Procedural Due Process and ICC Fitness Flagging: A History and the Resultant 1976 Procedures*

> [I]t is established Commission policy to withhold issuance of new authority to any applicant while said carrier's fitness is under investigation in a formal proceeding; that, in such instances, it is not determinative that the application is unopposed or that the applicant has been previously found fit; and that once an investigation proceeding is instituted, all new authorities that have not been issued are withheld pending the final determination of the investigation proceeding.—Interstate Commerce Commission's description of its fitness flagging practice in a June 17, 1975, order (quoted in *North American Van Lines, Inc. v. United States*, 412 F. Supp. 782, 796 (N.D. Ind. 1976)).

I. INTRODUCTION

On August 9, 1976, the Interstate Commerce Commission (hereinafter the Commission) published a notice in the *Federal Register* proposing the institution of rules governing its so-called "fitness flagging" procedures.[1] Although the Commission had long practiced fitness flagging with respect to new applications for motor carrier operating authority, no notice had ever been published in the *Federal Register* and, furthermore, fitness flagging had never been the subject of a rule-making proceeding with notice or opportunity for comment afforded to parties affected by the practice.

The Commission, in issuing the rules,[2] stated that *North American Van Lines, Inc. v. ICC*,[3] *North American Van Lines, Inc. v. United States*,[4] and the July 1975 findings of the Commission's "Blue Ribbon Staff Report" were the decisive factors leading to the promulgation of the rules.[5]

The purpose of this comment is to analyze the prospective effectiveness of the proposed rules by examining the fitness flagging practice as it has evolved in various administrative proceedings and by determining whether or not the rules will afford the measure of procedural protections deemed necessary by the *North American* courts.

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* This note was prepared while the author was the 1976 Motor Carriers Lawyers Association summer research fellow at the University of Denver College of Law.

1. 41 Fed. Reg. 33307 (1976).
2. Proposed 49 C.F.R. 1067 (1976).
3. 386 F. Supp. 665 (N.D. Ind. 1974).
4. 412 F. Supp. 782 (N.D. Ind. 1976).
5. 41 Fed. Reg. 33307 (1976).

II. The Procedure Itself

In any application for additional motor carrier operating authority, the Commission is mandated, under § 207(a) of the Interstate Commerce Act,[6] to make an affirmative finding that the applicant is "fit, willing, and able properly to perform the service proposed." The Commission must also find that the carrier is able "to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder."[7] The primary aim of § 207(a), as elaborated in *Jones Common Carrier Application*, is to protect members of the public from carriers whose conduct evinces an unwillingness to operate in conformity with the statutory requirements.[8]

It is a well-settled rule that a determination of the fitness of a motor carrier applicant is wholly within the discretion of the Commission.[9] Although there is no absolute rule by which an applicant's fitness is determined,[10] the Commission does take several common factors into account. Among the most frequently cited are: 1) the nature of the proven violation of the act, 2) extenuating circumstances surrounding the infraction, 3) evidence of self-compliance on the part of a carrier, 4) effort on the part of a carrier to correct past violations, and 5) patterns of persistent disregard of the relevant law.[11]

The fitness flagging practice has taken four forms, the most common being where the Commission finds that "present or future public convenience and necessity" require that a particular applicant's request for new authority be granted. But then, upon advisement by its Bureau of Enforcement of the pendency of a matter affecting the fitness of that applicant, the Commission decides that it is inappropriate at the present time to make the required fitness finding, and will order the application proceeding held open until a final determination in the investigatory matter.[12]

A second manner of applying the practice is embodied in an agree-

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6. 49 U.S.C. § 307(a) (1970).

7. *Id.* The Interstate Commerce Commission is also required to find that "the proposed service . . . is or will be required by the present or future public convenience and necessity." *Id.*

8. 96 M.C.C. 100, 103 (1964).

9. United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1946); Georgia Highway Express, Inc. v. United States, 331 F. Supp. 906 (N.D. Ga. 1971).

10. Consolidated Carriers Corp., Common Carrier Application, 118 M.C.C. 695 (1973).

11. S.T.L. Transp. Inc., Extension, 115 M.C.C. 14 (1972); Eagle Motor Lines, Inc., Extension, 107 M.C.C. 499 (1968).

12. Aero-Trucking, Inc., Extension, 121 M.C.C. 742 (1975); Cherokee Hauling & Rigging, Inc., Extension, 121 M.C.C. 756 (1975); Curtis, Inc., Extension, 113 M.C.C. 340 (1971); Frigidways, Inc., Investigation & Revocation of Certificate, 76 M.C.C. 77 (1958); Houff Transfer, Inc., Extension, 78 M.C.C. 145 (1958); Penn-Dixie Lines, Inc., Extension, 73 M.C.C. 145 (1957). It should be noted that in none of the above administrative decisions was the fitness flagging practice challenged.

ment[13] by which the Commission empowers the Department of Transportation to intervene in an application proceeding if, in the Department's belief, the applicant has engaged in a systematic violation of safety regulations. In *Eagle Motor Lines, Inc.*,[14] the Federal Highway Administration of the Department of Transportation requested that the Commission take no action with respect to the release of certificates of operating authority until Eagle's fitness was determined relative to safety regulation violations alleged in a pending investigatory proceeding.

The third form of fitness flagging was illustrated in *North American Van Lines, Inc. v. ICC*.[15] The Commission had already made the findings necessary to the granting of a certificate of public convenience and necessity to North American and had entered a written order directing the issuance of such certificates as soon as North American complied with the usual statutory formalities.[16] North American did not receive the certificates, however, and upon inquiry was informed that it was "the Commission's 'practice' to 'withhold the release' of any permanent operating authority when an applicant's fitness came under Commission scrutiny."[17]

The fourth variation on the flagging procedure employed by the Commission is also found in the *North American* case. This is where the Commission reopened application proceedings that had previously been closed but in which the Commission had not yet entered an order for the issuance of certificates.

In all variations of the fitness flagging practice, the decision to hold the certificate application in abeyance was made *ex parte*. No hearings were held to permit the applicants to present views and evidence as to whether or not the fitness flagging procedure should apply to a particular application. Moreover, the Commission orders imposing the fitness "flags" generally contained no findings of fact as to the need for staying the applications.

Upon being criticized for withholding information as to the nature of the practice and its procedural applications, the Commission explained the basis upon which "fitness flagging" rests:

> The concept of fitness is a continuing one. An applicant carrier must establish its fitness in every proceeding, and thereafter it must maintain its operations at all times in conformity with all applicable statutes and regulations. Having previously found a carrier fit, this Commission is not foreclosed from reopening the proceeding to consider the matter further. It is

13. 32 Fed. Reg. 5744 (1967).

14. Eagle Motor Lines, Inc., Investigation & Revocation of Certificates, 117 M.C.C. 30 (1972).

15. 386 F. Supp. 665 (N.D. Ind. 1974).

