APPENDIX I

UTILIZATION OF MATERIAL NOT OFFERED AS EVIDENCE

Veterans' Administration.—Considerable informality attends the process of proving veterans' claims for pensions or compensation and, in fact, hearings are a more or less incidental step in establishing settlement. As a result, those who initially adjudicate the claims freely supplement the record or the files of the particular case with matters within their own knowledge. Notice is taken of various military facts—dates of wars, battles, embarkations, and the like. Official notice is particularly applied on the issue of disability in relation to the physical requirements of various occupations. Thus a series of principles regulating the evaluation of the disabling effect of diseases and injury has been formulated for application to particular cases. Each rating board—the body of original jurisdiction—has three members, one of whom, the medical rating specialist, is chosen "by reason of his actual experience in and knowledge of medicine, and the procedure and policy in regard to the handling of problems of disability ratings"; a second, the occupational rating specialist, is chosen "by reason of his familiarity with occupations, vocations, and employment requirements and their effect upon the application of the schedule of disability ratings * * * in evaluating the disabling effect resulting from diseases and injuries." As a result, the record is ordinarily devoid of detailed proof of the claimant's ability or disability or the physical demands of particular occupations. It is considered sufficient to show the precise injury or disease and, possibly, the general nature of his occupation or occupations. Whether or not the claimant is disabled, and, if so, to what extent, is not a subject of proof but of decision by the specialists who are chosen for their knowledge of diseases and the effects of such diseases upon capacity to engage in certain occupations.

United States Employees' Compensation Commission.—Perhaps because awards are regarded less in the nature of "privileges" which can be paid or withheld at the discretion of the agency, the mechanics of official notice taken by the United States Employees' Compensation Commission are somewhat more formalized than those of the Veterans' Administration. Paragraph 41.8 of the Compensation Commission's Rules and Regulations provides that "All evidence upon which the deputy commissioner relies for his action shall be contained in the transcripts of testimony either directly or by appropriate reference * * *." The rule, however, does not preclude the deputy commissioner's utilization of official notice, since included in the "evidence" upon which he relies may be the specialized knowledge which he has acquired in the course of the execution of his duties, concerning the incidence of injuries and illnesses. The deputy's ordinary

practice is to state for the record in general form and perhaps incidentally as an introduction to one of his own questions, what he knows relative to cases of the same type. Even if the deputy fails to make this statement for the record, however, he may invoke official notice. Thus, if the record is silent on whether conjunctivitis is a permanently disabling disease, the deputy may utilize his knowledge concerning pink eye and find that it is not permanently disabling. He may not, however, make a finding contrary to the uncontradicted evidence in the record despite his knowledge that such evidence is erroneous.

The Railroad Retirement Board's use of official notice lies in the field of railroad practices and facts. The Appeals Council, before which the first hearing in the process of adjudication is held, is required by the rules and regulations to base its finding on the record; nevertheless the Council, composed of men with experience in and with railroads, will take notice of "facts within the range of their knowledge peculiar to the railroad industry." "Railroad facts" become relevant in two types of situations: (1) Where there is an issue concerning the claimant's total and permanent disability for regular employment for hire; and (2) where there is an issue of the claimant's status either (a) concerning the question whether the claimant is an employee within the meaning of the Act, or (b) concerning the question whether the employer is a carrier within the meaning of the Act. On the issue of disability, the adjudicator's knowledge of the several occupations on a railroad, and the demands of such occupations, is utilized and testimony of the mechanics of operating a locomotive, for example, is not taken. On the issue of status, there are often general investigations or hearings to determine whether an employer is a carrier, or to determine the rules and practices of a carrier so that it can be decided whether a claimant was an employee on a given date. Such determinations are thereafter regarded as of general application and are utilized in subsequent decisions without requirement that the question be relitigated for purposes of the particular claim. Although the mechanics have not been fully articulated, it is probable that in the particular case parties would be permitted to undertake rebuttal of prior determinations; but no formal procedure for incorporation by reference or notice of such determinations has been yet devised.[69]

The remaining agencies utilize official notice and knowledge to a less extent. In general, their practice is spasmodic, perhaps accidental, and inarticulate to a degree which makes ascertainment of their custom difficult; yet one can discern varying degrees of utilization of the doctrine. Thus the National Labor Relations Board, the Division of Public Contracts, and the Wage and Hour Division in the Department of Labor, administering the Walsh-Healey Act and the Fair Labor Standards Act, respectively, the Federal Power Commission (even in its rate-making procedure), the Board of Tax Appeals, the Civil Aeronautics Administration, both in disciplinary and rate-making cases, the Federal Deposit Insurance Corporation, the Post Office Department, the Bituminous Coal Division, and the Federal Trade Commission may take judicial notice of facts of which courts take notice; as far as can be ascertained, however, none takes official notice of mat-

