Harold S. Shertz Essay Award

The Short Haul Survival Committee v. U.S.: An Industry Deregulated Without a Substantial Basis in Fact*

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I. INTRODUCTION

In March of 1978, the United States Court of Appeals for the Ninth Circuit entered its decision in the case of the *Short Haul Survival Committee v. United States and Interstate Commerce Commission*.[1]

This suit was filed by the Short Haul Survival Committee,[2] numerous individual motor carriers and other associations. The Survival Committee was unsuccessful in its attempts to have set aside a report and an order issued by the Interstate Commerce Commission (ICC) that effected a massive deregulation of the short haul transportation industry nationwide.[3]

The Ninth Circuit in affirming the Commission's report failed to take cognizance of recent developments in the law of judicial review of adminis-

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1. 572 F.2d 240 (9th Cir. 1978).

2. The Short Haul Survival Committee is an ad hoc committee of the Local and Short Haul Carriers National Conference of the American Trucking Association, Inc.

3. Ex Parte No. MC-37 (Sub-No. 26), Commercial Zones and Terminal Areas, 124 M.C.C. 130 (1975) (Interim Report); 128 M.C.C. 422 (1976) (Decisions).

trative rulemaking. These developments are the topic of this paper. Initially, however, some discussion of the genesis of this controversy is warranted.

The ICC, administratively, effected a massive deregulation of the short haul motor carrier industry through that body's redefinition of Commercial Zones and Terminal Areas.[4] By expanding these zones and areas, the ICC removed from economic regulation massive quantities of what otherwise would be regulated freight. The establishment of these massive regulation free zones has proven to be one of the ICC's more controversial decisions.

Historically, the Commission employed the rulemaking provisions of the Administrative Procedures Act (APA)[5] to define the scope of Commercial Zones and Terminal Areas in the mid-1940's. Those proceedings culminated in the development of a population-mileage formula for Commercial Zones in 1946, and for carriers' Terminal Areas in 1952.

On August 12, 1975, the ICC, pursuant to the notice and comment rulemaking provisions of the APA, caused notice to be published in the *Federal Register*[6] of its intention to propose a revised population-mileage formula.[7] The Commission stated that a new formula was desirable due to changing demographics and increasing urbanization occurring throughout the nation. The notice, which invited the submission of written data, views and arguments, received wide response. The result was the issuance by the Commission of an interim report, fifty-five pages in length plus appendices, stating tentative conclusions and inviting further comment. Again, the

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4. For a good review of the development of Commercial Zones and Terminal Areas see Baker & Greene, Jr., *Commercial Zones and Terminal Areas: History, Development, Expansion, Deregulation*, 10 TRANSP. L. J. 171, 174-186 (1978).

5. 5 U.S.C. §§ 551 et seq. (1970).

6. 40 Fed. Reg. 33,840 (1975).

7. The notice, in pertinent part, read:

> The purpose of this document is to institute a proceeding to determine whether commercial zones and terminal areas of motor carriers and freight forwarders should be redefined.
>
> . . . .
>
> Section 203(b)(8) of the Interstate Commerce Act exempts motor carrier operations about municipalities from Federal economic regulation. The geographic area within which exempt motor carrier operations may be performed is referred to as commercial zone. The existing regulations provide two methods of defining the size of a particular commercial zone. The customary method is by reference to a population mileage-formula developed in the mid-1940's. The alternative method provides for an individual determination of the commercial zone of a specific municipality. The present proceeding is instituted for the following three purposes: (1) to determine whether, and the extent to which commercial zones (and corresponding terminal areas of motor carriers and freight forwarders) should be enlarged by expanding or otherwise changing the present population-mileage formula; (2) to attempt to devise a rule of general applicability for all commercial zones and terminal areas of motor carriers and freight forwarders, at least with respect to incorporated communities, thus dispensing with the need for the present individual definition of irregularly shaped zones which are sometimes difficult to describe and in need of subsequent revision; and (3) to make adjustments in the rule of applicability about unincorporated communities compatible therewith. (Citations omitted).

response was widespread, causing the compilation of a massive record some twenty-three large volumes in length.[8]

On December 17, 1976, a divided Commission issued its final report, 134 pages in length, plus an expansive appendix. The report affirmed the findings of the interim report and stated that the proposed expansion would become effective on March 29, 1977. A temporary stay pending judicial review was granted by the Ninth Circuit Court of Appeals on March 18, 1977, having been previously denied in a 5-4 decision on March 4, 1977. The Survivial Committee et al., then filed their appeals.