16. These formalities consist of: 1) filing a tariff amendment, 2) filing proof of insurance, and 3) appointing an agent for the service of process.

17. 386 F. Supp. at 672.

> absurd to contend that we should put on blinders, and not take another look at a carrier's fitness if our attention is called to a possible lapse. To follow such a course would be an abnegation of our statutory responsibilities.[18]

III. Early Attacks On The Fitness Flagging Practice

The delay occasioned by the fitness flagging practice was first attacked in 1958, in a decision before a specially-constituted court in *Illinois-California Express, Inc. v. United States.*[19] Defendant Watson Brothers Transportation Company filed with the Commission an application for transporting general commodities in late 1949. In April 1951, a Joint Board, to whom the application had been referred for a hearing, recommended that Watson Brothers be issued a certificate of public convenience and necessity.[20] In November 1952, the Commission voted to postpone action on the application pending the outcome of a fitness proceeding.[21] Although the record did not disclose when the investigatory proceeding ended, the date of issuance of the certificate to Watson Brothers was stipulated as November 12, 1956. More than six years, then, had intervened between the time the application was filed and the issuance of the certificate.

Plaintiff protestants brought action for injunctive relief and attacked the Commission's order issuing the certificate on grounds that the public necessity which had been found six years earlier no longer existed in view of the radical economic changes in the freight transportation business.

Although the court recognized that the delay was "unusual, extraordinary, and inordinate," it dismissed the action and held that such a delay does not constitute a ground for attack if it is due to the pendency of a proceeding before the Commission in which the fitness of the applicant is in question. The court hinted, however, that if the record were to show an abnormal delay in the completion of the investigatory proceeding (which the present record did not), or that a certain amount of time had elapsed between termination of the investigation and final determination of the status of the application, it might reach the opposite result and open the order to attack.[22] However, the three-judge panel offered no guidelines from which a carrier could reasonably ascertain what the court would consider as an unconscionable delay.

Fourteen years later, the fitness flagging procedure itself, rather than the attendant delay, was the subject of attack in *Eagle Motor Lines, Inc.*[23]

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18. Eagle Motor Lines, Inc., Investigation & Revocation of Certificates, 117 M.C.C. 72, 75 (1972).
19. 7 Ad. L.2d 915 (1958).
20. *Id.* at 916.
21. *Id.* at 917.
22. *Id.*
23. 117 M.C.C. 72 (1972).

in a petition for reconsideration of an order issued 41 days earlier.[24] The Bureau of Carrier Safety of the Federal Highway Administration had conducted a survey of Eagle's operations.[25] From the survey, which revealed several violations, the Commission concluded that a grant of additional operating authority to Eagle would not be in accordance with the Interstate Commerce Act, public safety, or the terms of the national transportation policy.[26]

Eagle claimed that since the Commission had made all the necessary findings of public convenience, necessity, and fitness with respect to its five applications, its due process rights would be violated by an *ex parte* reopening of these administratively final applications.[27] The Commission relied on *Eazor Express, Inc.*[28] to hold that the agency has the authority, at any time prior to the actual issuance of a certificate, to reopen on its own motion any proceeding whatsoever.[29]

The Commission reasoned that fitness is a continuing concept; therefore, the carrier must establish its fitness in *each* proceeding for additional operating authority and must further show that it is in conformity *at all times* with the rules and regulations of the Interstate Commerce Act.[30]

IV. The Problem of the Internal Commission Memorandum

> [L]aymen and lawyers alike are baffled by a lack of published information to which they can turn when confronted with an administrative problem.
> *Hearings on S. 674, 675, & 918 Before the Senate Subcomm. on the Judiciary*, 77th Cong., 1st Sess., pt. 2, at 807 (1941).

Eagle Motor Lines had also requested information with respect to the fitness flagging practice, asserting that the Commission's General Counsel had earlier urged in a memorandum that the procedures be changed. The Commission deemed this memorandum an internal Commission communication on in-house procedures and therefore not for public dissemination.[31] It also denied that the document represented the opinion of the Commission and attributed it solely to the Office of the General Counsel.

With respect to fitness flagging, however, the Commission stated:

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24. Eagle Motor Lines, Inc., Investigation & Revocation of Certificates, 117 M.C.C. 30 (1972).
25. *Id.* at 33.
26. *Id.* at 36.
27. Sub -Nos. 228, 289, 294, 296, & 299.
28. 101 M.C.C. 719 (1967).
29. *Id.* at 720-21.
30. 117 M.C.C. at 75.
31. *Id.* at 79.

> Our procedures are designed to promote efficient administration and to reduce the expense, in time and monies, of both the Commission and the parties. Rather than . . . trying the fitness issue in each and every pending application involving that carrier, we have . . . reopened those of Eagle's pending applications . . . which now await only an affirmative finding of that carrier's fitness. . . .[32]

It is interesting to note that nowhere in the Commission's statement were considerations of procedural due process mentioned. Moreover, the Commission's reference to a blanket reopening of the pending applications seems contrary to the principle in *North American Van Lines, Inc. v. ICC*,[33] where the court stated that " 'fitness' in respect to new certificate applications is a *case-by-case* determination (so long as there is no consolidation of cases), and must ultimately be individually litigated in each application proceeding".[34] This the Commission seemed to recognize four years later, however, in its joint brief with the United States filed with respect to *North American Van Lines, Inc. v. United States*.[35] Here the Commission stated that it "cannot and ought not to defer internally or informally a finding on fitness in a *given* application proceeding without issuing a judicially reviewable order to that effect."[36]

The question as to the whereabouts of the memorandum surfaced again in 1976, in a May 20 letter[37] to the Commission's Freedom of Information Officer from W.J. Digby, Inc. in reference to the case of *W.J. Digby, Inc.*[38] The Commission's return letter stated: "We have examined the entire docket in that proceeding, and have been unsuccessful in locating a copy of the subject memorandum. Accordingly, we can only presume that the respondent, Eagle Motor, merely cited its existence and did not introduce a copy for the record."[39] The Commission Secretary then stated that the memorandum, not having been published, was an internal Commission communication and that, even if the memorandum did exist, it did not reflect the opinion of the Commission. Furthermore, said the agency, Digby's request was denied pursuant to 5 U.S.C. § 552(b)(5), which excepts intra-agency memoranda from public inspection.[40]

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32. *Id.* at 77.
33. 386 F. Supp. 665 (N.D. Ind. 1974).
34. *Id.* at 677.
35. 412 F. Supp. 782 (N.D. Ind. 1976).
36. Joint brief for defendants at 4.
37. TRAFFIC WORLD, July 19, 1976 at 32-2.
38. 110 M.C.C. 684 (1969).
39. Letter from Robert L. Oswald, Commission Secretary, to Leonard A. Jaskiewicz, Esq., Counsel for W.J. Digby, Inc., June 8, 1976.
40. Administrative Procedure Act, 5 U.S.C. § 552(b)(5) (1970). Exempt from disclosure are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

On July 8, 1976, Digby, pursuant to 49 C.F.R. 1001.4, appealed from the Commission's decision and filed a motion to compel the production of the memorandum.[41] Digby argued that since a *Traffic World* article had indicated that the Commission would soon be promulgating new fitness flagging rules, production of the memorandum would not inure to the Commission's detriment.[42] The Chairman's answer on July 14 indicated that the Commission was in complete agreement with the decision of the Secretary denying Digby's request[43] and cited *NLRB v. Sears, Roebuck & Co.*[44] as standing for the proposition that *Exemption (5)* calls for the withholding of all papers which represent the group-thinking of an agency in the process of formulating its policy and working out what its law will be.

