled that the company is such an employer, whether particular types of employment with the employer are creditable as "service" in the computation of annuities.<sup>23</sup> Although, as indicated below, the first two of these types of cases may begin by filing of an application by an employee in an individual claim, there is a separate procedure for each.

#### TYPE I. INDIVIDUAL CLAIM FOR AWARDS

A fundamental characteristic of the procedure in cases involving individual claims for benefits is its nonadversary nature. No party appears in opposition to the claim;<sup>24</sup> and except where a "coverage"

<sup>21</sup> Sec. 1 (d) of the act provides that an individual is "in the employment relation to an employer if he is on furlough, subject to call for service . . . or on leave of absence, or absent on account of sickness or disability, all in accordance with the established rules and practices in effect on the employer." Since ordinarily the applicant must have been in the compensation of or in the employment relation to an employer on August 20, 1935, many of the applications involve the question of whether or not such relation existed. This, in turn, may depend on the employer's rules and practices concerning seniority, furloughs, etc.

Once the determination is made for a particular class of employees of an employer, the determination is listed and distributed, indexed under the name of the employer, to the adjudicators. If a similar question subsequently arises in an application filed by an employee in the same class, the question is considered settled and the adjudicator need only consult the list.

<sup>22</sup> As of September 30, 1939, there had been 140,421 applications for annuities and 166,091 certifications of awards. There had also been 22,425 lump sum death benefit applications and 18,095 certifications. Less than 10 percent of the applications had been disallowed; the remainder of the claims were still pending adjudication or certification.

<sup>23</sup> Typical questions of this nature are: (1) Are the agents of the Railway Express Co. employees or independent contractors? or (2) Are the employees of the X Construction Co., which has contracted with the Y Railroad (admittedly an employer) to build for the Y Railroad under the supervision of the latter's engineers, employees of Y and so employees under the act?

<sup>24</sup> In only one case before the Appeals Council have there been "adversary parties." In that instance two applicants claimed to be entitled to the same death benefits.

or status question is involved, in which case a different procedure is followed, no provision is made for a carrier's participation in such a case. Nor does the Board "take a position"; rather it stands ready to disburse money immediately upon the production of evidence showing entitlement.

A second characteristic is that conventional evidence—in the sense of exhibits, sworn documents, and testimony—rarely furnishes the material upon which adjudication is based. The evidence is "paper evidence" furnished on forms and by correspondence. In comparatively few cases must the Board go beyond the applicant and his employers to obtain the material necessary for adjudication.

*The initial determination.*

*The institution of action.*—Claims for awards, whether involving death benefits or annuities are begun by application filed by a person believing himself entitled to awards. Only those cases involving waiver of overpayment, as described below, are begun on the Board's own motion, and even in this type of cases, the original action must have been begun by application.<sup>25</sup>

A sworn application is a condition precedent to obtaining annuities. The regulations provide that—

No individual, irrespective of his qualifications, shall receive an annuity unless he has, on or before the date of his death, filed with the Board, in Washington, D. C.,<sup>26</sup> a duly executed application \* \* \* (sec. 210.02).

There are two types of applications: (1) An application for annuities; and (2) an application for death benefits. The annuity application form is intended to give the basic facts relating to the claim: Vital statistics, whether there have been previously filed applications, statement of service, present activity, and the like.<sup>27</sup>

An application for annuities is considered filed on the date of its receipt by the Board, if it is properly executed. In the event that the application is incomplete or improperly executed, the adjudicator is directed to return it, pointing out the defects. If the reexecuted or corrected application is received by the Board within 30 days after notice to correct the deficiency is mailed to the applicant, the date of original receipt obtains; otherwise the filing date is the date of receipt of the reexecuted or corrected application (sec. 210.04). No such rules pertain to death benefit application, which are considerably less formal since, in contrast to applications for annuities, the time of filing of a death benefit application is of no legal significance. There are no fees charged by the Board for filing an application.

<sup>25</sup> Where an annuitant dies and the Board is so apprised, the Board will notify, if recorded, the survivors who may be entitled to benefits. In any event, such survivors must make application.

<sup>26</sup> Regional offices, district managers, and field agents may receive applications. The offices, however, have no duty other than that of forwarding the application to the Board in Washington immediately.

<sup>27</sup> It may be noted here that the application forms may be difficult for ordinary employees to fill out in certain particulars. Some of the questions are legal in form; for example, "Are you now working for a person, company, or institution, not an employer under the act?" To select an extreme example applicable only in rare situations, "If the Board decides that a payment of \$500 or less is due and that you, because of your relationship to the deceased and/or because you have paid funeral expenses of the deceased, are entitled to a preferred claim under the pension, exemption, or allowance laws of the deceased's last domicile, do you hereby select and consent to accept such payment as a first charge against any such preferred claims and agree that if the estate is ever administered you will notify the proper court of the receipt of this payment and of the fact that it was selected and accepted as a first charge against your preferred claim and to indemnify the United States against liability arising by reason of this payment?" Yet criticism is easier than suggestion for correction. It is evident that certain legal questions must be put. The Board, aware of the problem, has changed the forms from time to time in the direction of simplicity. Further progress in this direction is desirable. As time goes on, however, labor organizations, of which almost all railroad employees are members, may be prepared inexpensively and rapidly to assist applicants. It is to be hoped that such organizations may develop full time experts, as have the service organizations in relation to veterans' claims, who can aid the claimants and also the Board in assuring that papers will be submitted in proper form.



*Official action following receipt of the application.*—After the adjudicator has initially examined the application, found it to be in order, and found that no bars to entitlement appear on its face, the case is submitted to a unit known as the AA-2 section. This section, named after the form sent to the employer, is composed of adjudicators, clerks, and aides; it requests from the Bureau of Wage and Service Records a report of the applicant's service and compensation subsequent to December 31, 1936. The AA-2 form, immediately sent to employers named in the application, concerns the employer's records of the applicant's age, his status on August 29, 1935, his personnel and service record (by month and year), and his compensation. The form is not sworn, but the signatory must certify that it is correct to the best of his knowledge and belief.<sup>28</sup>

If, however, the application or the AA-2 form raises any novel legal questions, the case is immediately submitted, with a statement of facts prepared by the adjudicator, to the Legal Adviser of the Retirement Claims Division. If, in fact, a novel question of law is presented, the legal adviser, in the name of the Director of the Retirement Claims Division, in turn submits the case to the General Counsel's office for a decision. It is at this point that an application case may branch off into a status or coverage case.<sup>29</sup>

On the receipt of the AA-2 form as filled out by the employer, the statements therein are compared with the statements in the application.<sup>30</sup> If, as is usually the case, there are no variations between the two statements, the adjudicator will proceed forthwith to determine whether benefits are due, and the amount thereof. If there are variations, the applicant will be notified, and further evidence is developed, ordinarily by correspondence.

*Field investigations.*—In the case of sharp conflicts—as, for example, an employee's statement that on August 29, 1935, the date on which he must be "in the service of" or "in the employment relation with" an employer, he was on furlough and was expected to return to work, while the employer states that before that date, the employee's relations with him had been entirely severed—or in the case of inconclusive evidence—as, for example, in the question of age—field examination will be ordered.<sup>31</sup>

The field investigator is sent a form on which his report is to be made. This form, as sent to the investigator, gives the basic details of the case, such as the name and address of the claimant and of the employers, and the particular question or questions involved. The investigator, after interviewing the necessary person or persons, and obtaining their statements, fills in the form, stating the persons interviewed and the sources of his information. It is to be noted that the investigation is not necessarily a complete one, in that all sides may not be interviewed. For example, in one case examined, the question

<sup>28</sup> On this form, as well as others, there is set out sec. 13 of the act, which provides for a penalty not exceeding 1 year imprisonment or \$10,000 fine, for willful failure or refusal to furnish information required, or for the making of a false or fraudulent statement.

<sup>29</sup> Submission to the General Counsel's office may, of course, occur at any stage of the initial adjudication. The submissions are on legal questions, but may sometimes involve the question whether certain evidence would support a finding of fact.

<sup>30</sup> The adjudicator, meanwhile, has obtained, usually by correspondence, whatever other preliminary evidence is indicated to be necessary by the application. The letters are prepared by the adjudicator, pointing out what further evidence is desired. These letters are reviewed and signed by the reviewer for the chief of the division.

<sup>31</sup> Requests for field investigation must be directed to the field through the Assistant Director of Employment and Claims in charge of the Division of Clearance and Coordination. The number of investigations is described as "very, very small compared with the total number of cases handled."

involved was whether the claimant was on furlough, or in any way connected with his employer on the base date. In his applications and letters, the claimant stated he was on furlough and expected to return. He further quoted alleged statements of his employer indicating that the latter expected him to return. The employer's form AA-2 stated otherwise. Field investigation was ordered and the investigator interviewed the employer and the supervisor alleged to have made statement. The applicant was not interviewed.

It may be suggested that where there is a conflict as to facts between the various statements submitted, care should be exercised to interview all parties to the controversy since it is possible that there may be a tendency on the part of the adjudicator to accept the statements made orally to and reported by one of the Board's employees, in preference to the written assertions of the other party. Yet no rigid rule can be prescribed for the extent of the field investigatory process; the essential criterion must be, as it is now, what the person interviewed can contribute that cannot be obtained equally as well by correspondence. If, as in the example described above, one party to the controversy has made his position clear by correspondence, no need exists for interviewing him. As recommended below, as long as the Board is alert to apprise the applicant of all material adverse evidence submitted, there is no real danger in interviewing only one side, and no real utility in interviewing both.

Under a space for "additional remarks" in the investigation report, the investigator may sometimes state his conclusions as, for instance, that the applicant was not on furlough. Since the investigator will rarely be in possession of all the evidence, it may be suggested that he should confine himself to a report of the statement made to him, adding, where relevant, his opinion on the general credibility of the person interviewed, and whatever other conclusions which are based upon personal observation, such as the apparent age of the person interviewed and the like.<sup>32</sup>

*The initial adjudication.*—After all the evidence deemed necessary has been gathered, the adjudicator reaches his conclusions. Ordinarily the adjudicator then refers the case to a reviewer, who reviews the evidence and the issues; the former has first prepared an "award sheet" or "disallowance memorandum." The reviewer may disagree with the adjudicator; if he does, he can overrule the adjudicator forthwith. More often, in case of disagreement, where the reviewer cannot convince the adjudicator, the case will be submitted to the legal adviser of the Retirement Claims Division, who may in turn refer it to the General Counsel's office if it involves matters of real doubt or novelty.

If the adjudicator and reviewer agree, the latter approves the award sheet or disallowance memorandum. These form sheets do not set out the evidence, but simply state the conclusions on each item necessary for eligibility. The form is signed by the adjudicator and the reviewer. If the decision is to grant an award, the files are then submitted to the certifying officer, or, more usually, to a supervisor authorized to act by the Board on the recommendation of the Director of the Retirement Claims Service. The supervisor usually examines the files; the extent to which he reviews the evidence and the adjudicator's conclusions depends on the particular case and the particular supervisor. If,

<sup>32</sup> Compare the Veterans' Administration practice, which forbids conclusions by field examiners and permits only comments on credibility.

on examining the files, he disagrees with the conclusions (as happens very rarely), he may return the case for the further consideration of the chief of the division from which the case came. If, however, he agrees to the award, he signs at the bottom of the award sheet; his signature follows a paragraph stating that "I \* \* \* do hereby constitute the foregoing statements as my decision of fact and law." The case is next submitted to the Division of Finance and then to the Treasury. The procedure in case of denial of the application is described below. It is to be noted, however, that over 90 percent of the applications coming before the Board are allowed, although some of them may not have granted the full benefit requested, and, therefore, follow the route just described.

*Adjudication of disability claims.*—Somewhat different is the path of a case involving a claim of "total and permanent disability for regular employment for hire." Upon receipt of the disability claim in the Disability Section, the applicant is requested to consent to the carrier's releasing such medical data as may pertain to his mental or physical condition. The waiver is sent to the carrier, accompanied by a request for the carrier's medical evidence relating to the applicant. If the carrier has no such evidence, or if it is inconclusive, the Board directs that the applicant subject himself to a physical examination, usually by a physician attached to the Veterans' Administration.<sup>33</sup> Ordinarily, the carrier's or the doctor's report is the only evidence in the case. It is to be noted that the physician's report, filled out on a form supplied, is strictly confined to a statement of the relevant medical facts. The examining physician makes no recommendations or conclusions.

The medical evidence is next sent to the Disability Rating Board, whose duty it is to make a "rating"—that is, to determine whether on the medical and other evidence the applicant is permanently or totally disabled for hire.<sup>34</sup> All other questions of age, of service, of the employment relation, and similar issues are determined by the adjudicators and reviewers in the Disability Division. If the Disability Rating Board finds favorably, the case follows the usual course described above.

There is no provision for the applicant's personal appearance before the Disability Rating Board prior to its decision although as a matter of fact a few requests for such appearance have been granted. The Disability Rating Board does not examine the applicant; the findings of fact are to be made by the examining physician in the field, and the conclusion is to be reached by the Disability Rating Board. This split in functions is attributed in part to a distaste for the Rating Board's acting as both judge and jury. It is also suggested that an element of time is a factor: That the members of the Rating Board are vested with the responsible task of reaching conclusions, and so their time should not be devoted to making physical examinations. Finally, it is argued that the Board is desirous of having a record as the basis of determination, rather than permitting the decision to be based in any part on unrecorded observation.

The insistence upon the separation of functions in this instance seems somewhat dubious. Merger of fact-finding duties and the duty

<sup>33</sup> It is estimated that there are approximately 800 such examinations each month. Examination will not be ordered unless the adjudicator has first decided that the application shows a *prima facie* right to entitlement.