Petitioners, particularly the Survival Committee, brought a series of significant procedural and policy issues before the court. In this regard, the Survival Committee certified the following issues:[9]

1. Whether the Commission's action expanding the population-mileage formula for Commercial Zones and Terminal Areas, thereby establishing massive exempt zones, was contrary to the intent of Congress, the Interstate Commerce Act, and case precedent.
2. Whether the Commission's action was arbitrary, capricious, an abuse of discretion, unsupported by the record, and without substantial evidence.
3. Whether the Commission's action was in violation of the substantive and procedural requirements of the National Environmental Policy Act (NEPA), and therefore arbitrary, capricious and legally unsupportable.
4. Whether the Commission's action was contrary to the public interest and the National Transportation Policy.

Detailed analysis of each issue presented is beyond the scope of this article. Rather, concentration here will be focused on the second issue stated above, dealing with the procedural requirements of the APA, both in rulemaking and in the scope of judicial review pursuant thereto. Consequently, it will be suggested that the Ninth Circuit was something less than thorough in its analysis of the issues presented.

II. Scope of Review

Traditionally, a reviewing court's determination regarding the applica-

8. 128 M.C.C. 422, 434 (1976). There the Commission noted the extent of the response stating:

> A numerical breakdown of the representation indicates that 313 motor carriers have filed individual and joint representations and 13 motor carrier associations also presented their views. Two freight forwarders filed comments, and the Freight Forwarder Institute submitted evidence on its own behalf and that of its 28-member forwarders. Individual shipper and warehouse interests filed 63 representations, and 23 shipper associations and conferences presented their views. Various local interests (*i.e.*, local governments, realtors, land developers, and chambers of commerce) filed 58 representations. Four state agencies have submitted written comments. Two labor unions, 144 individuals, one maritime interest, and one law firm also filed representations. Four members of the United States House of Representatives expressed views concerning our proposed commercial zone expansion on their own behalf and on behalf of their constituents.

9. C.A. No. 77-1070, Brief for Petitioner, at 1.

ble standard of judicial review has *pivoted* on the form of administrative rulemaking which had been employed by the agency below.[10] If the rulemaking involved is quasi-legislative, or informal, then the arbitrary and capricious test is generally employed. If, however, the rulemaking was adjudicative, or formal, then the substantial evidence test is generally employed.

The arbitrary and capricious test[11] has been defined as a highly deferential standard of review which presumes agency action to be valid.[12]

The substantial evidence test allows for the review of the factual basis for an agency decision. It is reserved primarily for review of adjudicatory type rulemaking pursuant to sections 556 and 557 of the APA. The Supreme Court defined the substantial evidence test as "such relevant evidence as a reasonable mind might accept as adequate to support (the agency's) conclusion."[13] The rulemaking format is quite structured, and follows the procedural guidelines established in the APA. The procedure is designed to produce a full record *exclusively* upon which all agency action must be based. It involves a hearing officer and includes the opportunity for cross examination so that a full and true disclosure of the facts is accomplished.

The Survival Committee argued that the proposed standard of review to be applied to the Commission's order must be both searching and careful to insure that "the decision (under review) is based on a consideration of the relevant factors . . . ."[14] In the alternative, the Committee urged that the court apply the substantial evidence test.[15] Essentially, petitioner sub-

10. The APA, 5 U.S.C. §§ 551 *et seq.* (1970), recognizes four formats for administrative decisionmaking. In descending order of procedural formality, they are: adjudication, 5 U.S.C. § 554; formal rulemaking, 5 U.S.C. § 553(c), invoking the formal procedures of §§ 556 and 557 "when rules are required by statute to be made on the record after an opportunity for an agency hearing"; informal rulemaking, 5 U.S.C. § 553(c); and nonformalized decisionmaking, 5 U.S.C. § 553(a), (b)(A)-(B), and any agency action not included in the definition of "rule," "order," "adjudication," "license," or "sanction." 5 U.S.C. § 551(4), (6), (7), (8), (10). These four modes of decisionmaking are generally invoked explicitly or implicitly in the enabling acts of administrative agencies.

11. This test is whether there is a "rational nexus" between the facts and the policy chosen. SEC v. Chenery Corp., 318 U.S. 80 (1943). There need only be demonstrated a rational connection between the facts found and the choice made. Bowman Transp. v. Arkansas-Best Freight, 419 U.S. 281 (1974).

12. Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976).

13. Atchison, T. & S.F. Ry. v. United States, 334 F. Supp. 651 (D. Minn. 1971).

14. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The Court's dicta in this case started the judicial restructuring of the arbitrary and capricious test into the more substantive form of review sought by the Survival Committee.