After the *Eagle* decision, *supra*, Commissioner W. Donald Brewer felt compelled to defend the fitness flagging procedures in a 1972 address before the Transportation Law Institute.[45] He described the practice as being "neither secret nor prejudicial to individual carriers such as Eagle, but rather is in accordance with procedures established in a memorandum of agreement between the Commission and the Department of Transportation and published at 32 Fed. Reg. 5744 (1967)." However, a reading of 32 Fed. Reg. 5744 is not illuminating as to the nature of the fitness flagging practice. In addition to describing the procedure by which the Department of Transportation is empowered to intervene in an application proceeding, 32 Fed. Reg. 5744 simply states that the statutory duty of the Commission under the Interstate Commerce Act to find a carrier "fit" includes a finding that the applicant is fit from the point of view of safety of operations—a proposition not seriously disputed. Brewer went on to say that this memorandum should clear up the "misinformation circulating among the transportation bar."

V. THE *NORTH AMERICAN* CASES

A. *NORTH AMERICAN I*

> The licensing provisions of the Administrative Procedure Act which require "agencies to determine promptly all applications. . . are necessary because of the very severe consequences of the conferring of licensing

41. Motion of W.J. Digby, Inc. to Compel Production of Documents Pursuant to the Freedom of Information Act, No. MC-115826, (Sub.-No. 21, 136 *et al.*) (July 8, 1976).

42. TRAFFIC WORLD, June 28, 1976, at 59.

43. Letter from George M. Stafford, Commission Chairman, to Leonard A. Jaskiewicz, July 14, 1976.

44. 421 U.S. 132 (1975). *See also*, Note, *Freedom of Information Act & the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047 (1973).

45. Address by Commissioner W. Donald Brewer, 1972 TRANSPORTATION LAW INSTITUTE at 429-30. *But see* Nader, *A Critical Analysis of MC-C-7795 Eagle Motor Lines, Inc., Investigation & Revocation of Certificates*, SEVENTH ANNUAL TRANSPORTATION LAW INSTITUTE (1974).

> authority upon administrative agencies. If agencies are dilatory. . .parties are subjected to irreparable injuries." S. Doc. No. 248, 79th Cong., 2d Sess. 368 (1946).

North American Van Lines, Inc. v. ICC,[46] can be described as the turning point in the history of the fitness flagging practice, for—more than any other occurrence—it led to the promulgation of the new rules. Although couching the import of that decision in terms as innocuous as possible, the Commission in its 1975 Annual Report to Congress stated that the court "expressed reservations about the lack of formal Commission procedure when determining whether to defer fitness findings."[47]

The factual background is quite lengthy and complicated. However, it is necessary to set it forth in some detail in order to compare the significance of the actions of the Commission with the grandiloquent testimony five years earlier of Ms. Virginia Mae Brown, then Chairman of the Commission. Ms. Brown, in hearings before the Senate Committee on Commerce, proclaimed the Commission's adherence to openness and to conformity with the procedural protections of the Administrative Procedure Act:

> Because of . . . the Commission's long history of conducting its operations in the environment of open scrutiny. . ., important regulatory decisions are preceded by . . .hearings or investigation. . . .Our regulatory concepts, policies and procedures are evolved through the medium of formal proceedings conducted in accordance with the Interstate Commerce Act and the Administrative Procedure Act.[48]

In 1972 the Commission had audited North American's (hereinafter NAVL) activities in its household goods operations pursuant to the 1970 revised regulations governing the transportation of these goods.[49] But the new rules contained no meaningful standard by which performance could be measured and NAVL asserted that 100% compliance was physicially impossible.[50]

Prior to the institution of the household goods investigation proceeding against NAVL in September 1972, the Commission offered NAVL an opportunity to settle the proceeding by signing a cease and desist order promising 100% compliance as had Aero-Mayflower Transit Co. and Allied Van Lines.[51] NAVL refused, again arguing that the nature of the business was such that 100% compliance was physically impossible.

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46. 386 F. Supp. 665 (N.D. Ind. 1974).

47. 89 ICC ANN. REP. 76 (1975).

48. *Hearings on Review of the ICC Policies and Practices Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 29 (1969).

49. 49 C.F.R. 1056 (1975). The rules concerning the operations of household goods carriers were promulgated in a rulemaking proceeding after an intensive study. *See* Practices of Motor Common Carriers of Household Goods, 11 M.C.C. 427 (1970).

50. 412 F. Supp. at 785.

51. 386 F. Supp. at 671.

At the time of the commencement of the investigation proceeding, NAVL had pending before the Commission several applications for operating authority in its new products division.[52] In six of these proceedings, the Commission had entered a written order issuing the certificates to NAVL, but NAVL did not receive the certificates even though it had fully complied with the formalities of issuance.[53] In another five application proceedings, the Commission had made all the required findings for the granting of the certificates but, prior to actual issuance, reopened the proceedings and deferred any further action until a final determination of NAVL's fitness in the household goods investigation proceeding.[54] In still another eleven application proceedings, the Commission found that the operations proposed by NAVL were required by public convenience and necessity, but again declined to make the necessary fitness finding pending the outcome of the same investigation.[55]

In June 1974, an administrative law judge's initial decision in the household goods investigation "rejected the ICC's contention that 100% compliance with the household goods regulations was required"[56] and dismissed three of the charges. However, he found that, with respect to three other charges, the evidence warranted cease and desist orders as to NAVL's activities.[57] The judge then ordered a further hearing concerning NAVL's compliance with the household goods regulations and accepted NAVL's suggestion that it conduct a study on feasibility levels. Despite the initial decision of the administrative law judge rejecting the 100% compliance standard and finding that the charges did not justify a revocation of NAVL's certificates, the Commission took no further action with respect to NAVL's pending applications for operating authority and,

52. The Interstate Commerce Commission established classifications of motor carriers of property based upon the type of goods the carrier transports. North American, Inc. operates under both classifications. When it engages in the carriage of household goods, it is classified as a "carrier of household goods as a commodity" and when engaged in the transportation of new products, it is classified as a "carrier of specific commodities not subgrouped." 49 C.F.R. pt. 1040 (1975).

