THE ICC HEARING PROCESS: A COST-BENEFIT APPROACH TO ADMINISTRATIVE AGENCY ALTERNATIVE DISPUTE RESOLUTION

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I sincerely appreciate the opportunity to participate in this landmark event in the history of the federal administrative process. Whenever one gets to be 100, people ask the same question: "To what do you attribute your longevity?"

Without getting into a discussion of the pros and cons of the ICC's regulatory accomplishments over the years, I think it is fair to say that one reason for the ICC's longevity is its ability to adapt to the real and perceived needs of the various constituent groups to which it is responsible — the Congress, the President, the courts, shippers and passengers, the various industries it regulates, and, ultimately, the taxpayers who must pay the bill. I believe that the development of the ICC's adjudicatory process, including, particularly, the creation of Modified Procedure, is a good administrative law illustration of the ICC's adaptability, in keeping with the theme of our forum, namely, Administrative Law and the ICC — their Evolution.

As most of you know, probably better than I, when Modified Procedure is employed, sworn statements and verified memoranda replace the usual oral testimony and cross-examination offered at a conventional hearing. Instead of cases being decided by individual administrative trial

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judges, they are processed by a cadre of somewhat anonymous lawyers in the ICC's Office of Proceedings, and result in opinions signed, until recently, by three-member staff boards and, now, by the Commissioners themselves. They are a prototype of institutional decisionmaking. When I served as Director of the Office of Proceedings in 1980 and 1981, we had a caseload of about 8000 contested adjudications a year. That kind of workload would have ground to a halt if each case were handled in an individual trial — at least in the absence of an enormously expanded cadre of administrative law judges.

The original Act to regulate commerce of a century ago[1] had virtually no reference to hearings as a mechanism for decision. The ICC was simply instructed to conduct its affairs in a manner conducive "to the proper dispatch of business and to the ends of justice."[2] It was Judge Cooley and his colleagues in the 19th century who decided to transplant the courtroom model into the administrative arena. But by the time Congress enacted the Hepburn Act in 1906, it used the term "full hearing" to describe the judicialized procedures that had evolved at the Commission.[3] The ICC's creation of the modern administrative hearing in the 19th century is, of course, itself a significant contribution to the federal administrative process — to say nothing of the contribution it makes to the financial well-being of those of us who make a living from administrative adjudication.

You may be surprised to learn that Modified Procedure is almost as old. The Commission first used it in 1923 to handle an increasing workload of railroad complaint cases. It was then called "Shortened Procedure."[4] In the 1920s it was a purely voluntary scheme. The Commission used it only when the parties agreed. But once they agreed, all issues were decided on the basis of written submissions. As far as I can tell, the parties agreeing to the Shortened Procedure simply made a determination that it made more sense to resolve all outstanding issues without a full-blown trial. In one of its earliest cases, the Commission explained that the new procedures were designed "to save time and money for all the interested parties, including the Government, and to effect a more prompt determination of issues."[5] It was, I submit, a very early effort in the administrative arena to use what has become popularly known in the last decade as "alternative dispute resolution."

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1. 24 Stat. 379 (1887).

2. *Id.* at 385 (section 17).

3. *See generally*, Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1271 (1975).

4. *See* 37th Annual Report of the Interstate Commerce Commission (December 1, 1923) at 7-8. *See generally*, IV Sharfman, *The Interstate Commerce Commission, A Study in Administrative Law and Procedure*, 221-222 (1937).

5. D.B. Mason v. Missouri, Kansas & Texas Ry., 77 I.C.C. 633 (1923).

By the 1930s, the Commission was handling about one-third of its docket of formal cases through Shortened Procedure.[6] Over time, the process evolved into Modified Procedure in somewhat the form we know it today — that is, a procedure where, even without out the parties' formal consent, undisputed matters or those not involving so-called material facts are processed in writing, and live testimony and cross-examination are reserved for controversial issues.[7] In the 1950s, the Commission began to use Modified Procedure in all types of proceedings[8]and it became extensively employed in motor carrier operating authority cases starting in the 1960s.[9]

The standard reflected in the Commission's rules for deciding when to hold regular hearings or when to use Modified Procedure was fairly conventional. Unless material facts were in dispute, oral hearings were not held for the sole purpose of cross-examination.[10] And, anyone seeking an oral hearing had to explain why the evidence to be presented could not reasonably be submitted in the form of affidavits.[11]

But, despite that nominal standards, what the Commission actually did was to employ a form of cost-benefit test to determine whether a trial or Modified Procedure should be used in a given case. As the system operated, at least in connection with motor carrier applications in the late 1970s when I first came in contact with it, the Chief Administrative Law Judge and the head of the Operating Rights Section of the Office of Proceedings would jointly decide which cases would go to hearing and which would be processed under Modified Procedure. There was little or no effort at that threshold stage to determine whether material facts were actually in dispute. That kind of analysis just was not practical from a day-to-day management point of view. Instead, the two staff officials made a sort of "cost-benefit" evaluation to decide which cases should be handled under which procedure. Generally speaking, big cases, that is, where the authority requested was substantial or where there were lots of opponents, went to hearing, and smaller cases, by and large, were handled under Modified Procedure.[12] But if the judges' caseload was a little

6. IV Sharfman, *supra* note 4, at 226.

7. *See* Chicago & E. Ill. Ry. v. United States, 43 F.2d 987 (N.D. Ill. 1930).