<sup>34</sup> This is interpreted to mean disability for all hire, and not merely disability for railroad purposes.

of drawing conclusions from the facts so found is certainly not uncommon, and, particularly where the question demands expert consideration, may be readily defended. It is not suggested that the medical report be dispensed with, but quite without reference to general propositions, one may suggest that a determination of disability may be facilitated by looking at the person who is allegedly disabled. But the circumstance that the Railroad Retirement Board has no control over the physicians who conduct examinations on its behalf argues against turning over to the medical officers the duty of deciding as well as examining. Yet, an effort should perhaps be made to utilize more fully the benefits of the examining physician's first-hand observation, by amplifying the form of his present report and by seeking to secure his judgments and opinions in addition to his notes of examination.<sup>25</sup>

The possibility of the Disability Rating Board's having opportunity to see and hear the applicant is sought to be preserved by a provision that the claimant may make a personal appearance before the Rating Board if its initial decision is unfavorable. If the personal appearance throws new light on the question, the Rating Board will order a new examination by another physician, even though two of the three members of the Board are themselves doctors and presumably competent to make such examination as may seem necessary, without delay. The opportunity to appear before the Rating Board may be illusory in some cases, it should be added, for the Board sits only in Washington and hence may be inaccessible to those whose physical and economic circumstances forbid travel. Still, while decentralized adjudicatory machinery seems best adapted to the determination of this class of case, it is likely that considerations of expense will prevent the creation of the fairly elaborate field organization which would be required for the relatively small volume of claims. As the Railroad Retirement Board's field offices develop, however, consideration might well be given to staffing at least some of them with medical adjudicators answerable directly to the Board. In view of the fact that comparatively few of the claims involve the issue of disability (approximately 800 a month)<sup>26</sup> and that the examinations can be made in a short time, it is probable that no very large staff would have to be added.

*The process of proof; evidence.*—As already indicated, there are no hearings and no "testimony," as such, leading to the initial decision upon any application. The evidence is solely paper evidence, the most important of which appears in forms filled out by the applicant, the employer, and, on occasion, by a field investigator. These forms

<sup>25</sup> In addition to the difficulty that the examining physicians are not employees of the Board, the unfamiliarity of the physicians with the Board's standards is said to militate against a useful conclusion by them. For example, many of the examinations are conducted by doctors employed by railroads. Such physicians are accustomed to the high standards of railroads, whereby a person is disabled from such work for comparatively slight ailments. It was because of these factors that the Board abandoned its original practice of leaving space for an expression of medical opinion. Railroad physicians accustomed to these high standards would express an opinion of total and permanent disability, and so inform the applicant. Since, under the act, the disability must be for all time, a heavy burden was thrown upon the Board in disagreeing with the examining physician.

Since its early experience, however, Board representatives have discussed the issues with railroad doctors and have succeeded in educating them to the Board's standards. At least as to them, it is probable that their conclusions should now be permitted. In any event, it seems possible to distinguish between "medical" conclusions on the one hand (i. e., conclusions concerning probable medical consequences—whether an eye injury is likely to result in permanent loss of sight) and "economic" conclusions on the other hand (i. e., conclusions, based upon personal observation and examination, should be permitted).

<sup>26</sup> It is urged, however, that these 800 cases are scattered throughout the country, and that in cases in which disability annuities have been granted under sec. 2 (a) (3) of the 1937 act, the Board has the responsibility of determining the continuance of total and permanent disability until the annuitant attains the age of 65, so that periodic examinations will be required.

may be supplemented by letters and other correspondence. Except for the applications, none of this material is sworn. Affidavits are rare, being used almost solely in cases where records are missing.

Since most of the informative material is adduced in response to form questions or inquiries by letter, questions of relevancy do not often arise. On the other hand, much of the material, if subjected to the lawyer's accustomed tests, would be inadmissible. All, nevertheless, is included in the file, whether it be argumentative or repetitive correspondence from the applicant or be some other type of informal evidence. For use in evaluating the files' contents, however, "rules of evidence" have been prescribed both by the regulations and by instructions to adjudicators. Such regulations and instructions stipulate the evidence necessary to establish the various conditions of eligibility, and form a complete handbook for the adjudicators.<sup>37</sup> In addition certain presumptions of fact have been created. For example, there exists a presumption of mental competence, and a presumption, arising from the Board's receipt of a duly executed application form, that the applicant or one duly authorized by him filed the application. Sections 230.04 to 230.09 prescribe rules concerning elections of joint and survivor annuities. Receipt of a communication of election is "prima facie evidence of the existence of all the elements of an election"; receipt of confirmation will conclusively establish such elements; even without confirmation, the prima facie evidence of election becomes conclusive under certain circumstances. To rebut the prima facie evidence, the applicant must present "evidence convincing" to the Board.

*Compelling the production of evidence.*—In no instance have subpoenas been found to be necessary at this stage of the proceedings. Indeed, the regulations make no provision for the use or issuance of subpoenas by field investigators. The Board, however, possesses the power to examine the books and records of employers, and section 13 of the act provides for criminal penalties for withholding or refusing to disclose evidence desired by the Board. Further, the Board has statutory power, which it has exercised, to require reports from employers. Section 250.02 of the regulations requires the employer to notify the Board of an employee's death. Section 250.03 prescribes the nature and form of quarterly employer reports of monthly compensation of

<sup>37</sup> For example, the following is included in the instructions to adjudicators on the question of establishing the age of applicants:

"The adjudicator will obtain the best evidence available to establish the age of the applicant, and, if a joint and survivor annuity has been elected, of the applicant's spouse. If in order, any other form of documentary evidence will be accepted and a distinction will not be made between primary and secondary evidence. Original documents ordinarily are more creditable [sic] than certified or photostatic copies, and records made or filed at an early date carry greater creditability [sic] than those of more recent origin. Ordinarily, preference should be accorded various types of evidence in the following order: (1) Civil and church birth records; (2) school records; (3) insurance records; (4) labor union and fraternal records; (5) naturalization records; (6) vaccination records; (7) immigration papers; (8) passports; (9) Bible and family records; (10) marriage records; (11) military records; (12) employer's records; (13) drivers' permits; (14) voting registration records; (15) name licenses; (16) newspaper and magazine clippings; (17) poll tax exemption certificates; (18) affidavits.

"Types of evidence listed in items 13 to 18, inclusive, should be used only as a last resort.

"Evidence in any other form may be accepted if of equal or greater reliability than the items listed from 1 to 12 above.

"If Form AA-2 is in the file and contains the employer's verified record of the applicant's birth date, or an unverified birth date recorded 20 years prior to the date of the report, it will be accepted if it agrees with the age or birth claimed by the applicant, or comes within the scope of the following paragraph.

"An arbitrary date of birth may be fixed by the adjudicator, subject to approval by the reviewer and supervisor, under the following conditions:

"(1) Where evidence to establish age or birth cannot be obtained. In such a situation the adjudicator will base his finding on opinions and other information in the record and will arbitrarily fix a birth date which reasonably appears to be in agreement with the applicant's age.

"(2) Where the file contains evidence which shows that the applicant attained the age of 65 years on or prior to the date on which his annuity begins to accrue, but either does not show the exact birth date or is not in agreement with the birth date claims, provided: (a) The applicant did not perform service subsequent to June 30, 1937; and (b) did not elect a joint and survivor annuity.

"Segregation of arbitrary birth dates from known birth dates is desirable for actuarial purposes."

employees; section 250.06 provides for reports of employees' representatives; and section 250.04 provides for registration of employees. By means of these reports, many of the difficult questions of length of service and related problems will doubtless be obviated in the future, and adjudication of awards will be greatly simplified.

*Disclosure of records.*—As described above, the evidence upon which initial determination is made is obtained *ex parte*; the applicant has no opportunity, for example, to inspect or object to reports from an employer or field investigator prior to their being filed. With a single exception, noted immediately below, the applicant is entitled to examine the files and records of his case. Section 262.12 authorizes disclosure of records and other documents "to any employer, employee, applicant or prospective applicant \* \* \* as to matters directly concerning such employer, employee, applicant or prospective applicant." The single general exception may occur in disability cases where, on rare occasions, medical evidence might be withheld from the applicant if deemed harmful to him. In such case, of course, his representative would in any event be permitted to examine the information.

It may, perhaps, be suggested that in cases under the Retirement Act under which the files are maintained in Washington, D. C., the availability of the files to the applicant is an empty right, in that practical obstacles arise to prevent his examining the files. Two factors tend to diminish the importance of this objection. The first is that the problem of transportation to Washington is, to some extent, eliminated by the fact that railroad employees are customarily given passes entitling them to free travel.<sup>38</sup> The second factor tending to diminish the practical unavailability of the records is the practice, more frequent after initial determination than before, of notifying the applicant through correspondence of adverse evidence submitted. It may be suggested that this practice be formalized, and that on receipt of contradictory evidence, the applicant be informed of its source and substance by mail. In the case of investigator's reports, it may be wise to send a duplicate to the applicant for comment or refutation. The Board urges, however, that formalization of the existing practice of notifying applicants with respect to adverse evidence would accomplish no useful result, but might, on the contrary, result in confusion, since many cases are discussed in informal conferences with labor representatives of individuals interested. Nevertheless, it seems apparent that the applicant is best fitted to refute adverse evidence, and it appears to be preferable to permit him to do so directly, rather than shifting the burden on a labor representative who would, in turn, have to inform himself through communication with the applicant. Of course, the applicant need be notified of the adverse or contradictory evidence only where, in the judgment of the adjudicator, it may have some bearing on the ultimate disposition of the claim.

#### *Procedure after the initial determination—Protests and Appeals.*

As described above, a vast majority of the applications are disposed of by the initial decision. Where such decision grants an application, the case ends through the certification of an award. When the appli-

<sup>38</sup> Sec. 18 of the act provides that it shall not be unlawful for carriers to furnish free transportation to individuals receiving annuities or pensions under the act "in the same manner as such transportation is furnished to employees in their service." This does not, of course, entirely answer the problem. The very question involved in an application may be whether the applicant is an employee.

cation is denied in whole or in part, on the other hand, the Board has provided for several separate stages of review and appellate determination.

*Notification of applicant.*—Whether the determination is favorable or not, the applicant is notified in accordance with section 260.01, which provides that “Notice of an initial decision shall be communicated by the Claims Service to the applicant in writing within 30 days after such decision is made.” The notice is formal, simply stating whether the application has been granted or denied. In case of denial, the ground of denial is noted, as, for example, the fact that no employment relation is found, or that the evidence does not support a finding that the applicant is of the proper age. There is no reasoning and no discussion in the notice.

*Finality of initial decision; protests.*—Until November 8, 1939, a unit known as the Special Committee on Protests, composed of the chiefs of the sections of the Retirement Claims Division, had been constituted to handle “protests” from claimants who were dissatisfied with the initial determinations. The Committee undertook to re-examine and, where necessary, reverse initial decisions; it analyzed the protests as a research body; and it conducted correspondence with the dissatisfied claimant where indicated in an attempt to explain the decision to him. The Committee failed, however, to achieve the purposes intended for it; its work was somewhat haphazard; and letters of “explanation” were not wholly successful. Accordingly, on November 8, 1939, the Board issued new instructions governing the procedure after initial decisions had been rendered.

The Division of Retirement Claims is instructed to reopen any claim which should properly be reopened in accordance with the criteria (clear and obvious mistake of fact or law, or failure of the evidence reasonably to support the denial) (discussed *infra*, p. 32) provided such opening is effected within a year after the claimant has been notified of the initial decision.<sup>39</sup> Upon receipt of any communication from an applicant protesting the initial decision, the claim is to be reexamined immediately. If it appears from a review of the file, or of evidence (if any) accompanying the communication, either that the initial decision was incorrect, or that all the relevant facts claimed by the applicant have not been adequately developed, the initial decision will be withdrawn and the applicant notified (provided that such withdrawal is within 1 year from the date of the decision). After such withdrawal, there will be immediate correction or further development and a new decision made. Where the protest concerns not an outright denial, but a protest concerning the amount of the award, the procedure is the same except that the initial decision is not withdrawn. In the event that the initial decision is modified, a memorandum will be placed in the file setting forth the basis upon which favorable action was predicated, with such discussion as is necessary to indicate the basis of allowance after former denial.

Where, upon receipt of the protest, reexamination indicates that the initial decision was correct, and the letter indicates a “definite present intention to appeal,” the communication and the files will be referred immediately to the Appeals Council and handled as an appeal. No reply will be made to the protesting communication even if it includes statements indicating that the applicant does not under-

<sup>39</sup> Any claim on which the Appeals Council has rendered a decision shall similarly be reopened by the council, but only if requested to do so within 4 months. Any other claim which it is believed should be reopened must be transmitted to the Board with the recommendation of the transmitting agency.

stand the basis on which the initial decision was made. Where the communication indicates a full understanding of the decision but does not state a definite present intention to appeal, the applicant will be sent a form letter stating that the initial decision "concluded the adjudication of your claim by the Division of Retirement Claims, and the appeals regulations [set out on the back of the notice of decision] \* \* \* govern the [subsequent] procedure \* \* \*." Where the protesting communication neither states a definite present intention to appeal nor indicates that the applicant understands the basis of the initial decision, *one* letter [italics in instructions] is sent to the applicant "making a clear, full and complete explanation" of the basis of the facts and law upon which the initial decision was made. The explanatory letter is also to state that the initial decision "concluded the adjudication" of the claim in the Division of Retirement Claims, and that the applicant may appeal.