A reading of the regulations governing the transportation of household goods and those governing the carriage of new products discloses many differences, and one is apt to question the relationship between the two divisions. However, as the Commission pointed out at 27 in its joint brief with the United States in North American Van Lines, Inc. v. United States, 412 F. Supp. 782 (N.D. Ind. 1976), section 207(a) of the Interstate Commerce Act authorizes the issuance of a certificate to the carrier as a whole and not to each of its separate divisions. Moreover, section 207(a) requires that a carrier conform to the "requirements, rules and regulations of the Commission" and not just to a part of the rules. The difference between the two divisions was not materially at issue in either of the two North American cases.

53. 386 F. Supp. at 672, (Sub.-Nos. 137, 139, 140, 142, 146, and 147).

54. *Id.*, (Sub.-Nos. 126, 133, 135, 145, and 152).

55. *Id.*, (Sub.-Nos. 141, 143, 148, 149, 150, 154, 155, 158, 160, 163, and 178).

56. *Id.* at 674.

57. North American Van Lines, Inc. v. United States, 412 F.Supp. 782, 786 (N.D. Ind. 1976).

in August of 1974, stayed indefinitely the judge's decision.[58]

Coincidentally, the very day after the administrative law judge issued his initial verdict, the ICC commenced a new products investigation proceeding against NAVL.[59] This "investigation" was essentially a declaratory proceeding and revolved around a difference of opinion between NAVL and the Commission as to the meaning of the terms "new furniture" and "household appliances."[60] Typical of the issues presented in this declaratory proceeding was whether North American could transport pool and ping-pong tables under its "new furniture" authority. Such an issue impliedly does not relate to a carrier's fitness to operate its proposed services. In fact, at the hearing in *North American I*, this point was conceded by the Commission's attorney.[61]

In none of the above application proceedings was the Commission's fitness flagging prefaced by a hearing or an opportunity for NAVL to be heard, nor was there any evidence in the pending applications with respect to the household goods fitness investigation. Thus, in *North American I*, NAVL requested mandamus relief and asked that the Commission's orders postponing fitness determinations on its applications be enjoined, set aside, annulled, or suspended.

The court began by noting the statutory authority of the Commission to affirmatively find in each application proceeding that the applying carrier is "fit, willing, and able properly to perform the service proposed" and the discretion given to the Commission in determining whether a carrier is fit.[62] Judge Eschbach felt that it would be unreasonable for the Commission to ignore current investigatory proceedings which could possibly involve factors very relevant to the Commission's consideration of a carrier's fitness to operate.[63]

Nevertheless, said the judge, although the Commission's power is discretionary and the Commission *may* determine that a given application for additional operating authority should be deferred until the outcome of a current fitness investigation,

> this court cannot hold that the statute delegates to the ICC the power to institute a rule withholding *all* certificate applications any time and every time there is a carrier investigation pending, regardless of facts concerning the individual application and the nature of the complaint at issue in the investigation.[64]

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58. *Id.* at 787.
59. *Id.* (No. MC-C-8372).
60. *Id.*
61. *Id.*
62. Interstate Commerce Act § 207(a), 49 U.S.C. § 307(a) (1970).
63. 386 F. Supp. at 676.
64. *Id.*

Moreover, said the court, "[t]he results of the fitness investigation, even if there were a substantial factual link between it and the pending application proceedings, could only be evidence and not conclusive in the subsequent application proceedings."[65]

The court went on to say that the discretion possessed by the Commission must comply with the procedural protections afforded by the Administrative Procedure Act and cannot be exercised by the Commission in an *ex parte* manner. The court also faulted the agency for not having disclosed how it concluded that NAVL's applications for additional authority should be suspended pending a determination of current investigation proceedings. The court quoted the words of the United States Supreme Court in *Burlington Truck Lines, Inc. v. United States*:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. . . . The Commission must exercise its discretion . . . within the bounds expressed by the standard of "public convenience and necessity." . . . And for the courts to determine whether the agency *has* done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress had empowered it."[66]

The court then mandated the Commission to proceed with the certification process with respect to those six application proceedings wherein the only outstanding Commission order was the actual granting of the certificates. With respect to the five application proceedings which were reopened and deferred pending the final determination of the household goods investigation and the eleven proceedings in which the Commission delayed a fitness finding, the court granted the motion to dismiss of the Commission and intervening defendants, holding that the applications were not sufficiently final for judicial review.[67]

B. North American II

> A prerequisite to fair formal proceedings is that when formal action is begun, the parties should be fully apprised of the subject matter and issues involved. Notice, in short, must be given; and it must fairly indicate what the respondent is to meet. . . .Room remains for considerable improvement in the notice practices of many agencies. Agencies not infrequently set out their allegations in general form, perhaps in statutory terms thus failing fully to apprise the respondents and to permit them adequately to prepare their defenses. S. Doc. No. 8, 77th Cong., 1st Sess. 62-63 (1941) (*Report of the Attorney General's Committee on Administrative Procedure*).

After *North American I* was issued on October 31, 1974, NAVL notified the Commission that it had complied with the statutory formalities

65. *Id.* at 677.
66. 371 U.S. 156, 167 (1962).
67. 386 F. Supp. at 686.

required for issuance of the certificates in the six administratively final application proceedings.[68] But on December 20, the Commission issued an order reopening the six completed dockets, ostensibly for the limited purpose of permitting NAVL and other interested parties to present evidence and views as to whether or not these proceedings should be further deferred pending the final outcome of the household goods investigation.[69] No party, with the exception of NAVL, filed a response. But on June 2, 1975, the Commission ordered these proceedings reopened pending not only the final outcome of the household goods investigation but also the investigation into NAVL's new products business, the declaratory proceeding.[70]

Meanwhile, in November of 1974, NAVL had filed a petition for reconsideration with respect to the application proceedings in which NAVL had not, according to the 1974 *North American* court, exhausted its administrative remedies. On January 2, 1975, the Commission, in a single consolidated order applicable to all the proceedings, issued an order denying NAVL's petitions for reconsideration.[71] The Commission found that each petition was identically worded and "did not present any relevant evidence, views, or arguments which might indicate that the determination to withhold a fitness finding is incorrect. . . ."[72] This order, contrary to the mandate of Judge Eschbach that the flagging decisions accord with the requirements of the Administrative Procedure Act, was entered without notice or opportunity to be heard.

On May 5, 1975, the Commission set aside its order of January 2 and reopened each of the proceedings for reconsideration. By an order of June 17, again entered without notice or hearing, the Commission turned down NAVL's petition for reconsideration because no reasons had been given, said the Commission, for granting the relief NAVL sought. The Commission went on to note that since its initial decision to suspend consideration of NAVL's fitness in its application proceedings, two additional developments relating to the question of NAVL's fitness had taken place:[73] the second "investigation" in the new products business and *North American Van Lines, Inc., Extension—New Furniture*[74] (Sub.-No. 170).