[69] There has been insufficient experience with hearings by the Social Security Board to generalize concerning the extent of official notice. The present rule is that all material in the Board's files must be introduced into the record of the particular case.

ters within their specialized range or uses material in their public files without formal introduction into the record at the hearing.[70]

On the other hand, the remaining agencies present examples of limited principles of utilization or of specific instances in which material not specifically incorporated in the record of a hearing may be used in reaching decisions. The Interstate Commerce Commission notices its own reports and orders, all judicial opinions of which a court takes notice, and such facts generally known to those versed in railroad regulation as the existence of differences in traffic conditions in southern classification territory and in central freight association territory; the end of the World War; the heaviness of the traffic moving to, from, and within the Chicago district; and the steady reduction of the business of steam railroads by motor transportation competition since 1929. In addition, in reorganization cases conducted by the Commission's Bureau of Finance, the examiner, in preparing his report, or the Commission in preparing its decision, often secures facts concerning developments since the closing of the record by reference to monthly reports made by carriers to the Commission.[71] The Federal Alcohol Administration, prior to its absorption by the Bureau of Internal Revenue, took notice of the Administration's regulations, the contents of reports of permittees, statistical data compiled but not yet published by the Administration, and other material the authenticity of which the trial examiner had no reason to doubt; notice of these matters was taken, however, only if there had been specific request in the course of the hearing.

In its administration of the Grain Standards Act, the Department of Agriculture takes official notice in a narrow range: It notices the meaning of various trade terms and technical and scientific terms connected with grain inspection. Even when such limited notice is taken, the examiner is instructed to announce at the hearing what matters are being accepted without formal proof in order that the respondent or other parties may have an opportunity to offer evidence in rebuttal, explanation, or qualification. In the course of its designation of live poultry markets for regulation under the Packers and

[70] Thus, for example, the Fair Labor Standards Act requires that, in establishing a minimum wage, comparative living or transportation costs (by regions) must be considered. No significant difference seems to appear in the data on this issue from industry to industry, and the issue was early determined. Yet at each hearing the Wage and Hour Division laboriously introduces the same evidence. In contrast, official notice is utilized with great freedom in exemption cases; there, however, the hearing is not a statutory one and is regarded simply as a step in the gathering of all pertinent information.

[71] That the Commission is not liberal in its employment of official notice is suggested, however, by *General Commodity Rate Increases,* 1937, 233 I. C. C. 657 (1937), where it stated (p. 733): "Since the record in this portion of the proceeding was closed, we know, as does all the world, that the railroads have agreed to very substantial increases in the wages of their employees, and that many of these increases are now in effect. Applicants have not sought to have the record reopened for the purpose of incorporating in it the facts as to this matter. In this report, we have not taken judicial or official notice of these facts, notwithstanding their notoriety. It is a difficult feat to attain the degree of mental detachment which permits exclusion from consideration of an important and pertinent fact, of which each and every member of the Commission is fully aware, but we believe that the conclusions herein are supported by the record as it stands." In his concurring opinion, Commissioner McManamy stated, "What is here involved is fixing rates for the future, a purely legislative function. In view of this, I see no occasion for performing the 'difficult feat' of excluding from consideration important and pertinent facts, such as wage adjustments accomplished through the medium of mediation, which will add substantially to the burden of expenditures which the railroad must bear. * * * We know, as does all the world, that more than $100,000,000 per annum has been added to the obligations of the railroads by wage negotiations and mediation * * * and that either now, or in the near future, this must be given consideration. Failure to give official recognition to that important fact and to deal with it at this time, will simply result in forcing another hearing in the immediate future which, in the public interest, ought to be avoided."

Stockyards Act, the Department of Agriculture leans heavily upon information in its files not introduced at the nonstatutory hearing and upon common knowledge of existing racketeering practices which call for regulation; under the same Act, however, no official notice appears to be taken in reparation, disciplinary, or rate-making proceedings. In the Department of Agriculture's execution of mediation and arbitration functions under the Agricultural Marketing Agreement Act, the arbitrator is expressly authorized by the regulations to use "his own technical knowledge in addition to the evidence submitted by the parties"; such "technical knowledge" apparently includes his knowledge of particular facts in the case.

The Tariff Commission makes extensive use of material in its files and of its special accumulated knowledge in its cost investigations, even though no indication is given at the hearing that file material will be used or that notice will be taken. Similarly in unfair import practice cases which result in an exclusion order, the Tariff Commission does not consider itself bound by the record in making findings, and, accordingly, it relies in considerable part upon general data in its files.