It is submitted that on its face, this projected procedure is sound, well-suited to accomplish its purposes, and at the same time to avoid the danger of protracted argument, with its consequent loss of dignity on the part of the Board and irritation on the part of the applicant. When there is a discovered error in a case, even though pending appeal, surely there is small reason to perpetuate it unless and until it is cured by appeal to another body. On the other hand, where the applicant indicates his determination to appeal, whether or not he understands the basis of the decision, it seems wise to permit him to choose his own course and not attempt to convince him that he is making a mistake—a procedure scarcely consonant with an adjudicatory function. Finally, however, where the applicant has not decided to appeal, and does not understand the decision, it seems eminently sensible to make one attempt to explain the decision to him. If the explanation is, in fact, simple, complete, and objective (rather than defensive or argumentative) there is at least a possibility that the applicant may realize that his case is lacking and that he may thus be dissuaded from further pressing of the suit.<sup>40</sup>

*Appeals; the right to appeal.*—Section 260.02 of the regulations provides that—

Every applicant shall have a right to appeal to the Appeals Council from any initial decision of the Claims Service [Retirement Claims Division] by which he claims to be aggrieved.

There is no procedure similar to the Veterans' Administration's "administrative appeals"—that is, appeals taken by officials of the agency from the granting of awards.<sup>41</sup> The Board's omission of such a procedure seems sound, even though it results in permitting appeals only from denials. Administrative appeals at the Veterans' Adminis-

<sup>40</sup> It may be suggested that the entire "protest" procedure be abandoned in favor of one which envisages that the first notice of decision shall be more complete than it is at present, and that any exception thereto or any protest concerning it will be instantly referred to the Appeals Council as though it were a petition for review. The Board, however, is primarily a beneficent agency, dealing with persons untrained in the niceties of legal procedure. Under such circumstances, and because the applicants themselves must provide out of their own wages 50 percent of the contributions supporting the retirement program, the Board cannot treat them in a rigidly formalistic fashion. Perhaps in the future, if and when a trained corps of applicants' representatives is developed, it may be well to consider the feasibility of (1) notifying the applicant fully of the grounds of the decision in the first place; and (2) requiring all further action (including the presentation of new evidence) to be taken by the Appeals Council, except in cases involving readily apparent clerical mistakes, errors in computation, or the like defects.

<sup>41</sup> The chart of the organization of the Board includes, under the duties of the Appeals Council, the hearing of appeals taken by the Director of the Retirement Claims Division. The statement is erroneous, for no such appeals have been taken, none is contemplated, and no procedure is envisaged whereby any appeal might ever be taken by the director.



tration are employed as a check against aberrations by field adjudicators. Under the Retirement Act, adjudication is centralized, and close supervision may, and in fact is, maintained over the work. The conclusions of the adjudicator, as described above, are reviewed by the reviewer; their conclusions are examined by a supervisor. Difficult cases are often referred to the General Counsel's office. It appeals, therefore, that there already exists sufficient check to guard against any individual's inclination to dispose of dubious or difficult cases by granting the award.

*Procedure for appealing.*—Section 260.02 (b) and (c) of the regulations provides that—

Appeal from an initial decision of the Claims Service shall be made by the execution and filing of the appeal form prescribed by the Board, and must be filed with the Appeals Council within 1 year from the date upon which notice of the initial decision is mailed to the applicant at the address furnished by him. The right to further review of an initial decision \* \* \* shall be forfeited unless formal appeal is filed in the manner and within the time prescribed herein.<sup>12</sup>

Until recently, the Appeals Council, operating under this provision, was accustomed to attempt to dispose of the case informally through discussion by correspondence. Lengthy letters, setting out the evidence in the file and discussing the case, were sent to the applicant, signed by the chairman of the Appeals Council. This practice has been wisely abandoned. Two reasons are assigned for the abandonment of the practice. The first was that it proved to be useless; the matter was rarely disposed of in this manner, and formal appeal was always forthcoming. The second was that, despite cautions taken, the explanatory letters often appeared to take sides and make arguments. This was of poor psychological effect, since the letters, as stated above, were signed by the chairman of the Appeals Council, which was ultimately to decide the case. An impression of prejudice arose.

That the danger was more than theoretical is demonstrated by one of the files examined. The applicant, after receiving such a letter, objected strongly to the "one-sided" procedure and expressed his opinion that his case was not being fairly considered.

As stated in the regulations, the appellant must, before his appeal is accepted, file an executed form with the Appeals Council. This form is a simple one. The appellant must set out his name and address and the date of the notice of the decision. A blank line follows the words, "This appeal is based on what I consider to be mistakes of fact or errors of law pertaining to -----"  
(eligibility, service, compensation, error, etc.)

Space is left for the appellant to "certify that the following details as to the alleged mistakes of fact or errors of law are true to the best of my knowledge or belief," and for a statement as to additional evidence intended to be submitted. The form also enables the appellant to indicate whether he desires to have a hearing before the Appeals Council. The appeal form must be signed, but need not be sworn.

*Scope of review.*—Although the appeal form contemplates that the appellant shall specify the errors assigned, less than a third of the

<sup>12</sup> The regulations provide also for an "informal appeal." Sec. 260.02 provides that if the applicant informally complains of the initial decision, and this complaint has not been eliminated "by explanation of the basis of the initial decision" of the Retirement Claims Division, "the Appeals Council shall endeavor to ascertain, by correspondence or conference with the applicant, whether he takes issue with any point of fact or law involved in the initial decision \* \* \* and, if so, whether the applicant desires to take a formal appeal \* \* \*."

applicants do so. Those that do attempt to specify errors do so ineffectively. An appeal will not be rejected for this reason, nor will the scope of review be limited even where errors are assigned. In effect, therefore, the appeal form serves simply as a formal record of the fact that an appeal has been made.

In this connection, it may be here noted that in some respects the Appeals Council is misnamed. It is more than an appellate body. The council, as a matter of fact, examined each case coming before it *de novo*. Although it retains and uses the evidence already available, it has been stated by the chairman that "No particular weight is given to the initial decision. In every appeal, we start from scratch."

The regulations envisage such a procedure, and that the council shall be virtually a hearing body of original jurisdiction. Section 260.02 (e) provides that the appellant, or his representative—

shall be afforded full opportunity to present further evidence upon any controversial fact, orally or in writing, or by means of exhibits.

The regulations, as discussed more fully below, make full provision for the council's summoning witnesses, obtaining further evidence on its own motion, and taking testimony.

It is thus obvious that the Appeals Council is not limited to an examination of the case as made below. This procedure is sound. As indicated by the fact that only approximately 600 cases have been appealed, and the remainder of the 160,000 applications have been disposed of in the Retirement Claims Division, an overwhelming majority of the cases can be determined on simple paper evidence. Rather than providing for hearings in the first instance, when such hearings are ordinarily unnecessary, it seems sensible to postpone hearings to those cases which really require them. The appeals sift out this latter type of case.<sup>43</sup>

*Hearings; notice; time and place.*—Hearings may be held either on the request of the appellant or upon the council's own motion. As of September 30, 1939, there had been only 62 hearings before the Appeals Council.<sup>44</sup> Of these 62 hearings, 5 had been held on the council's own motion. In these 5 cases, there either was sharp conflict in the evidence which could not be resolved merely by examination of files or it was felt that convincing and authentic evidence could best be obtained through appearance and examination of witnesses. Typical of this type of case was one in which the railroad records were missing and the appellant was relying on affidavits from his fellow workers concerning his services and absences with respect to a time 20 years past.

Notice of the time and place of the hearing is sent to the appellant, who is considered to be the only interested party. Since in most cases the hearings are held on the appellant's own request, the notice contains only the time and place of the hearing. Where the Appeals Council itself calls the hearing, more complete information concerning the subject matter of the hearing is set out.

The Appeals Council's practice concerning hearings is flexible. Ordinarily, hearing will be set approximately 2 weeks after notice.

<sup>43</sup> The Unemployment Insurance Act has embodied this into statutory form, providing for hearings before district boards only after denial of a claim by the initial adjudication.

<sup>44</sup> The number of hearings requested is increasing. It is now estimated that there is approximately one hearing each day.

Requests for extension of time are invariably granted. In a few instances, where the appellant and his witnesses were ready and the Appeals Council was not otherwise engaged, an appellant has been granted a hearing forthwith.

To date, all hearings except three have been held in Washington. It is stated, however, that the place of hearing is a matter for the discretion of the Appeals Council, and that it depends upon such considerations as expense to the Board and to the appellant, and the availability of witnesses.

It is difficult to conclude whether, in view of the necessity of coming to Washington, the right to a hearing is a comparatively illusory one and, if it is, what the solution is. The fact that only 10 percent of the appealed cases thus far presented have involved hearing may indicate either that the appellants are not interested in hearings, or, as is possible, are unable to make the journey. The problem of transportation, as already observed, is somewhat diminished by the fact that many of the applicants can obtain free transportation,<sup>45</sup> and further by the fact that many of the applicants, by the nature of their cases,<sup>46</sup> do not, by coming to Washington, lose employment time. Nevertheless, the applicant's age, his possible disability, and the problem of expenses are factors making journeys to Washington difficult.

Two possible solutions may be tentatively suggested. One is the development, now under way, by the railroad labor organizations of a permanent and expert body of individuals who, upon request of the appellant, may represent the appellant before the Appeals Council. A second possibility is the application of the procedure now in effect at the Veterans' Administration; that is, the holding of hearings by subordinate persons or bodies in the field, where the testimony and argument may be transcribed and submitted to the Appeals Council in Washington for its consideration. Such hearings in the field may be in lieu of hearings before the Appeals Council.<sup>47</sup> Again, as the adjudicative machinery under the Unemployment Insurance Act becomes more fully developed, Unemployment Insurance personnel might be utilized for such field hearings.

*Counsel and representation in appeals proceedings.*—The applicant has a right to be represented at the hearings. There is no requirement that the representative be an attorney, and often the applicant uses a representative of his labor organization. It is necessary for a power of attorney to be filed with the Board before an individual is qualified to represent the applicant. In about one-third or one-half of the cases heard thus far, the appellant has been represented by an attorney or a labor organization. In a comparatively few cases, the representative alone has appeared. In those cases where the applicant is unrepresented, the Appeals Council does not assign a counsel to him.

Present at the hearing and representing the Board, or the council, is the "legal adviser to the chairman." It is stated that the function of the legal adviser is "to see that the record contains all relevant evidence and that the hearing is expeditiously conducted," although,

<sup>45</sup> The observation may be repeated here that this does not wholly solve the problem since such transportation may be furnished only to employees, and the very issue in the case may be whether the applicant is an employee.

<sup>46</sup> In all but disability cases, the applicant must relinquish his right to return to railroad service.

<sup>47</sup> The appellant, of course, may retain his right to a hearing before the Appeals Council, if he does not wish the substitute field hearing.

of course, the primary responsibility for this is the council's. His actual participation is somewhat unique. At the opening of the hearing, he is sworn by the chairman, and he begins the proceedings by reading into the record a prepared statement of the case. He states the history of the case to date, summarizes the evidence, and reads verbatim the important parts of the file. Thereafter, he remains at the hearing and questions the witnesses and the appellant's counsel. Such questioning may, at times, resemble cross-examination and argument.

The use of the legal adviser is an innovation. Formerly, the members of the council carried the burden of putting questions; now, the adviser is intended to assume this burden. Several reasons are assigned for the creation of this office. One is that "it sometimes happens that a particular line of questioning by the council may convey an impression to an appellant that the council has prejudged his case. The danger of such misunderstanding is eliminated by having the assistant present to conduct such questioning." Although this reasoning may have theoretical soundness, its value is lost by virtue of the fact that the council members, as is altogether appropriate, participate freely in the questioning. Nor would it be wise to do otherwise. To consign the members of the council to a silent role, where issues need clarifying in the minds of those who adjudicate and where examination is in order, would be an expensive price to pay for avoiding the possibility of offending the appellant.

Somewhat more persuasive reasons for the utilization of the legal adviser are that (1) his reading the statement of the case at the opening of the hearing provides a good starting point and apprises the parties, as well as the council members (who may not yet be entirely familiar with the record) of the issues; and (2) his knowledge of the record makes it possible for him to put questions and examine witnesses where the council members cannot do so. The exact value of the legal adviser at these hearings is difficult abstractly to ascertain. The chairman of the council explicitly approves the legal adviser's participation as a real contribution to administrative procedure, saying that it serves to direct the hearing at once to the issues concerning which there may be real doubt.

*Conduct and nature of the hearings; participation by the council.*—The hearings have few of the characteristics of adversary judicial proceedings; rather, they are in the nature of conferences and examinations. The hearings are, at present, held in the chairman's office; they take place around a table at which the council members and the participants sit, with the chairman at the head of the table.

The members of the council, as indicated above, take an active part in the proceedings, questioning the witnesses and the representatives, discussing the contentions, clarifying the statements, and, sometimes, examining the witnesses. Since the proceedings are informal and nonadversary, there has been only rare occasion to rule on motions. The council, through the chairman, does rule on questions of evidence and passes upon the admissibility of exhibits, by virtue of section 260.02 (e) which provides that the council "shall protect the record against scandal, impertinence, and irrelevancies." The "technical rules of evidence," according to the regulations, do not apply, so that the council rarely has occasion to make rulings on evidence at all. It does so most often when the witness or the applicant strays from the

issues of the case, and then there is no formal ruling but simply a gentle reminder to return to the path.

The council may not only examine witnesses, but may also call for them and direct the examination of new issues. Section 260.02 (e) of the regulations provides:

If, in the judgment of the Appeals Council, evidence not offered by the appellant is available and relevant, and is material to the merits of the claim, the Appeals Council shall obtain such evidence on its own initiative.

At present, this power is rather frequently used. In about one-third of its cases, the Appeals Council does seek such evidence, usually by correspondence or field investigation. Particularly in view of the present backlog of cases before the Appeals Council, as described subsequently, it is important that adjudicators, when the case is first under consideration, exert every effort to complete the file, in order to lessen the necessity of the council's seeking new evidence.<sup>48</sup> Of course, this necessity cannot be wholly eliminated, since a hearing is often likely to bring to light new issues or questions requiring further investigation.