8. Fair and Guandolo, *Transportation Regulation* 326 (7th ed. 1972).

9. Hardman, *Modified Procedure in General*, 1972 Transportation Law Institute, Practice and Procedure Before the Interstate Commerce Commission 104.

10. *See* Frozen Foods Express, Inc. v. United States, 346 F. Supp. 254, 260 (W.D. Tex. 1972).

11. *See* Allied Van Lines Co. v. United States, 303 F. Supp. 742, 747 (C.D. Cal. 1969).

12. The Commission has acknowledged this approach. *See* 45 Fed. Reg. 86,771, 86,777-78 (1980). So has its staff. *See* King, *Types of Procedures Followed by the Commission and the Factors Determining Choice*, 1972 Transportation Law Institute, Practice and Procedure Before the Interstate Commerce Commission 73-77.

light in any given month, a few more cases were added to the oral hearing docket. On the other hand, if the Office of Proceedings staff had a little extra time, a few more cases were thrown on the Modified Procedure pile.

I later learned that the Commission had invented a separate mechanism for ensuring that these threshold management decisions did not run afoul of the "material fact in issue" standard contained in the Commission's regulations. As sophisticated ICC practitioners are aware, if a losing party took a case to court following a Commission decision, the Office of the General Counsel scrutinized the decision to see if it was defensible. Among other things, it looked to see if the Commission had used Modified Procedure where facts were actually disputed and turned out to be material. If it had, the General Counsel, after clearing it with the Commission, asked the court simply to return the case to the Commission for more traditional disposition.[13]

Thus evolved a *de facto* consensual form of alternative dispute resolution for most ICC proceedings. Given the tens of thousands of adjudications processed over the decades, and the very high percentage handled by Modified Procedure, I have no doubt that the Commission basically decided most issues, including issues of fact, without a conventional hearing. But it was all done, in effect, with the acquiescence of the parties — if we assume that a failure to seek judicial review manifests at least an acceptance, if not an endorsement, of the Commission's ultimate decision in a given case.

The Commission's approach over the years has been generally approved and applauded. When the Attorney General's Committee on Administrative Procedure surveyed federal agency operations in 1941 as a prelude to its recommendations leading to the adoption of the Administrative Procedure Act, it pointed to the ICC as an agency at which litigants were generally satisfied that procedures were fair and unbiased.[14] Indeed, the Committee strongly endorsed "shortened procedures," and even noted that the use of written statements in some types of cases resulted "in greater precision than where the facts are presented orally."[15]

Judge Henry Friendly, who was one of the more thoughtful analysts of the administrative process during his tenure as a Circuit Court of Appeals judge, observed, in a 1960s case, that

> [t]he Commission's modified procedure is a commendable effort to limit hearings to those cases and even those witnesses where an oral hearing is

13. The technique is still in use. *See* Lakeland Bus Lines, Inc. v. ICC, 810 F.2d 280, 283-84 (D.C. Cir. 1987).

14. Final Report of the Attorney General's Committee on Administrative Procedure 59-60 (1941).

15. *Id.* at 69.

essential to fairness.[16]

And I think it is accurate to say that the Commission's decisional process, including its reliance on Modified Procedure, has been, by and large, accepted by the Practicing Bar.[17]

As some of you may know, before coming to the ICC in 1980, I spent 13 years in the Office of the General Counsel of the Civil Aeronautics Board. Back at the CAB in the late 1970s, we were looking around for a means of handling more applications and expediting the licensing process. Historically, the CAB had held only conventional hearings in all cases and had no counterpart to Modified Procedure.[18] But the CAB operated under the identical licensing scheme as the ICC, because the Civil Aeronautics Act of 1938 was modeled on the Motor Carrier Act of 1935. And Modified Procedure was a tried and true form of handling transportation licensing cases.

So, when the CAB put together its expedited hearing procedures in the late 1970s, we naturally used Modified Procedure as the model. We made only one principal change. Rather than employ the "material issue of fact" standard that was included in the ICC's rules, we attempted to fashion a cost-benefit criterion that we believed to be the practical governing standard applied by the Commission.

The CAB's rule, as it evolved, provided for conventional hearings only when "material issues of decisional fact [could not] adequately be resolved without oral evidentiary hearing procedures," or when "use of expedited procedures would prejudice a party," or when oral hearings were "otherwise required by the public interest."[19]

The CAB's expedited procedures were never challenged in court, because the Airline Deregulation Act specifically approved the CAB's approach and the airline industry essentially acquiesced in the deregulation of domestic air transportation.[20]

But, when I came to the ICC in 1980, one of our first projects was to develop an even more expedited licensing process for motor carrier cases. Congress, after all, was getting ready to impose statutory deadlines as part of the Motor Carrier Act of 1980. What seemed clear was

16. Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (W.D.N.Y. 1963).