15. The substantial evidence test was posited only alternatively. The substantial evidence test, 5 U.S.C. § 706(2)(E), allows for the review of the *factual* basis for an agency decision, and is reserved primarily for review of adjudicatory type rulemaking pursuant to 5 U.S.C. §§ 556-557 of the APA, "[W]hen rules are required by statute to be made on the record of an agency hearing

mitted that whatever the label used for the appropriate standard of review in this rulemakng, the court was bound to make a substantial inquiry into the record below to determine whether that record contained substantial evidence to support the Commission's actions.[16]

The Ninth Circuit, however, retreated from petitioner's plea that the court make a substantive review of the facts. Instead, it applied the arbitrary and capricious test in its more pristine form wherein the court "presumes agency action to be valid."[17] This decision to restrict review is singularly unenlightened as judged by the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*[18] and cases subsequent to *Overton* in which the Courts have reviewed or discussed informal rulemaking.

III. *Overton* and its Progeny

The main issue in *Overton* was Secretary Volpe's decision to allow a highway to be built through a park. The rulemaking involved was neither formal nor informal; rather, it was an administrative action which was something less than informal. The Supreme Court rejected both de novo review[19] and the substantial evidence test[20] when it held for the use of the arbitrary and capricious standard.[21]

Had the Court stopped there, no problem would have arisen. However, in dicta, the Court cautioned that despite its adoption of the least stringent test, the reviewing court would also have to consider "whether the decision [under review] was based on *a consideration of the relevant factors* and whether there has been a clear error of judgement."[22]

Cases subsequent to *Overton* which have discussed or reviewed informal rulemaking have similarly strengthened the arbitrary and capricious test into one requiring some form of substantive review.

In *United States v. Midwest Video*,[23] the plurality opinion held that in

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provided by statute." The Survivial Committee posited this test only in the alternative, noting that the notice and comment procedure is the only procedural format, other than formal rulemaking or adjudication, which produces a record. What is more, the informal rulemaking procedures have also been held to constitute a "hearing." In United States v. Florida East Coast Ry., 410 U.S. 224 (1972), the Supreme Court approved a broad definition of "hearing" as including both section 553 notice and comment procedures and sections 556-557 proceedings that use written rather than oral evidence. The record in the Survival Committee case was voluminous. *See* note 8 *supra*. However, it should be noted that under the APA, a "hearing" is distinct from a "hearing on the record." The latter invokes formal rulemaking procedures.

16. C.A. No. 77-1070, Petitioner's Brief, at 16.
17. 572 F.2d 240, 244 (9th Cir. 1978).
18. 401 U.S. 402 (1972).
19. 5 U.S.C. § 706(2)(F).
20. 5 U.S.C. § 706(2)(E).
21. 5 U.S.C. § 706(2)(A).
22. Overton, *supra* note 14, at 416 (emphasis added).
23. 406 U.S. 649 (1972).

Federal Communication Commission notice and comment procedures for formulating cable television regulations, the standard applicable to review of the record of written comments was whether the regulation was "supported by substantial evidence that it will promote the public interest."[24]

In *Ethyl Corp. v. EPA*,[25] the D.C. Circuit engaged in a lengthy discussion rejecting substantial evidence and adopting arbitrary and capricious as the appropriate standard of review for informal rulemaking.[26] The court nevertheless declined to allow the presumption of the validity of an agency action when it said that the reviewing court "must engage in a substantial inquiry into the facts, one that is searching and careful."[27]

Similarly, in *Freight Forwarders v. United States*,[28] a three judge district court strengthened the arbitrary and capricious test by requiring substantive review of an ICC informal rulemaking determination that defined the scope of terminal area exemptions under section 202(c) of the Interstate Commerce Act. Therein, the court stated that review was "normally confined to an affirmance of the Commission's findings unless there is a clear showing of an abuse of discretion."[29] However, the court went on to state that "our function is to ascertain whether the Commission has correctly applied the law, and if so . . . whether the evidence contains substantial support for the finding."[30]

The restructuring of the arbitrary and capricious test continued in *Chrysler Corp. v. Dept. of Transportation*,[31] an action involving the review of informal rulemaking by the National Highway Traffic Administration. Therein, the Sixth Circuit, citing *Overton*, emphasized that:[32]

> [t]he substantial evidence test may be applied to agency action even when the agency is performing a rulemaking function. Accordingly, the reviewing court must "engage in a substantive inquiry" and a "thorough, probing, in-depth review," yet at the same time must be mindful that the ultimate scope of its review is narrow and that it may not substitute its judgement for that of the agency's [*sic*].