*Disability cases.*—In appealed cases involving the issue of disability, the Appeals Council is aided by the presence of a physician from the Disability Rating Board. The physician is ordinarily the Rating Board's chief consultant, although in some instances he may be one of the physicians who participated in the original rating. The function of the physician is to apprise the council of the issues, and to ask questions of the witnesses relevant to the medical issue. If the council, aided by the consultant, believes that new evidence has been introduced, or that new questions have been raised, the matter will be referred to the Rating Board for a formal opinion as to whether new and material evidence has been introduced, and if so, the effect thereof.

Whether appeals to the council on the disability issue serve any valuable purpose is a difficult question. That particular issue is a technical one, for the resolution of which the council is in any event likely to rely heavily upon the Rating Board or the doctor detailed to sit with the council. In effect, therefore, it is at least possible—and perhaps even justifiable—that the issue on appeal will be decided in actuality by the Rating Board itself. It might be suggested, therefore, that it would be preferable for the "appeal" from a Rating Board decision to be in the form of a petition for reconsideration by that Board itself, after the applicant (if he cares to do so) has personally appeared before it.<sup>49</sup> On the other hand, however, two factors tend toward acceptance of the present procedure: (1) The Council composed of men familiar with railroad practices,<sup>50</sup> may bring to the issue a new and less technical approach. The initial rating process may tend to become somewhat formalized and the real issue of practical,

<sup>48</sup> In one hearing attended, the issue was whether the appellant, who had been either furloughed or laid off in 1931 when operations were curtailed, was still subject to call and therefore was to be regarded as an employee on August 29, 1935. This in turn may have depended on the rules and practices on the carrier; but there was no evidence in the file on this question. The hearing was halted while a council member telephoned the Employment Relations Rules Unit. The latter had no information, and the chairman indicated that the matter might have to be investigated. He warned the appellant's representative that this would considerably delay the decision.

<sup>49</sup> As already described, personal appearance before and reconsideration by the Rating Board after an initial unfavorable rating is not infrequent.

<sup>50</sup> Disability, however, means disability to engage in any substantially gainful occupation, and not simply to engage in railroad work.

rather than medical, disability may be lost sight of. It is felt that the Appeals Council may act as a corrective in this respect and may also be better fitted to make inferences which the Rating Board may have been unwilling to make. (2) There may very possibly be a psychological advantage, so far as satisfaction of the appellant is concerned, in having the issue appear to be considered by a body a level higher in the hierarchy, and different from the one which made the original rating.

*The record of the proceedings.*—Except for incidental colloquies “off the record,” a complete stenographic record of each hearing before the Appeals Council is kept, and this record is, in all instances, transcribed. This is in accordance with section 260.02 (g) of the regulations, which provides—

All oral evidence produced at any hearing shall be reduced to writing. All evidence presented by the appellant and all evidence developed by the Appeals Council shall be preserved. Such evidence, together with a record of the arguments, oral or written, and the file previously made in the adjudication of the claim, shall constitute the record for decision of the appeal.

Although the regulations do not provide that a copy of the record be furnished to the appellant, but only that the record shall be available to him or to his representative, the present practice is to grant to the appellant any request for a copy of the record.

*The process of proof.*—All witnesses who give testimony at the hearings are sworn; the oath is administered by the chairman of the Appeals Council. In cases where a representative appears, he is first asked whether he will present any evidence. If the answer is affirmative, he is also sworn, as is the legal adviser to the chairman.

Although there may be and often is investigation apart from the hearing, the evidence or statements obtained thereby are required to be included in the record and the council's decision must be based on such record (sec. 260.02 (g) (h)).<sup>51</sup> Despite the inclusion of such material in the record, however, there is no effective method whereby an applicant may be informed of its content (or, sometimes, even of its existence), so that the council's decision may rest upon evidence which the applicant has had no opportunity to rebut or explain, or upon testimony of witnesses not subjected to cross-examination. To require that all material relied upon by the Appeals Council must have been introduced into the record at a formal hearing, would be to encumber the proceedings by requiring frequent reopenings of closed hearings. One would hesitate to prescribe an abandonment of the investigative techniques whereby the council now secures so much of the raw material from which it fashions its decisions. Yet, for its own protection as well as for the protection of appellants, the council

<sup>51</sup> The Appeals Council, however, “takes official notice of facts within the range of their knowledge as to matters peculiar to the railroad industry.” The council, as well as the persons in the Retirement Claims Division who make the initial determination, also accepts as proved some of the basic facts involved in an application if such facts have already been determined in another proceeding. Thus, for example, it is not necessary in each case to prove that a carrier is an “employer” within the meaning of the act. If the Board has already made that determination in a status proceeding, it is recorded in a loose-leaf folder distributed to the personnel, and the issue is disposed of for subsequent cases. Similarly, rules and practices of an employer may have been determined by the Employment Relations Rules Unit and approved by the Board. If the same question arises subsequently in connection with an application, the folder is consulted. If the rule or practice for the particular class of employees on that employer has been determined, the issue need not be retried. It is submitted that this is a sound procedure. Full and complete investigations have already been made on status or rules and practice question and the matters have been determined. Unless there is new evidence or new light thrown upon the issue since such determination, there is no reason to require the matters to be proved anew in each one of many individual applications. It may be suggested, however, that in order to make the record complete, the status and rules and practice determinations be incorporated by reference in the record of each case where they are relevant. But see footnote 64, below.

should be required to communicate to the appellant detailed knowledge of any post-hearing material which has been developed in opposition to his contentions, so that he may, if it is within his power to do so, discredit or refute the adverse evidence. It will be understood that a great portion—indeed, the greater portion—of the post-hearing material which is acquired by the council is favorable, rather than adverse, to the applicant, having been sought in order to perfect his claim, not to defeat it. No purpose would be served by describing to the appellant the material upon the basis of which the council enters decision in accordance with his contentions.

If at any time during the appeal period prior to the appeal to the Board, the appellant offers new and material evidence, the Appeals Council will reopen the record to admit such evidence. The procedure if new evidence is presented to the Board, or if the case has been closed, is discussed infra, pages 62–63.<sup>52</sup>

*Procedure after the record is closed.*—Under the Board's regulations the appellant is entitled to oral argument before the Appeals Council. There are no rules limiting such argument or prescribing the time that request for it must be made. In fact, in most hearings, presentation of evidence and oral argument cannot be separated. Witnesses may present oral argument and representatives may present testimony. It is required that all argument be recorded, transcribed, and made a part of the case file.

The appellant may also, as a matter of right, file briefs with the council. No rules have been formulated to govern the form, type, or number of briefs, or the time of filing. In only a very few cases, in any event, have briefs been submitted.

*Decision of the Appeals Council.*—Section 260.02 (g) of the regulations provides that "upon completion of the record, the Appeals Council shall render decision thereon as soon as practicable \* \* \* Decision shall be taken by unanimous vote of the members of the Appeals Council \* \* \*." This has been interpreted to require a unanimous decision.<sup>53</sup>

The council's decision may be of two types; (1) it may be a decision upon the merits of the appeal, or (2) it may be a decision to certify the entire record as an automatic appeal. In view of the requirement that the decision must be unanimous, it is not clear what would be the result if the members could not agree on either course. In fact, it may be presumed that where there is disagreement on the merits, the members will unanimously agree to certify the case to the Board. To avoid the apparent—if theoretical—dilemma posed by the wording of the regulations, provision should be made for certification to the Board whenever three, or perhaps even two, members of the council believe that consideration by the Board is advisable. At the same

<sup>52</sup> Sec. 10 (b) 4 of the act authorizes the Board to compel testimony and the attendance of witnesses, and secs. 250.08 to 250.10 of the regulations provide for the procedure of issuing subpoenas and compelling the testimony of recalcitrant witnesses. Thus far, there has been no occasion either for the Appeals Council, to which the regulations give subpoena powers, or for any other person at the Board, to invoke these powers. Briefly, the regulations require that parties must apply for subpoenas at least ten days before the hearing and must show the evidence expected to be obtained. Subpoenas may also be issued during a hearing on the petition of any party upon a showing that a witness will not appear voluntarily and that the testimony sought is material.

<sup>53</sup> In the single case where a party raised this question, the decision denying a grant had been signed by only 4 members of the council. Subsequently, the fifth member, who had been temporarily absent, signed. The appellant objected that the original decision was invalid, and that the subsequent signature did not cure the defect since it was not a reconsideration en banc, or, if it was, the 4 members had already made up their minds, had prejudged the case, and so were disqualified. These contentions were rejected by the Board.

time, elimination of the present requirement that decisions of the council on the merits of an appeal must be unanimous may be considered. Opinions may be divided without being valueless. Where the issue upon which the council's judgment is divided is one peculiar to the instant case—a disagreement concerning what findings should result from the evidence—with no implications for the future, it may be suggested that the council should be able to issue its opinion, though it be divided. On the other hand, it is suggested by an officer of the Board that the requirement of unanimity is a valuable device "to generate confidence in the decision." A substantial number of baseless appeals are taken; if the council unanimously rejects the claim, there is greater likelihood of the appellant's being satisfied that his case is lacking. A four to one decision might, in a measure, it is asserted, shatter such confidence and an appeal to the Board would inevitably result.<sup>54</sup> Further, it is suggested that ordinary logic is inapplicable here, since the Board deals with a "peculiar psychological problem" in that the class of claimants have a tradition all their own—a tradition largely consisting of a suspicion of anyone outside their own ranks. Unless, therefore, their claim is unanimously rejected, there is small chance that they would be convinced. Finally, it is argued that, as to less than unanimous approvals of awards, no provision exists for any appeal by a Board official from a favorable decision of the Appeals Council. Hence, it is said, it is a desirable safeguard that the Board itself should pass upon any case in which, after the Division of Retirement Claims has found against the claimant, any member of the Appeals Council agrees with that decision, even though a majority of the council disagree. This, however, would seem to be persuasive only insofar as it would form a further basis for the abandonment of the requirement that automatic appeals be agreed upon unanimously.

That the present system, however, appears to be successful is difficult to deny. Although between 90 and 95 percent of the Appeals Council's 310 decisions have been unfavorable to the appellant, only 38 have been appealed to the Board. This would indicate that unanimity may have had its effect in discouraging appeals. Nevertheless, if the council were permitted to issue divided opinions, there is at least a possibility that fewer cases would go to the Board. Under the present system, presumably all cases in which there is a division of judgment are automatically shifted to the Board. If the council issued divided opinions, the number of cases going to the Board would certainly be decreased by the number of divided approvals of awards,<sup>55</sup> and might possibly be decreased even in the case of a denial, when the applicant may not wish to go further.

*Preparation and form of decision.*—Following the hearing, if one is held, and the examination of the file by the council members, the council meets in executive session and votes upon the case. Thereafter, the procedure in the preparation of the decision varies according to the

<sup>54</sup> This reasoning, of course, is inapplicable in divided cases where the majority favors an award. The applicant who receives his annuities will doubtless be just as delighted where such award was by virtue of a three to two decision as where it was five to nothing.

<sup>55</sup> To date, there have been no instances where the Appeals Council has disagreed. It is said, therefore, that the problem of unanimity has presented no practical difficulties.



circumstances. Sometimes, each member may make brief notes—consisting, perhaps, of only a line or two—concerning the reasoning or decision in the case. If this is done, the notes are turned over to the legal adviser to the chairman, who sometimes thereafter discusses the case with the chairman and other members of the council. He then prepares a draft of the decision, which he submits to the council. Although the council may modify, change, or wholly rewrite the draft, more frequently his draft is accepted. In some cases, the chairman may himself prepare the decision and submit it to the members of the council.

The procedure now obtaining in the preparation of the decision will, it is contemplated, soon be changed. An increasing number of appeals and hearings, as well as a mounting backlog of cases, is now burdening the council. Consideration is accordingly being given to the splitting of the cases for preparation among the members of the council, so that study of a particular case would be undertaken by one member, who would subsequently report the case to the council in conference and would prepare a draft opinion for the council either before the conference or after the council had voted. Since the council is apparently a compact body with a keen grasp of the issues before it, the contemplated delegation of primary responsibility in particular cases would probably be unobjectionable.

The decision of the Appeals Council takes the form of a written opinion. Ordinarily, it is divided into three parts (although the practice is not formalized): "Facts," "Discussion," and "Conclusion." It is signed by the five council members. Originally, in the first 40 cases, the decisions were somewhat short and sketchy, but, more recently, they have since become full opinions, with relevant reasoning and discussion of the appellant's contentions and the law. In their existing form, the decisions are admirably clear and satisfactory.

Under section 260.02 (h) of the regulations, the Appeals Council's decision "shall be communicated to the appellant in writing within 30 days after the decision is made."<sup>56</sup> The written opinion itself is mailed to the appellant.

*The Appeals Council's work load.*—In 1938, there were 240 appeals filed with and 126 decisions rendered by the Appeals Council. During the first 8 months of 1939, 370 appeals were filed and 184 decisions issued. Five percent of the Appeals Council's decisions have been reversals of the initial determination of the Retirement Claims Division.

A serious administrative problem is raised by the existing state of the Appeals Council's docket. In the 18 months of its operations twice as many cases have been appealed as have been decided. There are now awaiting decision about the same number of cases that have been decided throughout the council's life. A record of monthly operations

<sup>56</sup> Unless appealed by the applicant to the Board within 4 months from the date upon which notice of the decision is mailed to the appellant at the address furnished by him, any decision on the merits by the Appeals Council is final (sec. 260.03 (b)). There has been no formulation of principles regarding rehearings before the Appeals Council, and the question has not yet arisen.

shows that this pile-up continues, with each month bringing in more new cases than are decided.<sup>57</sup>

Three chief reasons are assigned by Board officers for the Appeals Council's backlog. One is that, when the Board's operations began late in 1937, there was a tremendous number of applications, many of them by ineligible, which immediately confronted the Board. The second reason is that the burden of writing the decisions has fallen largely upon the chairman and his assistant, thus creating a bottleneck. The third is that many of the cases involve the question of employment relation, a "fact question of such complexity as to require detailed and often lengthy consideration as well as additional investigation." It is stated that the problem is not regarded as a serious one since fewer original applications are being made and fewer ineligible are applying. Therefore, denials, which lead to appeals, may be expected to decrease. Although the monthly figures cited in footnote 57 show that for the months of 1939 which were given, the appeals still outnumbered the decisions, many of the early 1939 appeals continue to be from the reservoir of old cases.