Like the Tariff Commission, the Department of Interior in some respects freely supplements the evidence adduced by the parties, both by its own general knowledge and by its knowledge of specific facts of the particular case. In issuing grazing permits, the Grazing Service utilizes advisory boards composed of local livestock operators who have used the lands involved and who are conversant not only with the carrying capacity and service value of the base properties, but also with the affairs of each applicant; indeed, the boards look largely to their own knowledge of the applicant's operations in order to determine whether a permit should issue. In the course of hearing appeals in grazing-permit cases, the examiners have adopted a practice of similarly acquiring knowledge in the particular case by discussing its aspects with the local officials of the Grazing Service and by inspecting the range prior to the hearing. The extent to which he utilizes such specially acquired knowledge to supplement the proof formally adduced—rather than to furnish a background for understanding the issues, making intelligent inquiries, or attempting to settle in the course of the hearing, or for evaluation of the testimony—is difficult of ascertainment. So, too, in the administration of Indian Affairs (probate work), the examiners who make the adjudications rely extensively upon material gathered in the official files and upon their own knowledge of the particular facts which they have gained through long and intimate contact with the Indians over whom they have jurisdiction.

The practice of the War Department in its regulation of bridges and obstructions in and over navigable waters, and in its rate making for toll bridges, in respect of official notice parallels that of the Tariff Commission and the Department of Interior. The district engineer who presides at the hearing utilizes not only his own general knowledge but also his knowledge of the specific facts in the case. In addition, material in the files is used; but the parties are not, except perhaps accidentally, apprised of the results of any of this acquisition of knowledge upon which ultimate decision is subsequently based.

For the rest, one may find only isolated examples of official notice. The Securities and Exchange Commission has been extremely reluctant to dispense with proof by using official notice and has rigidly observed the requirement that all evidence must be in the record. Recently, however, it noticed officially that the ratio of a party's funded debt to its depreciated property was larger than that of comparable companies, although evidence concerning the comparable companies was absent from the record.[72] Even in this case, however, the decision was accompanied by an announcement that the Commission would grant a rehearing on the issue. In addition, the Commission has taken notice of previous and connected proceedings; for example, one case involved an application for approval of a plan for reorganization of the applicant company. In passing on the plan, the Commission found it necessary to consider the solvency of the applicant's holding company, and the assets and earnings coverages of the new securities to be issued. After evidence had been taken and the hearing had been closed, but before the application had been passed upon by the Commission, the holding company applied for and was granted permission to sell the stock of one of its subsidiaries, which, in turn, filed a declaration, which was approved by the Commission, to raise money to pay its open account indebtedness to the holding company. The holding company's application and declaration were filed in a separate proceeding from the reorganization proceeding, and the sale and payment were made pursuant to Commission approval of the separate application and declaration. The Commission, in passing upon the reorganization plan, took notice of the sale and payment, stating that "to have closed its eyes to these transactions [which were officially recorded in the Commission's files] would have stultified the Commission and might have misled the investors." In addition, the parties may occasionally stipulate that the Commission may notice any information contained in its general files; ordinarily, however, such material is incorporated by reference or, as in a recent integration case under the Holding Company Act, all file material may be introduced bodily into the record as an exhibit.

The precise extent to which the Bureau of Marine Inspection and Navigation takes official notice is difficult to ascertain. While some officials refuse to note matters of which courts will not take notice, others expand the doctrine beyond this point. One officer, for example, has stated that he knows officially that pier 45 in San Francisco points northeast toward Alcatraz Island; he knows how far a ship will back from the pier, that it will take a broad swing to the left to pass under a bridge, and that the current at the light ship is southwesterly at a certain time. If in a specific case a witness' testimony disagrees with any of these facts, the officer will reject the testimony; further, if a master testifies to contrary facts, the officer will have reason to believe that the master was improperly maneuvering his vessel even though there is no direct evidence in the record to that effect.

In general, the Maritime Commission's policy in respect of official notice has been similarly loosely defined. Some officers state that official notice is not taken in any matter not in the record and not

[72] This was a departure from the Commission's customary practice: Where, for example, the issue is the reasonableness of an underwriter's fee, Commission counsel prepares and introduces charts and tables indicating fees for comparable undertakings.

within the scope of judicial notice. Some examiners, on the other hand, assert that they will take notice of a tariff or agreement if it is in any way referred to in the record of the hearing and if it is on file with the Commission and if, in preparing the report, they find it relevant and helpful.

Finally, it is not uncommon for the Federal Communications Commission's staff, in preparing a proposed decision, to turn to the files for aid in the decision's formulation. After the hearing, the proposed findings submitted by the parties are examined by the Engineering and Accounting Departments; employees in these departments refer to and utilize extra-record material and facts gleaned from the Commission's files. At least some of the material thus used may have been available only since the close of the hearing: For example, where an application for a license to operate a broadcasting station is involved, an intervener who may have been operating on one frequency at the time of the hearing may have since, by virtue of the granting of an application for modification of his license, changed to a different frequency. The Commission will take notice of this fact. In addition, in common carrier rate proceedings, notice is taken of information in the many reports submitted by the carriers, portions of records of previous hearings, and of filed tariff schedules; file material of this character is, however, required by the Commission's rules and regulations to be incorporated in the record by specific reference.