In a May 2, 1975, order with respect to Sub.-No. 170, Division 1 of the Commission affirmed the findings of the administrative law judge that

68. North American Van Lines, Inc. v. United States, 412 F. Supp. 782, 788 (N.D. Ind. 1976).
69. *Id.*
70. *Id.* at 789.
71. Brief for Plaintiff at 5, North American II.
72. Joint Brief for Defendants at 5, North American II.
73. 412 F. Supp. at 796.
74. No. MC-107012.

NAVL had violated the Act in part and denied the certificate application. However, the June 17 order mentioned above disclosed that the deferrals were *not* imposed pending the outcome of Sub.-No. 170, and the order expressly noted the dissimilarity between the subject of that proceeding and the matters involved in the household goods investigation. North American agreed with Division 1 that this particular application proceeding (Sub.-No. 170) should be denied and did not petition the Commission for a reconsideration of its application.[75]

The Commission followed its June 17 order with a July 1, 1975, order of Division 1 acting as an Appellate Division. Division 1 once again denied NAVL's petition for reconsideration and provided that each of the proceedings would remain open not only for the final outcome of the household goods investigation but also for the new products "investigation."

In the interim, the Commission had on March 5 issued an order lifting its August 1974 stay of the administrative law judge's decision in the household goods investigation. The Commission affirmed the judge's decision and provided that the study of feasibility levels that had been suggested in the previous proceeding would now be jointly conducted by the Commission and NAVL, rather than by the NAVL alone. On April 9, NAVL filed a petition for clarification and questioned whether, in light of the March 5 order, the fitness flagging practice would continue to apply. Ten days later, the Commission denied NAVL's petition and declared that it would continue to hold any application proceedings in abeyance pending a final determination of NAVL's fitness.[76] On May 1, NAVL again filed a petition for further clarification and requested a determination that the March 5 order not be a bar to the issuance of limited term certificates.[77] The Commission, on May 13, denied NAVL's petition and noted that the certificates could not issue even if there were a final determination in the household goods proceeding because of the pendency of the new products "investigation".

On May 21, NAVL filed a petition in the nature of a compliance statement and requested that the Commission consider the issuance of limited term certificates based upon a 90% compliance standard.[78] Shortly thereafter, on July 8, the Commission instituted an investigation in order to verify the compliance statements, auditing 2,250 household goods contracts and NAVL's new products business.[79] Although the audit ended in August, NAVL was not apprised of the results despite several requests.[80]

75. 412 F. Supp. at 789, n.32.
76. *Id.* at 781.
77. *Id.* at 789.
78. *Id.* at 790.
79. Reply Brief for Plaintiff at 17, North American II.
80. 412 F. Supp. at 790.

Shortly after filing its joint brief with the United States in *North American II*, the Commission, in a single consolidated order without notice or hearing, raised a third flag applicable to 31 different application proceedings. Now NAVL's applications for additional operating authority would not be considered until a final determination of NAVL's fitness in not only the household goods and new products investigations, but also pending the final outcome of Sub.-No. 170, which the Commission reopened by this order and which NAVL believed had been concluded.[81]

NAVL immediately petitioned for a reconsideration of this order on the grounds that, *inter alia*, the September 23 stay had been imposed without notice or hearing and that the Commission failed to take into account the August 1975 audit of NAVL's operations by the Commission. NAVL also requested the issuance of limited term certificates and again proposed that it be permitted to sign a 90% compliance order.[82]

The Commission denied NAVL's petition on December 22, 1975, and affirmed its earlier decision that no new applications be issued pending a determination of all three "flags". The Commission also ruled that as far as "notice" was concerned, since NAVL by this time must surely have been aware that the Commission was likely to impose stays on any further application proceedings, it therefore had actual notice of the flagging procedure. In addition, the Commission, without mentioning the results of the 1975 audit (which NAVL estimated would demonstrate in excess of 95% compliance), found it "unappropriate" to extend to NAVL a 90% compliance settlement offer. The Commission then reopened the household goods investigation, consolidated it with Sub.-No. 170, and rescinded its earlier decision to participate in a feasibility level study with NAVL.[83]

Since September 28, 1972, three years had passed since North American had been issued any new operating authority. Expert witnesses testified that NAVL was losing over $15,000 per day because of the awareness on the part of shippers that it could not, or would not, obtain new operating authority.[84]

By this date the time had expired for the Commission to enter an appeal of Judge Eschbach's decision, leading most observers to speculate that the Commission would shortly be promulgating new rules with respect to its fitness flagging procedures. In fact, on January 7, Commission Chairman George M. Stafford had appointed a Blue Ribbon Panel of staff members to institute a regulatory reform study, and one of the issues to be treated was that of fitness flagging. As stated by the Chairman in

81. *Id.*
82. *Id.*
83. *Id.* at 791.
84. Brief for Plaintiff at 21, North American II.

testimony on regulatory reform pursuant to a Senate Resolution authorizing a study of the purpose and effectiveness of certain federal agencies, "[t]heir charter called for a 'no holds barred' review of the heart of our operations—the processing of cases."[85]

However, in testimony at the same time the Commission was issuing its December 22 order without notice or hearing imposing three flags with respect to each of NAVL's applications, the Chairman, in addressing the problem of regulatory lag, reported "[t]here is not a great deal that can be done about the opportunity of parties to be heard because the sense of fair play that pervades the judicial process cannot be compromised."[86] Yet, from the time of the 1974 decision, NAVL had not received a hearing as to the propriety of the suspensions on its new operating applications, despite Judge Eschbach's holding that a determination to apply the practice must be in compliance with the notice, hearing, and record requirements of 5 U.S.C. §§ 554, 556-57, and despite the fact that the record in the household goods investigation had closed on October 26, 1973.[87] (The record in the new products "investigation" had closed on April 15, 1975.) Most surprising, however, was the fact that the Commission sometime in 1974 had allowed another motor carrier involved in the transportation of household goods to sign a decree promising 90% compliance,[88] the very level of compliance that the Commission had earlier rejected and which had triggered the Commission's investigation into NAVL's household goods business. *ICC v. Global Van Lines.*[89]

The stage was set for *North American Van Lines v. United States.*[90] This time the case went before a three-judge federal court, with Judge Eschbach again participating and writing the court's opinion. The Judge began by stating that the facts and issues presented in the previous *North American* case were applicable to the present proceeding as well.

The court noted that 5 U.S.C. § 558(c) requires: "[w]hen application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons *and within a reasonable time*, shall set and complete proceed-

85. *Hearings on S. Res. 71 to Authorize a Study of the Purpose and Current Effectiveness of Certain Federal Agencies Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 301 (1975).

86. *Id.* at 303. In fairness to the ICC, however, it must be mentioned that despite an increasing workload, the Commission personnel decreased by 20 to 25 percent during the period 1965-70. Cramton, *Causes & Cures of Administrative Delay*, 58 A.B.A.J. 940 (1972).

87. 386 F. Supp. at 674.