It is nevertheless difficult to account for the council's consumption of its time. It would seem that, in the course of 18 months, five persons, devoting a major part of the time to their task, could dispose of somewhat more than 310 cases.<sup>58</sup> An explanation, as noted in the preceding paragraph, is offered: Although five men consider the cases, the duty of preparing the written decision devolves upon the chairman

<sup>57</sup> The situation is reflected by the following figures:

Date	Number of appeals filed	Number of decisions made
1937		
March.....	1	1
1938		
February.....	4	1
March.....	6	8
April.....	13	5
May.....	21	18
June.....	27	15
July.....	24	18
August.....	42	10
September.....	18	17
October.....	24	29
November.....	33	5
December.....	28	
Total.....	240	126
1939		
January.....	38	15
February.....	41	24
March.....	70	41
April.....	79	9
May.....	58	10
June.....	42	53
July.....	42	32
Total.....	370	184
Grand total.....	610	310

<sup>58</sup> The Appeals Council has issued an average of approximately three decisions every four days. A section of the Board of Veterans' Appeals at the Veterans' Administration is said to dispose of as much as ten cases a day on occasion. It can be assumed, however, that the problems have become somewhat more standardized at the Veterans' Administration. That the slowness of the Council is in part due to the novelty of the problems is indicated by the fact that between November 1, 1939, and March 21, 1940, 240 decisions were issued.

and his assistant. Effective January 1, 1940, however, a new procedure designed to obviate this bottleneck will be instituted. It is planned to provide three separate channels for preparation of council opinions; the chairman is to prepare the more difficult opinions, and all others are to be prepared by the remaining four members of the council working in groups of two each. A second assistant is to be assigned to the council to aid its members in this work. It is submitted that this change is a salutary one.

*Proceedings before the Board—Appeals from the Appeals Council.*

*The right to appeal to the Board.*—Section 260.03 (a) of the regulations provides that—

Every appellant shall have a right to a final appeal to the Railroad Retirement Board from any decision of the Appeals Council by which he claims to be aggrieved.<sup>49</sup>

As already described, the Appeals Council may also certify a case to the Board as an "automatic appeal."

There have, thus far, been 38 appeals to the Board from decisions by the Appeals Council. In these 38 appeals, the Board has issued 19 decisions, with 19 still pending. Thus far, no Board decision has reversed the decision below. Of the 38 cases coming to the Board from the council, only one was an "automatic appeal" in which the record was certified to the Board by the council, without a decision by the latter.

*Scope of Board review.*—It is stated that "An appeal to the Board is in the nature of a review of the record on which the Appeals Council decides." The decision will be reexamined in full, as in the case of appeals to the Council. Specification of errors is requested, but appellants ordinarily are unable properly to list specifications. As will be noted from the discussion which follows, the fundamental characteristic which differentiates the Board's appellate procedure from the Council's procedure is that the Board's consideration, with certain exceptions, is confined to the record as made below (sec. 260.03 (e)).

*The nature of the review; oral argument; new evidence.*—Under section 260.03 (e)—

further argument [before the Board] will not be permitted except upon a showing by the appellant that he has arguments to present which for valid reasons he was unable to present at an earlier stage, and in cases in which the Board requests further elaboration of the appellant's arguments.

In fact, in only one case has there been appearance before the Board. This case involved a question of statutory interpretation upon which the Board wished to hear oral argument prior to adjudication.

Section 260.03 (d) also provides that "Upon final appeal to the Board, no additional evidence shall be received." However—

In the event that the appellant shows that he is ready to present further material evidence, which for any reason he was not able to present to the Appeals Council, the claim shall be referred back to the Appeals Council for presentation of the further evidence upon receipt of such further evidence, the Appeals Council shall transmit to the Board a transcript thereof together with its recommendation to the Board for final decision.

<sup>49</sup> The appellant must appeal within 4 months of the date of the mailing of the Appeals Council's decision. Failure to appeal within the time limits, or in accordance with the manner prescribed by the Board, forfeits the right to appeal.

Except in the case of automatic appeals, the appellant must execute and file an appeals form as a condition precedent to the Board's consideration of the case. The appeal form is similar to that described above in connection with appeals to the Appeals Council, except that there is no space provided either for noting an intent to submit additional evidence or for requesting a hearing.

It is submitted that the restrictive features of these provisions are proper and sound. As stated by the Board, "Since there has already been full opportunity for presentation, both of argument and evidence," there should be no right further to prolong the proceedings unless for good cause shown. With a substantial part of its time devoted to administrative problems, and with the future added burdens which the Unemployment Insurance Act will impose, the Board should not be harassed by litigants who, although they have had two opportunities to present their cases—first to the Retirement Claims Division, and then to the Appeals Council—might wish to begin all over again before the Board.

For the same reason, it is believed that, in the event that the appellant can fulfill the requirements pertaining to new evidence, it is sound to insist that such evidence be presented to the Appeals Council rather than the Board. No serious hardship is imposed upon the appellant. For the Board itself to hear new evidence would open the door to transforming it into a hybrid body, partly appellate, partly of original jurisdiction. The function is the Appeals Council's, and it seems wise to permit the function to rest there.

Somewhat more difficult of justification is the rule requiring that, in case new evidence is taken before the Appeals Council, the record thereof must then be transmitted to the Board with the council's recommendation. The Appeals Council does not itself issue its decision. The symmetry preserved by the regulations up to this point is broken by requiring, at least in theory, that the Board make the initial decision on the new evidence. It may be argued that rather than "submit its recommendations," the council should issue a supplemental decision, and that if, as is required, the evidence is new and material in fact, it may alter the original decision and save the necessity of appeal to the Board. Against the suggestion that in this situation the council be permitted to issue its own supplemental decision, it is argued that an appellant whose claim has once been rejected by the council is likely to feel, if the council again denies his appeal, that his case had been prejudged and that he will immediately appeal again to the Board. Of course, this argument would not obtain where the council held that the new evidence warranted a reversal of its former decision. But it is further urged that it is probable that there will arise few cases in which the requirements for the presentation of further evidence can be satisfied (none has thus far arisen), and that therefore decision by the Board involves a very slight increase in administrative burden and it also short-cuts cases which would otherwise be extremely long-drawn out. If this be true, no reason is apparent why the Board should not complete its adjudication of the case by issuing its decision without the intervention of the Appeals Council at all. The simplest solution, thus, would seem to be altogether to omit remand to the council for the latter's "recommendation."

*Preparation of the Board's decision.*—When a case comes before the Board, it is not assigned to a single member, but rather, the examination of the files and the preparation of the decision is the responsibility of each member. It is stated that, in fact, each Board member does examine the case in its entirety.

In most cases, the Board does not assign the case to staff members for analysis and recommendations. On occasion, however, the

Board may consult its staff members. Thus, for example, if a novel legal question is presented, the issue may be submitted to the General Counsel for analysis and recommendation. Similarly, if a difficult question concerning the employer's rules and practices is involved, the Employment Relations Rules Unit may be consulted. Such conferees may or may not have had some contact with the case in its early stages. In any event, since the matters concerning which consultation is held are on technical or legal issues, rather than questions of fact, this consultation appears unobjectionable.

The Board does not prepare its own opinion and the practice has varied as to who is assigned the duty of drafting the opinion.<sup>60</sup> Until recently, it has been more usual for the chairman of the Appeals Council to prepare a tentative draft. Now it is more customary for the General Counsel's office to do this work. It is stated that there is a possibility that the practice of the chairman of the Appeals Council's submission of a draft will in the future be altogether abandoned. Such a step appears to be a wise one, although, since as a matter of fact the Board members examine the record in its entirety, the question may be of comparative unimportance. The objections to the participation of the Appeals Council are two: (1) The Appeals Council has already reached a decision, written an opinion, and so presumably made up its mind, it is doubtful whether it can supply a fresh slant; (2) as already indicated, the Appeals Council now is overburdened.

The practice of assigning the draft work to the General Counsel's office may also be objected to on the ground that, especially since these are denial cases, the General Counsel's office may have had more or less intimate contact with the case in its earlier stages. In rare instances, where the adjudicator has submitted the question whether the evidence is sufficient to support a finding of fact, this contact may even have extended to an examination of the facts. Yet, with the inevitable subsequent shaping of the case in the interim, as well as the multitudinous other questions submitted to the General Counsel's office, the latter is not likely to have any very steadfast preconceptions, if it has any at all, concerning the case. Again it may be pointed out that the decision is reached by the Board after its careful examination of the record. Under these circumstances, and since (1) the draft will probably be prepared in the counsel's office by a different attorney from the one who may previously have worked on it, and (2) the earlier opinion of the General Counsel's office on the sufficiency of the evidence to support a particular finding does not commit that office to any particular position, for it merely defines the permissible limits within which findings may be made, it seems fair to conclude that there can be no substantial objection to the practice.

The tentative draft is not submitted to the appellant, but to the Board members only. This draft is sometimes revised by Board members, sometimes referred by them to the General Counsel for revision in accordance with the Board's instructions, sometimes adopted intact, but when prepared initially in the General Counsel's office, is usually adopted by the Board in toto.

<sup>60</sup> In general, the Board's decision is similar to the council's, which has been described above. The decision is accompanied by a reasoned opinion, including summarization of the evidence, findings of fact and conclusions of law, although these may not be labeled as such. The opinion may be somewhat longer than the Appeals Council's, discussing the contentions at fuller length.

*Finality of decisions; rehearing.*—The rules pertaining to rehearings in application cases have not been completely codified. Thus far, there have been only two applications for rehearing or reconsideration. In each case the appellant was informed that the regulations make no provision for reconsideration of such cases. It was added, however, that if “new evidence is developed which there is good reason to believe might affect [the appellant’s] eligibility for an annuity, the matter of procedure should then be presented to the Board.”

The Board apparently expects to insist, before granting reconsideration, that the applicant submit in writing good reasons therefor, if it allows reconsideration or rehearing at all. This, too, it is submitted, is sound practice, well calculated to protect the Board from constant harassment and to provide a reason for careful decision in the first instance. It is clear that, with the thorough consideration of each case at three separate levels, there is no hardship imposed upon the applicant in closing the doors to further reconsideration except in extraordinary situations.

*Internal administrative finality; reopening of final decisions.*—The act does not expressly authorize the Board to change its decisions after entry. Nevertheless, the Board has interpreted section 9, requiring the Board to make adjustment where erroneous payments have been made, as “necessarily implying” that the Board must change any decision discovered subsequently to be erroneous. The General Counsel, on August 16, 1939, prepared an exhaustive memorandum on “Reopening by the Board of final decisions on claims for benefits” under the act. His conclusions, adopted by Board Order, are summarized as follows:

A final certification must be reopened for reduction or cancellation—

- (a) When the certification was made on the basis of a clear and obvious mistake of fact.
- (b) When the evidence as of the date of the certification does not reasonably support the certification.
- (c) When the certification was made on the basis of a clear and obvious mistake of law.
- (d) When the certification, even though made on the basis of reasonable evidence and law, was induced by fraud or other fault of the applicant.

A final decision denying a claim must be reopened in the circumstances set forth in (a), (b), or (c). In any other case, a final decision denying a claim may be reopened in the discretion of the Board. The General Counsel has also concluded that the right and power to reopen and revise decisions is not affected by a change in officers of the administrative agency. The memorandum indicates clearly, however, that “clear and obvious mistake” of fact or law should be interpreted strictly and that, in those cases where reopening is discretionary, the discretion should be sparingly used and not exercised on the basis of mere differences of judgment.<sup>61</sup>

If the discretion to reopen closed cases were to be loosely utilized, awards or denials might too easily become the football of changes in administrative personnel, with consequent loss of standing of the Board and of its decisions.

<sup>61</sup> His discussion insofar as it pertains to the Retirement Act and the future conduct of the Board on this question is set out in the appendix, *infra*, p. 49 ff.

## TYPE II. STATUS OR COVERAGE CASES

Major questions in connection both with the determination of claims and with requiring the furnishing of employers' reports are whether a corporation or individual is an employer within the meaning of the act, and, if so, whether particular groups or classes of those working for him are employees under the act. Since the beginning of its operations, the Board has passed upon more than 7,000 such questions. In order to assist it in disposing of the more difficult problems within the category, the Board has prescribed an elaborate procedure for hearings.

In an overwhelming number of instances, the question whether employment by a particular company is creditable toward annuities under the act can be disposed of forthwith; there is usually no doubt of the employees' status, and hearings are neither sought nor helpful. The question may be for practical purposes long since settled by the Interstate Commerce Commission,<sup>62</sup> and the parties concede status. Of the more than 7,000 jurisdictional questions thus far disposed of, only 194 have been referred to the Board directly by the General Counsel's office for an opinion. In only 13 cases (only two of which have been finally decided) have there been hearings.