17. *But see*, Hardman, *supra* note 9, at 122-24 (many lawyers believe Modified Procedure is not as fast, not less costly, and does not result in full disclosure of the facts).

18. For a fuller comparison of the CAB and ICC hearing procedures, *see* Edles, *The Hearing Requirement in the 1980s*, 31 Fed. B. News & J. 434, 435 (1984).

19. *See* 44 Fed. Reg. 24,266, 24,273 (1979).

20. The CAB's approach was an acknowledged effort to move beyond the traditional "material facts in issue" criterion for granting conventional hearings. *See* 43 Fed. Reg. 19,403, 19,408-11 (1978). In the Airline Deregulation Act of 1978, Congress eliminated the traditional statutory hearing requirement and specifically endorsed the CAB's expedited procedures. *See* 44 Fed. Reg. 11,364 (1979).

that Congress would demand elimination of the case backlog and was going to require very speedy handling of all new motor carrier applications. Increased emphasis on Modified Procedure seemed the only way to go.

The Office of Proceedings staff, using its reservoir of experience, developed an even more efficient Modified Procedure designed to comply with Congress' requirement that all motor carrier license applications be processed within six months. Adoption of the "case-in-chief" format was a major aspect of the new procedures. As part of those procedures, though, the Commission also decided to adopt, in terms, the criteria for conventional hearings that the CAB had adopted the year before.[21]

This time the procedure, including the new standard, was challenged in court. And, in an opinion written by Circuit Judge Brown, the Fifth Circuit found it to be consistent with the requirements of the Motor Carrier Act of 1980.[22] Thus, the cost-benefit balance, which started out as a *de facto* but not *de jure* element of the ICC's adjudicatory approach, and which gravitated to the CAB in the late 1970s, became a formal element of the ICC's adjudicatory process in the 1980s.

Now, the cost-benefit balance has become a popular analytical tool in the administrative environment of the 1970s and 1980s. In 1976, for example, in the case of *Mathews v. Eldridge*, the Supreme Court adopted the approach to determine what kind of hearing, if any, is necessary to protect individual rights under the U.S. Constitution.[23] But the approach has not really been explicitly approved across-the-board where administrative hearings are required by regulatory statutes.[24] Alternatives to conventional hearings are only now slowly finding their place in the arsenal of procedures used by federal administrative agencies.

Professor Kenneth Culp Davis argues that

> [t]he tendency of courts, aided and abetted by practitioners, has been to refuse to recognize any middle position between requiring a trial-type hearing and not requiring it.[25]

The ICC's use of Modified Procedure over the years is a happy exception to the Davis rule. Although it hasn't always prevented backlogs,

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21. *Compare* 45 Fed. Reg. 86,771, 86,794 (1980) (ICC rule) *with* 44 Fed. Reg. 24,266, 24,273 (1979 CAB rule).

22. American Transfer & Storage Co. v. ICC, 719 F.2d 1283 (5th Cir. 1983).

23. 424 U.S. 319, 335. *See* Sutton v. City of Milwaukee, 672 F.2d 644, 645 (7th Cir. 1982), explaining that *Mathews v. Eldridge* is "a simple cost-benefit test of general applicability."

24. Perhaps the most far-reaching judicial approval of a type of cost-benefit approach was the District of Columbia Circuit's *en banc* decision in United States v. FCC, 652 F.2d 72 (1980). The court endorsed an FCC determination that it was in the public interest to allow new entrants into the domestic satellite communication industry without holding an evidentiary hearing, despite the express statutory hearing requirement in the Communications Act.

25. Davis, *Discretionary Justice: A Preliminary Inquiry* 118 (U. of Ill. Press 1971).

and has had its critics from time to time, it has produced an expeditious means of handling a large administrative caseload that is generally fair and, just as important, is perceived as fair. It was a cost-benefit approach to alternative dispute resolution long before either of those notions had become popular. And those of us who have been involved with the procedures — whether from the inside as government lawyers or the outside as private practitioners — should recognize that we have played a role in a unique and successful experiment in the evolution of the federal administrative process.

MS. CHRISTIAN: Thank you very much, Gary.

Our final speaker on this panel is one of the foremost academic authorities on administrative law in this country, Professor Victor Rosenblum. Vic received his AB and LLB Degrees from Columbia and his PhD from the University of California at Berkeley. He has taught both law and political science.

He served as President of Reed College from 1968 to '70 and has been a professor of law in political science at Northwestern since 1970. Since 1979, he has also served as Director of the Law School Graduate Studies Program at Northwestern.

Vic is very active in the Administrative Law Section of the American Bar Association and also in the Administrative Conference of the United States.

It is my great pleasure to introduce Professor Victor Rosenblum.