88. Von Hoffman, *Another Horror Story from the ICC: Little Guys Aren't the Only Victims of Bureaucratic Caprice*, Rocky Mountain News (Denver), Aug. 13, 1976, at 53.

89. Civil No. 72-3020-WMB (D.C. Colo. 1974).

90. 412 F. Supp. 782 (N.D. Ind. 1976).

ings . . . ." (emphasis added).[91] In addition, the court obseved that this provision for timely processing of operating authority is complemented by 5 U.S.C. § 706(1) to "compel agency action unlawfully withheld or unreasonably delayed."[92]

Also, said the court, 49 U.S.C. § 307(a) directs that a certificate "shall be issued" if the applicant is determined to be fit and that "otherwise such application shall be denied." In light of the foregoing, the court held that the statutes by their very terms do not clothe the Commission with discretion as to whether or not it will act upon an application. Rather, the Commission is charged with the duty of *either granting or denying* the applications. Therefore, the delays of the Commission in processing NAVL's applications were not a matter "committed to agency discretion by law," 5 U.S.C. § 701(a), and were therefore reviewable under the Administrative Procedure Act.[93]

According to § 553(b)(A) of the Administrative Procedure Act, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice are exempt from the notice and hearing requirements." However, unless a party is deemed to have actual notice of it, a rule of procedure must be published in the *Federal Register*. The court discounted the Commission's contention that NAVL had actual notice of the fitness flagging practice by observing that the only decriptions extant of the procedure were to be found in the Commission orders under review. Therefore, said the court, NAVL's knowledge of the scope of the flagging practice was no better than its own.

The court reiterated the findings of the 1974 *North American* decision that although the Commission may place a carrier application in abeyance in an appropriate case, provided the action satisfies the procedural safeguards of the Administrative Procedure Act, the Commission cannot apply fitness flagging as an automatic rule. The court found that the record did not support this prohibition of the 1974 court. In each order holding NAVL's applications in suspension, the sole "findings" were as follows:

> *It appearing*, that matters concerning the fitness of applicant are in issue in a pending proceeding in No. MC-C-7901, makes it inappropriate here to determine applicant's fitness properly to perform the proposed service in conformity with the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder.[94]

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91. Administrative Procedure Act, 5 U.S.C. § 558(c) (1970).

92. 412 F. Supp. at 792.

93. Administrative Procedure Act, 5 U.S.C. § 701(a) (1970).

94. 412 F. Supp. at 796. The court found that in over 15 stay orders, the findings were identically worded.

Therefore, said the court, because of the lack of evidence in each order supporting the nexus between the individual application proceedings and the outstanding fitness investigations, the stays "were issued solely on the basis of an automatic rule requiring the withholding of action whenever an investigation involving the carrier was technically unresolved."[95]

The court then went on to compare the fitness flagging rule with the NLRB's "blocking charge" rule in which the NLRB delays consideration of a petition for the decertification of a bargaining representative pending the determination of an unfair labor practice charge. In *Surratt v. NLRB*,[96] the court decided that the Board could not apply its "blocking charge practice" as a per se rule without "exercising its discretion to make a careful determination in each individual case whether the violation alleged is such that consideration of the election petition ought to be delayed or dismissed."[97] Continuing the analogy, the court noted that, like the blocking charge rule held illegal above, the flagging practice was automatically applied in each of NAVL's applications regardless of whether the charges in the current investigations were proven, unfounded, or disproven. As a result, the court held that the

> ICC's statutory duty . . . to determine a carrier's fitness in an application proceeding may not be fulfilled by the expedient of promulgating an informal rule automatically withholding a fitness determination whenever an investigation involving the carrier is filed by the ICC's Bureau of Enforcement.[98]

The court concluded, then, that the rule was arbitrary under 5 U.S.C. § 706(2)(A), in excess of statutory authority under 5 U.S.C. § 706(2)(C), unreasonable under 5 U.S.C. § 558(c), and unlawful under 5 U.S.C. § 706(1).[99]

Because the court was unable to find any evidence of NAVL's unwillingness to conform to statutory requirements after the March 5, 1975 order of the Commission affirming the administrative law judge's decision in the household goods investigation, it determined that no further question of fitness was involved.[100] The Commission itself had repudiated the 100% compliance level standard and, as it had not yet promulgated a new standard, NAVL could not be found remiss in failing to conform to a requirement that did not exist. Insofar as the declaratory proceeding was concerned, since the very purpose of such a proceeding is to determine

95. *Id.* at 797.
96. 463 F.2d 378 (5th Cir. 1972); Annot., 18 A.L.R. Fed. 420 (1974).
97. 463 F.2d at 381.
98. 412 F. Supp. at 785.
99. *Id.* at 799.
100. *Id.* at 800.

just what a particular rule will be, NAVL could not be held to be in violation of a rule not yet announced.[101] Therefore, the continued refusal of the Commission to consider the applications was "arbitrary, capricious, an abuse of discretion, and in excess of statutory authority."[102]

The court also noted the Commission's refusal to permit NAVL to sign the 90% compliance agreement which it had allowed Global Van Lines to sign and held that the continued suspension of NAVL's applications based on this factor, in addition to being without reason,was "beyond the limits of justifiable discretion, and tinged at times with bad faith."[103]

Finally, the 1976 *North American* court quoted the 1974 court and indicated that by the terms of the Administrative Procedure Act:

> [a]djudications otherwise required by statute to be decided on the record after opportunity for an agency hearing must comply with the notice, hearing, and record requirements of the Act, 5 U.S.C. §§ 554, 556-7. It has long been held that an application of a motor carrier for a certificate of public convenience is such an adjudication and therefore covered by those requirements.[104]

NAVL had not received notice of the actions of the Commission in deferring its applications, had been denied the opportunity to be heard, and had not been informed of the standards to be applied. Therefore, every stay order was entered without observance of the procedures required by the Administrative Procedure Act and was consequently unlawful.

The court gave the Commission 60 days within which to render an order in each application proceeding stayed before the March 5, 1975 order.[105] As far as any subsequent applications were concerned, the court ordered the Commission to hold the required hearngs promptly or to make a decision consistent with the opinion. The court also permanently enjoined the Commission from applying the fitness flagging rule in a per se manner.[106]

On May 10, 1976, in *North American Van Lines v. United States*,[107] a different case, the very same court, although denying the Commission's motion for clarification of judgment filed May 3 and its motion for amendment of findings filed the same day, extended the time within which the Commission was expected to either grant or deny the pre-March 1975 applications.

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101. *Id.* at 801.
102. *Id.* at 800.
103. *Id.* at 802.
104. 386 F. Supp. at 678-79.
105. 412 F. Supp. at 808.
106. *Id.*
107. 1976 FED. CARR. REP. ¶ 82,615 (N.D. Ind. 1976).