*Effect of status determination.*—Once the Board's determination is reached, the question for that particular employer or class of employees is considered settled, and the issue is not thereafter retried in each application case.<sup>63</sup> After determination, the name of the employer, or the class of employees, is added to a list which is distributed to the Board personnel, for consultation in each case.<sup>64</sup>

The status determination affects not only the rights of individual applicants but also certain duties of the employer. A decision that a corporation is an employer under the act involves a determination that the employer must submit a report to the Board every 3 months concerning the compensation earned by each employee for service during each month of such quarter. Willful failure or refusal to submit such reports is punishable by a fine of not more than \$10,000 or by imprisonment of not exceeding 1 year. Imposition of such penalty is by ordinary judicial proceedings in the United States District Courts where, presumably, the issue of status under the act may be relitigated.<sup>65</sup> While the matter is not altogether free from doubt,

<sup>62</sup> Sec. 1 (m) of the act defines "carrier" as "any express company, or carrier by railroad, subject to pt. I of the Interstate Commerce Act." A prior determination by the Interstate Commerce Commission is regarded by the Board as a precedent, and the Board will, without more, conclude that the employer is within the act, and will not require formal hearings. Whether the Board would hold a hearing on the insistence of a carrier who has already been determined by the Interstate Commerce Commission to be subject to pt. I of the Interstate Commerce Act is a question which has never arisen, since there has not been such insistence. Theoretically, of course, the Board must make its own determination. It is further to be noted that others than "carriers" are subject to the Retirement Act—those controlled by carriers, etc.

<sup>63</sup> The question of an employer's status may have been presented for the first time by the filing of an application for an award. In such a case the adjudicator to whom the application has gone in normal course, refers the case at once to the General Counsel with a request for advice. Adjudication of the claim is then halted pending determination of the status question, by the procedure about to be described.

<sup>64</sup> As the act is now drawn the Board, technically speaking, is probably under a duty to make a determination of employment status in each individual application case, as it arises. The advantages of a prior, sweeping determination are, however, obvious: both applicants and the Board gain by the present practice. Yet, if an applicant insisted upon having opportunity to show that he had been employed within practice. Yet, if an applicant insisted upon having opportunity to show that he had been employed within practice. Yet, if an applicant insisted upon having opportunity to show that he had been employed within practice. Yet, if an applicant insisted upon having opportunity to show that he had been employed within practice.

<sup>65</sup> Status determination by the Board in no way affects the issue of taxability under the Carriers Taxing Act. The Bureau of Internal Revenue must make its own determination concerning the question of whether the employer or employees are taxable. Although in fact there is close cooperation between the two agencies as discussed below, and each respects the determination of the other, it cannot be said that from the Board's status decision flow any duties to pay taxes. Of course, as to the issue of taxability, again the issue of coverage would be relitigated in court if an employer resists the imposition of the tax.

it seems that the Board's determination of status theoretically has no legal effect; nevertheless, its practical consequences are very considerable. Hence, even though in point of law the Board's conclusions could probably be reached without notice or an opportunity to be heard, it is appropriate that a procedure be provided whereby the affected parties may inform the Board's judgment by presentation of relevant factual data.

*Preliminary determinations.*—Inquiries concerning status are in all instances submitted to the General Counsel's office, where they are assigned to staff members for preliminary investigation. The records of the Interstate Commerce Commission are examined; Poor's or Moody's or other manuals are consulted; and a complete questionnaire is sent to the employer.

After the necessary material has been gathered and examined, the General Counsel may without further delay make a determination concerning status. In most cases, the determination is made without reference to the Board; in a comparatively few cases, as pointed out above, the question may be submitted to the Board accompanied by the General Counsel's recommendations. Such recommendations are stated to "carry great weight and are ordinarily accepted."

*Notice of determination; procedure leading to a hearing.*—Upon the General Counsel's preliminary determination of the status question, the employer, and, if there is such, the applying or inquiring employee, is notified by mail of the determination. The addressee is not at this point specifically advised of his right to a hearing.

In all but a handful of cases, the preliminary determination ends the question and no further action is taken. In some cases, however, the employer or a labor organization representing the employees might disagree with the General Counsel's determination. If the Board is notified of such disagreement, there may be further correspondence or conference, which sometimes convinces the disagreeing party of the correctness of the determination. On receipt of an expression of disagreement, however, the Board notifies the disagreeing person of his right to a hearing on the issue.<sup>66</sup>

*Notice of hearing.*—Upon a request for a hearing, labor organizations, railroad associations and the employers known to be interested are sent a notice of hearing. In addition, various Government agencies, the Social Security Board, the Bureau of Internal Revenue and, in some cases, the National Labor Relations Board—are notified of the hearing. The Board also has recently adopted the practice of publishing notice of the hearing in the Federal Register.

<sup>66</sup> In at least 5 cases of the 13 which have been formally heard, neither the General Counsel nor the Board made any preliminary determination at all. Pending consideration of the problem, either the employees or the employer involved have requested a hearing and such hearing has been granted forthwith.

In one class of case, disagreement with the General Counsel's conclusion results in transference of the proceedings to the Interstate Commerce Commission.

Sec. 1 (a) of the act provides that the term "employer" shall not include "any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railway system of transportation now or hereafter operated by any other motive power." Under the statute, the final power of determination now or hereafter in the hands of the Board, but the Interstate Commerce Commission is "authorized and directed upon request of the Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

Sec. 202.13 of the regulations prescribes the procedure in this type of case. The General Counsel is to review the submission of information pertaining to "the history and operations of an electric railway with a view to determining whether it is an employer \* \* \*." If in the opinion of the General Counsel an electric railway has certain characteristics set forth in the regulations "he will conclude that it is an employer under the act." If the operator concurs in the General Counsel's opinion, the decision will be made final by the Board. If the operator disagrees with the counsel's opinion, the counsel will forward the file and his own opinion to the Interstate Commerce Commission, which will thereafter determine the question after hearing.



In the notices sent by mail, the specific questions to be heard are set out, and those questions, as approved by the order of the Board and set for hearing, are read into the record at the opening of the hearing. The questions, for example, as set in one case examined were: "Are the individuals engaged since May 25, 1920, in stated repair service and moving of ore performed by the Y Company for the X Railway, when such employees were compensated by the Y Company, employees? Has the Y Company operated as a carrier? Has the Y Company been under common control with the X Company?" The notice in the Federal Register is broader; a recent one reads as follows:

Notice is hereby given to all persons interested \* \* \* [that] a hearing will be held on [date] at [hour] at [place] at which time evidence concerning the employer status of the following companies [named] and the employee duties of the individuals engaged in the operations of these companies will be received by me.

(Signed) \_\_\_\_\_,  
General Counsel.

In its present form, it may be doubtful whether such a notice as this appearing in the Federal Register serves any useful purpose, although it is argued that a notice in more specific terms "would probably have been unduly restrictive." The names of the companies, however, give some clue to the nature of the question—and this was the case in the above-quoted notice, since the names showed all the companies to be coal companies. Where a different type of question may be in issue, such question, it may be assumed, would be more specifically set out.

*Parties to the proceedings.*—The Board has not formulated, and does not expect that there will be any necessity of formulating, any rules governing participation in the hearings concerning status. Ordinarily, only the particular employers and the labor organizations representing their employees appear and participate. In only one case discovered has there been a petition for intervention. The request was made by a labor organization after the proceedings had begun; the request was granted and the intervener was given full right to participate.

All parties are entitled to be represented by counsel, and in fact, they almost always are so represented. In some cases, the labor organizations may not be represented by attorneys, but rather by lay representatives. In the event that the parties are not represented by counsel, the Board does not assign counsel to them.

*Time and place of hearings.*—The Board has no fixed rule regarding the amount of time to elapse between notice and hearing. Ordinarily, a date between 2 and 4 weeks after notice is set. The date set, however, is flexible. The notice contains a given date "or such other date as is arranged [by the examiner] to meet the convenience of interested parties." It is stated that "any reasonable requests for postponements" are granted, and that "in every case thus far it has been possible to arrange a date satisfactory to all concerned."

Whether hearings are held in the field or in Washington depends on the availability of evidence and of witnesses. About one-third of the hearings thus far held have been held in the field—at the location of the activity or service in question.

*The conduct of the hearing—the trial examiner.*—Status hearings are conducted by trial examiners under section 250.13 of the regulations which provides—

The Board may refer proceedings to an examiner for hearing and determination of any and all issues raised. Such appointment made in writing and entered upon the minutes of the Board shall constitute authorization for the examiner to preside and conduct hearings, require and compel the attendance of witnesses, administer oaths, take testimony \* \* \* and do such other acts as may be necessary for the hearing and determination of the issues referred.

As will be noted from this regulation, the Trial Examiner is given full power in the premises. Although there are no rules of practice or procedure governing his conduct of the hearing, he takes an active part in its direction and in the clarification of issues. He has authority to rule on contested motions, and may exercise such power either at once or at the time of his proposed report to the Board. A motion to dismiss, for example, has been "taken under advisement" and ruled on in the proposed report. The examiner also rules on all questions of evidence, invoking, on occasion, the familiar doctrine of admitting evidence "for what it is worth" and subject to the objection.

The examiner may himself question witnesses, either during the examination or after counsel have completed their examination. The examiner's questioning may be at considerable length; the stated purpose is "to perfect the record." The questioning may at times be solely of a clarifying nature; at other times it is to fill the gaps; sometimes it might even resemble cross-examination. It should be noted, however, that at least in emotional content, there is, in this type of proceedings, little difference between direct examination and cross-examination.

*Selection of the trial examiner.*—The Board does not have a separate staff of trial examiners, but attorneys in the General Counsel's office are selected ad hoc for each hearing. In some proceedings, the General Counsel has himself served as examiner. The Board states that "Examiners perform their regular duties under the supervision of the General Counsel, but are not supervised (except administratively) with respect to their activities as examiners." Examiners for the particular hearing are designated by the Board, ordinarily with the advice of the General Counsel. The designation is made at the time that the Board orders the hearing to be held.

It ought perhaps to be emphasized that the hearings on status matters should not be regarded as being analogous to a trial. A motion is wholly out of order, because the hearing is not against anyone, it is not on complaint, it looks to no coercive action. Although as stated above, the matter is not entirely free from doubt, it seems that the hearing is solely for the purpose of collecting information which interested persons may wish to lay before an official who is going to determine the attitude of a governmental body. For the sake of convenience and for its psychological value a formal hearing is held; but legally the hearing is no different from an office conference held in response to a telephone message from the General Counsel saying that he had been asked for an opinion and would appreciate having the advice of informed parties before he rendered it.

Hence, it is of no consequence—indeed, it is altogether fitting—that the examiner should be the General Counsel or one of his subordinates, even though the questions under consideration are ones concerning which that officer may already have formulated a tenta-

tive opinion upon the basis of then available data. It is, after all, the General Counsel who must be informed, and there would be obvious absurdity in insisting that a conference called for the purpose of advising him must at all events be conducted in his absence. True, decisions on questions of coverage are in form the Board's and not the General Counsel's. But the Board members are not lawyers, and the determination is in fact left by them to their legal adviser. Since, as pointed out above, the determinations are in essence made for the Board's own uses, there is clearly no impropriety, in law or in policy, in the Board's seeking the guidance of its chief counselor.

*The trial attorney.*—In some, but not all, of the status hearings, the General Counsel has assigned one of his staff to act as a sort of interlocutor. Examination of sample transcripts discloses that the Board attorney took an active part in the hearings. Examination in chief and first cross-examination is conducted by the parties, that is, the employer and the labor organization, with infrequent interruptions by the Board attorney in order to clarify an answer.<sup>67</sup> Thereafter the Board's interlocutor engages in extensive questioning—sometimes covering 20 or 30 pages of the transcript—which appeared in at least one transcript as "cross-examination." His questioning, however, is not in the nature of an attack on the credibility of the witness, but rather is an examination either to clarify or to bring out points perhaps unfavorable to but not emphasized by the witness.

Since the Board is not in the position of a complainant, and since, in status hearings, its chief function is to inquire into objective facts, the utility of a "trial attorney" is not immediately apparent. The use of a trial attorney originally arose, however, out of the fact that in the earliest hearings, the General Counsel served as trial examiner. The press of his other duties made it impossible for him to familiarize himself in advance with the details of the case and, therefore, it was found useful for a trial attorney who was familiar with such details to be present. Since the trial examiner is permitted to, and does, participate freely by examining witnesses, calling for evidence, and introducing exhibits, the use of a trial attorney in cases where the General Counsel does not preside would seem to be a waste of available manpower.<sup>68</sup>

*The record of the proceedings; stipulations.*—A complete stenographic record of the hearing is made and transcribed, and parties are furnished a copy of such record in accordance with section 250.15 of the regulations, which provides—

When the taking of testimony has been completed the examiner shall as soon as practicable mail to the parties at the address stated in their appearances a free transcript of the record of the proceedings had before the examiner. In the event that more than two parties have appeared at the hearing, the examiner shall make available as many copies of the transcript as there are different positions represented by requiring each group of parties representing the same position to designate the person or office to whom their one free copy shall be mailed.

<sup>67</sup> In status hearings, the employer first presents his case, followed by the labor organization. The trial examiner announces, however, that the order of presentations does not involve any question of burden of proof. Presentation of evidence follows the customary line of adversary judicial proceedings: Direct examination, cross-examination, redirect, recross, and so on. (In some cases, the process continues for considerable length. Although perhaps not suitable in proceedings of this nature, it would probably be difficult and unpleasant to attempt to curtail the game.) The evidence is adduced by the question and answer method rather than by permitting the witness to make a statement and tell his story. There is, however, no strict requirement as to succession of witnesses. It may sometimes occur that a witness is unable to testify on a particular point. He will be temporarily withdrawn; a second witness will testify; and then the first will be recalled.

<sup>68</sup> It is to be noted, in this connection, that the use of trial attorneys in status hearings has become less frequent, and no attorney has been assigned to hearings within the last few months. It has not, however, been decided to dispense with them at hearings altogether.