Moreover, in response to the agency's contention that the scope of review for informal rulemaking is limited to a determination of whether the agency's rule reflects a rational consideration of the relevant matters presented by the interested parties, the court emphasized that such a

24. *Id.* at 671, 673, n.71.
25. 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941.
26. *Id.* at 33-35.
27. *Id.* at 35, citing Overton, *supra* note 14.
28. 409 F. Supp. 693 (N.D. Ill. 1976).
29. *Id.* at 706-07.
30. *Id.* at 707, citing American Trucking Ass'ns v. United States, 260 F. Supp. 386 (D.D.C. 1966).
31. 472 F.2d 659 (6th Cir. 1972).
32. *Id.* at 669.

scope of review "is virtually no review at all."[33]

Judge Lumbard, in a concurring opinion in *National Nutritional Foods Ass'n v. Weinberger*,[34] pointed out that when an agency engages in substantive rulemaking it abuses its discretion (or acts arbitrarily) if its actions are not supported by substantial evidence.[35]

Recently, in *U.S. Lines v. Federal Maritime Comm'n*,[36] the U.S. Court of Appeals for the D.C. Circuit reviewed the applicable standard of review of an order of the Federal Maritime Commission (FMC). The order approved an amendment to a joint service agreement which was issued by the FMC under its limited authority to grant exemption from the antitrust laws for anti-competitive agreements among ocean carriers. Such authority arises only when it is in the public interest to grant such exemptions.

The court rejected the substantial evidence test as being inapplicable to the case at hand.[37] However, in discussing the standard of review applicable to this agency action, the court citing *Overton* noted that the agency decision was "entitled to a presumption of regularity."[38] That presumption, however, could not act as a shield to preclude a "*thorough, probing, in-depth* review." The review must be "searching and careful"[39] to insure that the agency action complies with the standards set forth in the APA, the FMC enabling act and the agency's own regulation.[40]

These cases are all significant in their support of the Short Haul Survival Committee's argument that the court has an affirmative obligation to search the record below to insure fairness in the promulgation of administrative actions. Mere recital by the agency that it has made a rational consideration of the relevant matters is clearly no longer acceptable.

Essentially, the petitioner pleaded that irrespective of the label attached, there was an affirmative obligation on a reviewing court to perform an in-depth and probing review of the facts underlying the agency decision. Petitioner pleaded *only in the alternative* that the Ninth Circuit should apply the substantial evidence test.

The Ninth Circuit, misstating petitioner's pleadings, said that the "Survival Committee exhorts us to apply the 'substantial evidence' test of 5 U.S.C. § 706(2)(E) in reviewing the commission's action."[41]

Irrespective of these considerations, the Ninth Circuit elected to apply

33. Chrysler, *supra* note 30, at 667.
34. 512 F.2d 688 (2d Cir. 1975), *cert. denied*, 423 U.S. 827.
35. *Id.* at 705.
36. 584 F.2d 519 (D.C. Cir. 1978).
37. *Id.* at 526.
38. *Id.*
39. *Id.*
40. *Id.*
41. 572 F.2d 240, 244 (9th Cir. 1978).

the arbitrary and capricious test with no substantive search into the underlying record. Its interpretation of the Supreme Court's invitation in *Overton* to make a searching and careful inquiry into the facts was to hold that the lower court was bound to " 'the highly deferential' standard of review which 'presumes agency action to be valid (.)' "[42] What is more, the court in the Survival Committee case imposed upon petitioner the burden of showing that the Commission acted unreasonably. The court declined to remand the proceeding, preferring instead to affirm the order and report based on a demonstrated rational basis for the agency action. In short, the court chose to apply the arbitrary and capricious test in its most elemental form. This posture is not totally wrong, but it is exceptionally unenlightened.

IV. Summation

The scope of judicial review for agency determinations is prescribed by the APA. Essentially there are two tests which may be employed. One is the substantial evidence test, which reviews the factual basis for an agency determination by inquiring into the entire record below. The second is the arbitrary and capricious test, which in its pristine form seeks only to ensure that there is a rational nexus between the facts found and the policy chosen.

In 1971, the Supreme Court handed down its decision in the *Overton Park* case. In dicta the Court noted that there was an obligation on the courts to effect a searching inquiry into the facts underlying an agency's decision. This challenge was embraced, and in the years following *Overton* the arbitrary and capricious test has developed into a reasonable standard of review and not just a rubber stamp for agency actions.

Whatever label is chosen for the standard of review, it is now reasonably clear that a substantive inquiry is required. This is where the Ninth Circuit failed when it reviewed the ICC decision noted above.[43]

Robert A. Ragland

42. *Id.* at 244.
43. *Id.*, citing American Public Power Ass'n v. F.P.C., 522 F.2d 142 (D.C. Cir. 1975).