The court rejected the Commission's contention that the March 5 order did not negative the 100% compliance requirement. In fact, stated the court, the Commission's very own wording in its order belied that argument:

> Such a study should demonstrate whether existing standards are realistic and, if they are not, it should aid us in formulating realistic standards of service which carriers are capable of meeting.[108]

Pursuant to the decision in *North American II*, the Commission on July 13 served an order in which Commissioners Murphy and Gresham did not participate and in which Commissioner O'Neal strongly dissented. The order approved the issuance of 29 certificates to NAVL as soon as it had complied with the statutory formalities.[109]

VI. Current Applications of the Practice

The most recent case to call the Commission's fitness flagging practice into question was *W.J. Digby, Inc. v. ICC*.[110] The factual background preparatory to this decision, which was affirmed without opinion, is as follows.

The Commission had originally found that all 41 of Digby's proposed services were required by the public convenience and necessity but declined to make fitness findings pending the outcome of No. MC-115826 (Sub.-No. 21). The decision in Sub.-No. 21, served March 29, 1972, determined that Digby had violated, *inter alia*, the terms of a civil injunction. This order deemed Digby to be "unfit" and recommended that the Sub.-No. 21 application proceeding be denied.

The Commission's Divison 1 affirmed the March 1972 order on January 17, 1973. In March 1973, Digby filed a petition for rehearing, which triggered an investigation of Digby's field operations. After the survey had ended in February 1975, Digby presented a supplemental petition for rehearing, but by a March 21, 1975 order of Division 1 acting as an Appellate Division, both petitions were denied. Division 1 noted that the January 17 findings were in accordance with the evidence and stated that even if the order were to be reopened after a three year time lag, a different result would not be reached.

In May of 1975, Digby instituted court action and, on June 6, 1975, the court stayed the Commission's January 17, 1973 order, only to subsequently affirm it on February 4, 1976.[111] By an order served on April 16, 1976, the Commission's Division 1 found that the 41 applications should be denied because Digby had failed to establish its fitness. On June 30, the

108. 121 M.C.C. 136 (1975).
109. No. MC-107012 (Sub.-No. 26 *et al.*) at 3 (July 8, 1976).
110. 530 F.2d 1095 (D.C. Cir. 1976).
111. W.J. Digby, Inc. v. ICC, 530 F.2d 1095 (D.C. Cir. 1976).

same Division 1—acting as an Appellate Division—affirmed the earlier order.

Division 1 distinguished the 1976 decision in *North American II* (and the proposed rules reflect this distinction) in that it dealt with:

> the flagging of proceedings pending the outcome of another application or investigation proceeding on the fitness where no *final fitness determination has as yet been made*, whereas here the various application proceedings herein had been held open on the fitness issue between January 17, 1973 and April 2, 1976 on the basis of an actual adverse fitness finding.[112]

Be that as it may, however, as Commissioner Christian observed in lone dissent, Digby was never afforded an opportunity for a hearing as to whether the issues presented in Sub.-No. 21 were so closely related to Digby's pending applications as to deny every single one.

Digby again petitioned for reconsideration on May 14, 1976 on the grounds that the Court of Appeals, in affirming the Commission's Sub.-No. 21 decision, observed:

> Our affirmance in this case does not intimate any views on the fitness of the petitioner with respect to any other certificates or applications therefor.[113]

Digby argued that the court did not specifically intend its decision to affect the other application proceedings. However, by order of June 30, 1976, Appellate Division 1 denied Digby's petition.

On July 16, Digby filed a motion for stay of the Commission's June 30 order pending judicial review and, on July 20, filed a stay motion with the United States Court of Appeals (D.C. Cir.). The Commission by order denied Digby's petition, but the court granted Digby a stay. But, just seven days before the new fitness flagging rules appeared in the August 9 issue of the *Federal Register*, the court vacated the stay and ordered Digby's temporary authorities terminated. As of October 13, 1976, Civil No. 76-1657 had not yet been scheduled for oral argument.

VII. The Proposed Rules

> If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power must be fixed and determined. The rights of the citizen against them must be made plain.
>
> Elihu Root[114]

The Commission indicated in the explanatory material preceding the

112. No. MC-115826 (Sub.-No. 136 *et al.*) at 4 (June 30, 1976).

113. Petition of W.J. Digby, Inc. for Reconsideration & Request for Receipt of Additional Evidence & Oral Hearing, No. MC-115826 (Sub.-No. 136 *et al.*) at 10 (May 14, 1976).

114. Quoted by Congressman Francis E. Walter, S. Doc. 248, 79th Cong., 2d Sess. 350 (1946) (*Administrative Procedure Act Legislative History*).

rules that the new flagging procedures were to be applied on an interim basis to carriers who are *currently* the subject of a fitness investigation.[115] This would, in effect, preclude the 41 application proceedings under dispute in *W.J. Digby, Inc.*[116] from receiving the benefits of the expanded notice, record, and hearing provisions since the investigation concerning Digby is closed.

The Commission sets forth a flagging standard which provides that the procedure may be initiated if there is *probable cause* to believe that the applicant for motor carrier operating authority will ultimately be unable "to meet statutory requirements for favorable Commission action."[117] This standard meets the middle ground of leaving within the discretion of the Commission the determination that a motor carrier is fit while at the same time forestalling any Commission action on the basis of mere suspicion or desire to vindicate prior administrative action.

The flagging standard section goes on to describe several situations from which a reasonable belief might issue that an applicant will not be able to conform to the statutory requirements: flagrant and continuous disregard of the rules and regulations of the Interstate Commerce Act, "uncorrected or other significant violations denoting an indifference by the applicant towards lawful standards of behavior, or a pattern of neglect of its duties towards the public that betokens a refusal voluntarily to meet its duties."[118] The rules hasten to add, however, that bona fide differences of opinion or interpretations regarding a carrier's operating rights would not give rise to a probable cause belief. This caveat would seem to eliminate situations such as the declaratory proceeding in *North American* wherein the main issue presented was whether or not a pool table could be transported under an already existing "new furniture" authority. It would also exclude those instances wherein the carrier lawfully challenges a rule which it believes in good faith to be incapable of execution, such as the 100% compliance standard set forth by the Commission with respect to its household goods regulations.