Although stipulations are admissible, they have not in fact been widely utilized. Despite the fact that many of its cases are bitterly contested, the National Labor Relations Board has been successful in obtaining stipulations on the question of interstate commerce. It would seem that the Retirement Board should meet with similar success, and that the subject matter of status hearings peculiarly lends itself to stipulations. Examination of transcripts discloses material that is capable of being stipulated. Indeed, so much of the significant evidence is of an essentially noncontroverted character that there may be a real doubt as to whether hearings on these questions are necessary at all. There are those who hold the belief, however, that since there are many fine shadings in the facts and issues involved, stipulations would not be entirely satisfactory, for "you cannot stipulate inferences." Further, it is stated that attempts to obtain stipulations have not been entirely successful. The process of trying to agree upon stipulations has in the Board's experience been so "arduous" that it is felt to be a simple process just to "get the evidence in."<sup>69</sup> On the other hand, it is customary, before the General Counsel has made his tentative determination, to send a questionnaire to the employer. It may be possible to use the answer to this questionnaire as a basis for a stipulation and to winnow out through stipulation all but the few uncertain issues. If it were more clearly understood and articulated that the hearings were not adversary in nature or purpose, but has as their sole object the securing of relevant information, much of the present tedious "proof" of facts could be eliminated.<sup>70</sup>

*Procedure after the record is closed.*—The parties have a right to present oral argument before and file briefs with the officer who presided at the hearing, under section 250.15 of the regulations:

Thereafter, the examiner shall give all parties participating in the hearing the opportunity for presentation to him of argument upon both law and facts.

This sentence of the regulations follows the provision for mailing copies of the transcripts to the parties. The word "thereafter," therefore, contemplates oral argument after the hearing proper is ended. In fact, it is stated that parties are afforded opportunity to argue "in any reasonable manner at any reasonable time," although the parties have as yet rarely availed themselves of this right.

<sup>69</sup> The Board has taken the view that it is not, and will not be a party to a stipulation, but that the stipulation must be entered into between the employer and his employees. This view is apparently based upon the theory that in an application case brought subsequently, the individual employee's rights will be affected by the stipulation. But compare the procedure utilized by the National Labor Relations Board, where stipulations concerning the respondent's business are usually entered into only by the Board and the respondent. It is submitted that the Retirement Board's view in this respect derives from a misconception of the status proceedings as adversary affairs with a legal effect more than merely the process of informing the Board so that the latter can take a proper position. Neither the Board, the employer, nor the employees are at this stage of the proceedings "parties" in the technical sense. Nor are the employees bound by the stipulation for purposes of subsequent and separate application cases. It can be presumed, however, that in entering into a stipulation, the Board would be alert to protect the employees and to assure itself that the stipulated facts are correct.

<sup>70</sup> The Board has not developed rules of evidence, although it is clear that technical rules of evidence are not ordinarily applied. The trial examiner usually informs the parties of this with a statement at the opening of the hearing. Representative of such statements is:

"... this hearing, of course, is not intended to be anything in the nature of a court trial. We are having a hearing only for the purpose of developing the facts with respect to the questions at issue. We are not disposed to follow the technical rules of evidence, and we are, of course, allowing considerable latitude in the presentation of evidence.

"However, we do not expect the parties to go beyond the limits—that is, we expect them to confine themselves with a reasonable degree of latitude, to questions before the Board."

Despite announcements of this nature, objections of rather technical nature are made. Thus one case disclosed objections on the grounds that the testimony represented a conclusion; that it was not the best evidence; and that testimony was incompetent since the witness had no first-hand knowledge of the fact testified to. Although most of these objections were overruled, and exception was taken, one objection to a hypothetical question and one objection on the ground that the testimony was "argumentative and a conclusion" were sustained.

Since, strictly interpreted, the regulations allow oral argument only after the transcript has been completed and mailed, and since this interpretation would work a hardship where the hearing is held in the field—either requiring the parties to follow the examiner to Washington to argue orally or requiring the examiner to return to the field after the record has been transcribed in order to hear the argument—it may be wise expressly to provide that oral argument, when requested, may be had immediately at the close of the hearing. Because the evidence is sometimes statistical and highly technical, however, so that a helpful argument could be made only after opportunity to study the evidence, the alternative right to argue orally after the transcript is completed should perhaps be preserved.

In general, the parties have chosen to file briefs rather than argue orally; oral argument, when made, is transcribed and included in the file. No rigid rule fixes the time for submitting briefs; at the close of the hearing, after the examiner has informed parties of their right to argue and file briefs, the examiner and the parties agree upon the time to file briefs. Usually, the time so agreed upon is either thirty or sixty days after the transcript of the record or after the post-hearing evidence has been mailed to the parties. Copies of briefs are mailed to all the parties.

*The examiner's report and exceptions thereto.*—Section 250.15 of the regulations provides that—

Upon conclusion of the proceedings before him, the examiner shall prepare an examiner's report \* \* \* The report shall set forth the examiner's findings of fact, conclusions of law, and recommendations as to decision. The report may also contain such discussion of the questions raised, both legal and factual, as the examiner may desire to present to the Board.

In only 2 of the 13 hearings thus far held has the trial examiner's report as yet been issued. The parties are neither required nor requested to submit their own proposed findings of fact, although a rough form of proposed findings may sometimes be included in their briefs.

No time limit is set upon the examiner's submission of his report, but section 250.15 of the regulations requires that when the report is completed, a copy "shall be served by the examiner upon each party participating in the hearing by mailing such copy to him at the address stated in his appearance."

Complete regulations governing the filing of exceptions have been formulated in order that the process may serve the useful purpose of defining the issues. Within 20 days, or longer upon application and for cause shown, of the mailing of the examiner's report, each party "shall \* \* \* file with the Board and serve upon other parties [by mail] \* \* \* such exceptions in writing as he desires to make to the examiner's findings of fact and conclusions of law." Precautions are wisely taken against the practice obtaining at some other administrative agencies, of indiscriminate exceptions (sec. 250.15):

Each exception shall specifically designate the particular finding of fact or conclusion of law to which objection is taken, and shall set forth in detail the grounds of the objection. General exceptions and exceptions not specifically directed to particular findings of fact or conclusions of law will not be considered by the Board. Exceptions to findings of fact shall make specific reference by page number to those portions of the record upon which reliance is placed.

There has been insufficient experience to test the result of these requirements; of the two cases thus far decided by the Board, exceptions were taken to the report in only one. It is felt that the mere presence of the regulations serves the healthy purpose of localizing the parties' energies. It is submitted that any attempt along these lines is a worthy one, but, if the attempt is to succeed, it is important that the Board strictly insist upon observance of its requirements.

Each party has the right within 10 days (or more upon application) after receipt of exceptions taken by other parties, to file with the Board replies to the exceptions. These replies are also required to make specific reference by page numbers to those portions of the record upon which reliance is placed.

*Proceedings before the Board; oral arguments.*—The regulations do not provide for oral argument before the Board, and no rules have been formulated governing such argument. In the only case in which request has been made for oral argument before the Board, however, the request was granted. Attorneys appearing before the Board for such argument were questioned by Board attorneys who were present to assist the Board.

The parties may file a brief on their exceptions with the Board, but only one has thus far been submitted. The briefs submitted to the trial examiner serve the purpose of presenting full argument.

*Preparation of the Board's decision.*—Section 250.15 of the regulations provides that—

The Board will render its decision upon the record, the examiner's report, and such exceptions and replies thereto as are made.

The Board is not always required, however, to read the entire record:

Where the record is voluminous \* \* \* the Board will consider only such points of law and fact as are specifically raised by the exceptions and such other points, if any, which it deems necessary for decision; and will examine only those portions of the record to which its attention is specifically directed, and such other portions of the record, if any, as the Board deems necessary.

A "voluminous record" is defined as one "more than 100 pages, including exhibits."

Findings of fact to which no exceptions have been taken stand confirmed, "subject only to the power of the Board upon its own consideration to reject or modify."<sup>71</sup> The regulations (sec. 250.15) further provide that "the examiner's report, while advisory only, shall nevertheless be presumed to be correct."

Since there has been only one status case in which exceptions have been taken, it is impossible to describe the Board's "practice" in considering cases of this type. The one case so far decided was not assigned to a single member of the Board, but was considered by each of the members. Nor was the case assigned to a member of the staff for analysis, recommendations, and preparation of the final decision. Instead, the task of evaluating the exceptions and arguments was left to the examiner who heard the case. The examiner discussed the issues and the exceptions informally with the Board and made such changes in his original report as he deemed necessary or as had been directed by the Board. Thereafter, the draft of the decision was submitted to the Board. It is considered highly improbable that the recommendations of the General Counsel's office will be rejected or

even substantially modified in cases of this general character, for status issues are regarded as peculiarly within the sphere of the General Counsel.

*The Board's decision; rehearings.*—The regulations provide that a decision made by at least two members of the Board shall constitute the decision of the Board. The decision is required to be in the form of a written opinion filed in the record. The opinion must set forth the reasons for the decision, either in full or by reference to previous decisions of the Board, or by adoption of the reasons stated in the decision or recommendation of a subordinate of the Board. Any decision made by two members of the Board shall constitute the unanimous decision of the Board, unless within ten days of the filing of the Board decision, a third member of the Board shall file a minority opinion setting forth his dissent and the reasons for his disagreement.

In form, the Board's decision is similar to the proposed report. To the material in the report may, however, be added discussion of the exceptions and the issues raised by them. In general, the decision is in the form of an argumentative opinion with findings of fact and conclusions of law.

#### TYPE III. OVERPAYMENT CASES

Section 9 of the act provides that if at any time the Board finds that payments of annuities or pensions have been erroneous, "proper adjustments shall be made in connection with subsequent payments" under the act "to the same individual."<sup>72</sup> There shall, however, be no recovery of overpayments from any person who "in the judgment of the Board, is without fault, and if, in the judgment of the Board, such recovery would be against equity and good conscience." Under section 255.03 of the regulations, all erroneous payments must be recovered unless waived. As of the end of September 1939 there had been 175 cases involving the question of overpayments.

*Procedure in overpayment cases: initial action.*—Recovery cases are begun upon the discovery that the Board has made an erroneous overpayment. The discovery may occur either when an employer or other member of the public informs the Board "of a situation in which there may have been an erroneous certification" or when an employee of the Board detects an error while examining the files of the case. If it appears that an overpayment has been made, the Chief of the Division of Finance will suspend subsequent payments and will notify the payee that payments have been suspended pending adjustment. Such initial suspension will occur: (1) when audits initiated by the Division of Finance "indicate the existence of an overpayment"; or (2) upon the receipt of an order from a Board member, the Secretary, the Director of the Retirement Claims Division, or the General Counsel; or (3) upon receipt of a form entitled "Request for Suspension of Overpayments" properly issued by an employee of the Retirement Claims Division, authorized by the Board to certify or deny claims for benefits.

<sup>71</sup> In fact, this latter phrase is precautionary only. Where no exceptions are taken, the Board intends to leave the examiner's findings undisturbed.

<sup>72</sup> For the circumstances under which a case involving overpayment will be reopened, see p. 32 above.

*Procedure for the taking of further action.*—Immediately upon such suspension, the Chief of the Division of Finance notifies the Director of the Retirement Claims Division of the action, and transmits to him the original of the stop payment order.<sup>73</sup> At the same time, the Director of the Retirement Claims Division is notified of the “indicated cause and amount of overpayment.”

The Director of the Retirement Claims Division in turn notifies the officer who originally certified the award by forwarding to him the stop payment order “for attention and incorporation into the file.” The certifying officer then transmits the file to the head of that division which was responsible for the adjudication of the claim in the first instance. The certifying officer will also transmit such “comments” as he deems necessary.

The chief of the division which adjudicated the claim will investigate the question by examination of the files,<sup>74</sup> and will “ascertain \* \* \* whether or not an overpayment has been made.” The division chief must then report his finding to the Director of the Retirement Claims Division, who, in turn, must notify the Chief of the Division of Finance. If an overpayment has not been made, the suspended benefits will be reinstated. If the Director of the Retirement Claims Division determines, however, that an overpayment has been made, the payee will be notified of the cause and amount of the overpayment and will be requested either to pay the amount immediately or to “set forth in detail the reasons, if any, why full payment \* \* \* should not or cannot be made.”

Pending reply from the payee, the claim file is transmitted to the Actuarial Bureau for recomputation of the annuity or pension for the purpose of assisting the Board in determining whether a particular method of recovery should not be employed.

In a large number of cases, the amount of the overpayment has been small and the payee has voluntarily returned the amount due. Where, however, full repayment is not made, the chief of the division in the Retirement Claims Division which originally adjudicated the claim, examines the file and the individual’s reply, if any, “and on the basis of the facts contained therein and in the light of his general knowledge” shall make a recommendation to the Board as to whether overpayment shall be waived. Such recommendation must include a statement of facts and considerations upon which the recommendation rests. The report must further include all information necessary to a determination whether recovery would be against equity and good conscience.

If this report can be made on the basis of information in the file and the individual’s reply to the notifying letter, there is no further investigation. If more information is necessary, further investigation will be made, usually by correspondence and sometimes by field investigation.

The report of the division chief, together with the comment of the Director of the Retirement Claims Division, is submitted to the Board. The Board’s ruling is communicated to the individual concerned. No provision for hearings has been made and none has been held.

<sup>73</sup> Copies of the order are also transmitted to the Treasury Department.

<sup>74</sup> Apparently it is contemplated that at this stage the “files” will include not only the material as of the date of the adjudication but material subsequently added which bears on the question of overpayment, fraudulent misstatements, and the like.



As already indicated, the amount in issue is ordinarily small, and the fact of overpayment is easily ascertainable by computation or by records. Less easy to establish are the elements entering into the question of waiver<sup>75</sup>—whether the payee was without fault (whether he knew or had reason to know of the overpayment) and whether recovery would be against equity and good conscience (“the extent to which the individual is dependent upon the current payment of his annuity or pension for the necessities of life” and “whether the individual has, by reason of the erroneous payment, changed his position in such manner as to make recovery a severe hardship”). These factors would seem to be best determined by a method of personal scrutiny and analysis. The matter is, by the definitions in the regulations, of grave consequence to the individual. A burden of proof is, in effect, placed upon the payee and in many instances he may be ill-equipped to do a convincing job by correspondence.

Under these circumstances, it is suggested that if the payee upon being notified of overpayment, makes a claim of hardship, etc., which is prima facie valid, field investigation be invoked unless the sum is entirely trivial. Perhaps, rather than field investigation, the personnel of the Unemployment Insurance Act may in the future be utilized so that the payee claiming hardship may obtain hearing on the issue.

## V. RULE MAKING

*Issuance of rules and regulations.*—The Railroad Retirement Board is not, in the broad sense, a regulatory or a policy determining body, and hence the rules and regulations of the Board are administrative implements of an interpretative or procedural nature promulgated to effectuate the policy of the statute. No formal distinction is made between “procedural” and “substantive” regulations, but the General Counsel is authority for the proposition that 75 percent of the regulations are “substantive” in nature, i. e., interpretations of the act.

Authority to issue regulations is specifically conferred by the statute. Section 10 (b) of the act contains a general authority and additional specific provisions appear in other sections of the act. There is no separate unit established to draft and issue regulations; rather suggestion for a regulation may be first made by any bureau or division head. Generally, however, the actual drafting is done in the office of the General Counsel, and in all cases the draft is reviewed by the General Counsel before submission to the Board. Consultation is had among the members of the Board and various bureau heads depending on the subject matter of the particular regulation.

Rules of the Board, also adopted by the Board, govern its general structure and organization. Administrative orders are issued by the chief executive officer. Supplementary regulations are issued by the heads of bureaus or subdivisions with the approval of the head of the branch.

<sup>75</sup> Thus far, the issues in overpayment cases have been simple. Typical cases have been those where a payee has obtained a part-time job with his labor organization, earning a small remuneration. He may forget, or not know, that the Board must be notified of this. The Board will then seek to recover the amount of the remuneration thus received. In most cases, the payee has returned the necessary amount forthwith.

## PROCEDURE LEADING TO THE FORMULATION OF RULES AND REGULATIONS

There is usually, except as noted below, no public hearing before issuance of regulations, but interested parties are free to submit proposed regulations to the Board at any time. While no actual draft regulations have ever been submitted as such, suggestions have been received (usually with reference to specific cases or situations) the substance of which has ultimately been embodied in the regulations. The view has been expressed that "because of the make-up of the Board, the interested parties have direct representation at all times."

In some instances, the Board has on its own initiative consulted with labor unions and railroad management with respect to particular proposed regulations. The Board does not have a representative of the "public interest" as such; however, the chairman of the Board is appointed by the President without recommendation from either carriers or employees and, under the terms of the act, "shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees."

There is no established rule with respect to initiation of a proposed regulation. While normally the Board itself or a subordinate thereof originates all regulations, suggestions from interested parties are entertained. Ordinarily, the Board conducts an informal investigation, using members of its staff for that purpose. Since regulations usually establish interpretations of law or rise out of administrative necessities and are not regulatory in character, there is little occasion for the investigation to go beyond a survey of the Board's experience. There is no uniform practice with respect to consulting affected groups. Where it is believed that such groups can contribute to the formulation of fair and equitable regulations, they are consulted. In large measure, therefore, action is taken on the basis of the expert knowledge and acquired information of the Board.

## REVISION AND AMENDMENT

There is no established procedure for reexamining regulations; they are currently reexamined in the light of new cases and circumstances. Such reexamination does not follow any time schedule; any given regulation may be reexamined at any time if circumstances warrant. Nor is there an established procedure for reexamination of regulations upon the request of interested persons. Whenever an interested person objects to a regulation (and this has occurred in a few instances), the question is fully explored and the basis for the regulation explained to the complaining person. This practice necessarily involves reexamination of the questioned regulation, and a change would be made if the Board became convinced that a change is either required or advisable. The Board does not ordinarily give any notice of proposed revision or amendment of regulations; recently, however, the Board considered the revision of the term "remuneration for time lost as an employee" and has scheduled a hearing on the matter. The notice of such hearing set forth the problems involved in detail. The procedure on revision is, with this exception, similar to that followed in the original issuance of the regulation. The sole difference occurs when the only change is in phraseology and not in substance; in such a case the revision is handled by the General Counsel without consultation with the affected bureau head.

## PUBLICATION AND REVIEW OF RULES AND REGULATIONS

All Board regulations are submitted for publication in the Federal Register. When the first codification of the regulations was published in the Federal Register, the Board purchased 5,000 copies and mailed them to persons on the Board's list of employers. In correspondence with individual applicants, pertinent regulations are always cited.

It is the opinion of the General Counsel that court review of a Board regulation can be had only in the course of a judicial proceeding reviewing a Board decision which involves application of such a regulation. Normally, the regulations become effective when promulgated. They may, however, merely assert the Board's interpretation of a statutory provision and in such case the interpretation is applied irrespective of the date of the regulations.

## VI. GENERAL

## AVAILABILITY OF BOARD RULINGS AND DECISIONS

In the brief period of its existence, the Board has issued a large number of instructions, interpretations, rulings, and decisions, and the material is accumulating at a rapid pace. Complaint is made by those within the agency that it is often difficult to correlate the material and keep it so that it is readily accessible. A similar complaint has been made by those outside the agency. At one hearing attended, the applicant's counsel who had come from a considerable distance, expressed regret at the fact that he had been unable to find prior decisions and rulings of the Board.

In order to expedite adjudication of cases and to prevent the material from overwhelming the Board's personnel, it is suggested that manuals, loose-leafed for additions, be made up, to contain the relevant material.<sup>78</sup> In order to assist those who wish to prepare and present cases to the Board, it is suggested that a summary of the Board's more important decisions be included in the annual report, and that a series of loose-leafed binders with mimeographed copies of the complete decisions of the Board be distributed to labor organizations and other interested groups. For these manuals and binders to serve a useful purpose, however, it is important that they be carefully indexed so that the relevant material is readily accessible.

It is to be noted that a major step has been taken in this direction by the Board's issuance of a small handbook entitled "Selected Questions and Answers on Railroad Retirement Act." Containing 171 questions and answers, it is divided into chapters according to subject matter, and is indexed with extreme completeness.

Current instructions to claims personnel are shortly to be superseded by a carefully indexed manual now in the course of preparation. Rulings by the General Counsel are distributed, after mimeographing, to all members of the legal staff as well as to other interested personnel. Each item bears a number which is correlated with a detailed cumulative digest system. Rulings on coverage are distributed by mail to the affected interests including some of the brotherhoods, the Association of American Railroads, the American Short Line Railway Asso-

<sup>78</sup> Individuals do attempt to make up manuals for their own use by collecting the instructions which are circulated. The system, however, is somewhat haphazard.

ciation, and other interested persons who request this service. On the basis of such information, the Association of American Railroads issued in February 1940, a greatly condensed summary of many of these rulings and distributed copies to its members. The Board itself recently issued its first law bulletin containing a compilation of all its rulings to date with respect to bus and trucking operations. Approximately a thousand copies were distributed to railroads through the Association of American Railroads; additional copies were supplied to labor organizations, to the Commerce Clearing House, to Prentice-Hall, and to other persons requesting copies. This publication is the first of a series contemplated by the Board; the second, now in process, will contain a compilation of rulings interpreting the statutory phrase "service in connection with the transportation of passengers or property by railroad." Finally, the Board will shortly begin to issue a monthly journal containing information on operating statistics of the Board; regulations, rules, and orders; legal opinions; personnel and organizational changes; and relevant legislation, as well as special articles. This will receive a sufficiently wide distribution both internally and to the public, to insure reaching all interested persons or their representatives.

#### COOPERATION WITH OTHER AGENCIES

As noted in passing, many of the problems dealt with by the Board are of interest to other federal agencies, and vice versa. The Bureau of Internal Revenue must impose the taxes which support the railroad retirement program; the Board is, of necessity, interested in the Bureau's rulings.<sup>77</sup> Similarly, questions may arise concerning whether an employee falls under the Retirement Act or under title II of the Social Security Act. Ordinarily, if he is not covered by the former, he is covered by the latter.

Accordingly, an agreement has been reached among these agencies whereby informal conferences are held among them on matters of mutual interest. Information is exchanged and advance discussions are held, in order that the agencies may arrive at mutually consistent decisions.

In the case of all coverage questions, the Retirement Board and the Bureau of Internal Revenue are equally interested. Although in one instance in the past, there was some difficulty when one agency reached a determination without consulting the other, and inconsistent decisions resulted which were harmonized only after a year's discussion, it is now the practice of each agency to submit its tentative conclusion to the other. Neither agency ordinarily issues its determination until an agreement has been reached (although neither agency has committed itself to this extent).

<sup>77</sup> As described above, the Retirement Act's definition of "employer" is identical with the Carriers Taxing Act. It is important, therefore, that the two agencies' rulings on coverage should be consistent, the one with the other.

As stated above, notice of hearing in status cases is sent to the Bureau of Internal Revenue and the Social Security Board, and an opportunity to participate is afforded them. In one or two hearings, these agencies had observers present, although they did not participate.

Ordinarily, each agency issues its regulations independently. In one instance, however, the Social Security Board and the Railroad Retirement jointly formulated regulations relating to acceptance, by the Retirement Board, of certain applications for old-age benefits under the Social Security Act as applications for annuities, under the Retirement Act.

## APPENDIX

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### REOPENING OF CERTIFICATIONS OR DENIALS OF AWARDS

[Memorandum of General Counsel, August 1939]

Turning to the Railroad Retirement Act, the statutory plan is designed to secure to certain classes of individuals who have retired a minimum income for life. The general plan is carried out by empowering the Board to adjudicate each claim in accordance with the terms of the statute, and to certify as to each claimant an annuity in the amount to which he is found to be entitled, or to deny the application. Since the plan embraces the employees of virtually the entire railroad industry of the Nation, it is obvious that a great number of claims must be handled (according to the Railroad Retirement Board's Weekly Review of July 22, 1939, on June 30, 1939, more than 130,000 monthly payments were in effect; for the fiscal year ended June 30, 1939, applications for employee annuities were received at an average rate exceeding 500 per week); moreover, claims must be adjudicated promptly, since most applicants have no means and are dependent on their annuities in whole or in large part. Inasmuch as the act must be administered by human beings, it is clear that to require perfection in certification would make reasonably prompt adjudication impossible. Congress must be presumed to have been aware of the nature of the administrative task and to have intended that the basis for certification be such as would be consistent with prompt adjudication of claims on a large scale. Therefore, Congress must have intended that in the absence of fraud or other fault on the part of the claimant, certifications made on reasonable grounds shall be correct (*United States v. Great Northern Ry.*, 287 U. S. 144 (1932); *Butte, Anaconda & Pacific Ry. v. United States*, 290 U. S. 127 (1933)); and not subject to subsequent reduction or cancellation. That is to say "correctness," under the act, is not a matter of abstract perfection, but depends upon the reasonable judgment of human beings, and a certification on reasonable grounds normally vests a right to payments for life (it is not suggested, however, that Congress could not itself revoke the right to annuities which have not yet accrued). This is further shown by the fact that, while section 2 (a) 3 of the act provides expressly for cessation of disability annuities when the disability ceases, no other provision appears in the act for revision of claims once adjudicated. Express provisions are common where it is sought to reserve power in the administrative agency to revise awards; for instance, the Director of the Veterans' Bureau is expressly empowered by the statute to review awards from time to time (see *United States v. Hines*, 25 F. (2d) 544 (App. D. C. 1928)).

On the other hand, Congress could not have intended to confer upon the Board any authority to act arbitrarily or capriciously, and thus distort the provisions of the act. The tradition that quasi-judicial bodies must act on reasonable grounds is so firmly established in our governmental system that it must be presumed that Congress intended finality to attach to Board action only when taken on a reasonable basis of evidence and law. Moreover, such a requirement would not impede reasonably prompt adjudication of a large number of claims. Hence, if the Board acts without color of law, or the action taken is not supported by evidence, such action, whether favorable or unfavorable, is erroneous and must be corrected retroactively. True, it was recognized that retroactive correction might work injustice and hardship in some cases, but provision has been made for this in section 9 of the act, authorizing waiver of recovery of erroneous payments in proper circumstances.

Other questions arise when, after rejection of claims, in whole or in part, on the basis of a reasonable regulation or interpretation of law, the regulation or interpretation involved is changed in such a way that the individual would now be entitled to certification, or to recertification in an increased amount. The same questions arise when new evidence, favorable to an individual, is presented after reasonable rejection of his claim in whole or in part.

The first thing to note is that since the denial was correct when made, the Board is under no duty to reopen the case. On the other hand, since the denial vested no right, the Board is not precluded from reopening such cases. Therefore, the matter of reopening such cases is within the discretion of the Board. In exercising its discretion, one important factor is the administrative burden that reopening might involve. For instance, a change of regulation or interpretation might affect a large number of cases; moreover the cases affected might be such that they could not be identified without examining thousands of files. These difficulties might be reduced to some extent by giving only general notice of the new ruling and reconsidering only those cases in which a specific request for reconsideration is made. Cases involving new evidence would not ordinarily present such difficulties since the evidence would usually be presented with respect to one particular case or, at most, with respect to a relatively small number of identified cases.

Another important factor involved in the exercise of the Board's discretion would be the amount of retroactive accruals that would result from reconsideration of the cases affected. In this connection, it would be proper for the Board to take into consideration the policy of the act, which is to provide for current income to annuitants or pensioners, as distinguished from payment of a large lump sum covering a past period, during which the individual had no expectation that the payment would ever be made. In these circumstances it would be reasonable for the Board to reopen only on condition that any award or increase resulting from such reopening should not be retroactive. (Denial of a claim does not, of course, prevent a new claim from thereafter accruing. For example, an individual might apply for an annuity on the basis of a claimed 30 years of service and age 60. Should the claim be denied on the ground that he had failed to establish more than 25 years of service, it is clear that the Board would be obliged to consider his claim for an annuity based on age 65 when he reaches that age.)