The Commission's Bureau of Enforcement, under the proposed rules, will no longer be able to intervene in application proceedings on its own motion but must request that it be allowed to participate. This request must contain a summary of the evidence that the Bureau intends to put forward. The procedures with respect to the Department of Transportation's participation are essentially the same: the Department must petition to intervene in an application proceeding bearing on the issue of carrier fitness but may still, on its own motion, pursuant to 32 Fed. Reg. 5744

115. 41 Fed. Reg. 33308 (1976).
116. 530 F.2d 1095 (D.C. Cir. 1976).
117. 41 Fed. Reg. 33309 (1976).
118. *Id.*

(1967) file a formal complaint with the Commission with respect to the safety practices of a particular carrier.[119] If the Department files a petition for leave to intervene, it must at the same time notify the applicant. This petition must also be published in the *Federal Register* and set forth the evidence to be presented. The rules then state that:

> Show-cause flagging procedures, if any, will be undertaken only in the application proceedings in which the Bureau of Enforcement or the Department of Transportation is participating on fitness.[120]

This section, §1067.5, leaves open the query whether, if the Commission initiates an investigation on its own motion, and alone participates in an application proceeding, the procedural safeguards inherent in the "show-cause flagging procedures" will be applicable. In explaining the fitness flagging practice as it evolved prior to the issuance of the rules, the Commission stated in its preface to the proposed rules that a flagging motion could be raised by one of three parties: the Commission itself (or by the Vice-Chairman), the Bureau of Enforcement, or the Department of Transportation. Yet in two sections of the proposed rules—§§1067.5 and 1067.11—the plain import would be to preclude the procedures specified from coming into existence where the Commission begins an investigation on its own motion, and is the sole participant in the application proceeding.

Under the "show-cause flagging procedures," the order authorizing either the Bureau or the Department to participate must contain the statutes, rules, or regulations allegedly violated and the nature of the allegations. In addition, the pending application proceedings being considered for a flag must be set forth. The order would also require that the Bureau or the Department inform the applicant in writing within ten days of "all matters of fact and law to be asserted with sufficient particularity to make clear the violations alleged and the nexus alleged to exist between those violations and the application proceeding in which fitness flagging is being considered."[121] The applicant will then have 20 days within which to respond by submitting verified "written representations including facts and arguments tending to show cause why all or any of its applications should not be flagged for fitness."[122] The Bureau or the Department is then allotted a fifteen-day period within which to reply.

Proposed 49 C.F.R. § 1067.13 provides that when the applicant, under the show-cause procedures, has filed its representations purportedly demonstrating why its applications should not be flagged, the Commission will promptly review the representations. This section also, in the

119. *Id.* at 33309-310 (proposed 49 C.F.R. 1067.3, 1067.4).
120. *Id.* at 33310 (proposed 49 C.F.R. 1067.5).
121. *Id.* at 33310 (proposed 49 C.F.R. 1067.6).
122. *Id.*

interest of administrative efficiency, requires the applicant to file, along with its representations, a petition for reconsideration, as the Commission will not consider a separately filed petition.

Although, under the proposed rules, the issuance of a show-cause order does not constitute flagging, the Commission cautions that the invocation of the procedure acts as a temporary restraint on the issuance of operating certificates until such time as the Commission has decided whether or not a flag should be raised. The 70-day time limit posted is well within the 90-day requirement for disposing of applications in the proposed 1975 Motor Carrier Reform Act.[123]

A carrier failing to respond to the show-cause procedures within the time limits specified will have its applications flagged. Such flagging, however, is to be accompanied by notice to the parties. Should the Commission determine that a flag must be raised, such order is subject to a petition for reconsideration. If the petition is denied, the matter is considered sufficiently final for judicial review. This would provide a measure of protection for those application proceedings that were not, under the previous application of the flagging practice, considered administratively final.[124]

All orders raising "flags" must designate "at least in general terms" the findings of the Commission in relation to the standard previously described and must list those application proceedings to which the findings apply. This order, however, cautions the Commission, does not constitute a decision per se as to the carrier's fitness.[125]

If an application is flagged, the Commission will not hold it completely in abeyance until a final determination of the applicant's overall fitness. Rather, the Commission will continue to move forward towards the disposition of the "public convenience and necessity" and the "fitness to perform the service proposed" issues. At the point when these statutory findings have been made, further consideration of the application will be suspended until the Commission has determined that "flagging is not warranted, the fitness issue is resolved, or the fitness flag is removed."

In a proceeding where there is fitness participation by the Bureau of Enforcement or the Department of Transportation, if a flag has been raised on a particular application and the carrier files a new request for operating authority, this application will, by notice, be added to the list of proceedings set forth in the original order unless the carrier files a petition. Such a petition will be acted on by the Commission 30 days after the notice of the application is published in the *Federal Register*. Moreover, the Commis-

123. H.R. Doc. No. 94-307, 94th Cong., 1st Sess. 8 (1975).
124. 41 Fed. Reg. 33309 (1976).
125. *Id.* at 33310 (proposed 49 C.F.R. 1067.9).

sion will promulgate any order with respect to the petition only on the basis of the announced standards.[126]

Here again, this section applies to the application proceedings in which either the Bureau or the Department participates. Does the Commission make the assumption that, since it is within the Commission's discretion to determine whether or not an applicant is fit, the show-cause safeguards do not apply in instances where the Commission is the sole participant in an application proceeding? Or is it the Commission's intent to ensure the Bureau of Enforcement and the Department of Transportation do not abuse their privileges in being allowed to participate in application proceedings? Why, then, does the Commission say that "show-cause procedures. . .will be undertaken *only* in the application proceeding in which the Bureau. . .or the Department is participating on fitness?"[127]

The Commission reiterated its authority to reopen *at any time* any application proceeding for reconsideration of the fitness issue. Only those applications which resulted in the issuance of operating rights are excepted. This latter provision would seem to exempt from fitness flagging the six proceedings in *North American I*, where the Commission had entered a written order for the issuance of the certificates but had nevertheless subjected those administratively final proceedings to the flagging practice.[128]

The Commission then addresses itself to the *Digby* controversy. Proposed 49 C.F.R. § 1067.16 provides:

> [w]here the fitness flag has been raised, an administratively final determination that applicant has failed to show that it is fit will provide a sufficient basis for disposition of all designated pending applications. Following an administratively final ultimate finding unfavorable to applicant, all flagged proceedings will be denied by appropriate order.[129]

Most likely, the United States Court of Appeals will consider the June 30 order, *supra*, at 345, an administratively final determination that Digby is unfit and affirm the Commission's decision denying the 41 applications.

If the carrier files applications subsequent to an adverse fitness finding, the last section, §1067.17, provides that the applications will be considered in the normal manner and that the applicant will have to prove that he is "fit". However, the Commission may take official notice of the prior finding.[130]

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126. *Id.* (proposed 49 C.F.R. 1067.11).
127. 41 Fed. Reg. 33310 (1976) (emphasis added).
128. *Id.* (proposed 49 C.F.R. 1067.10).
129. *Id.* at 33311.
130. *Id.*

It is evident that the procedures comport with the notice, hearing, and record requirements of the Administrative Procedure Act when either the Bureau of Enforcement or the Department of Transportation take part in application proceedings. To what extent are the rules addressed to the multifaceted test suggested by Judge Eschbach in the 1974 *North American* case? He believed that the Commission should take into account several factors in deciding whether or not to "flag" an application for new operating authority: 1) the seriousness of the violations, 2) the degree of relevance between the violation and the carrier's proposed services, 3) the expected length of delay should the application be flagged, and 4) the immediacy of the public's need for the service proposed in the application.[131]

The Commission's concern with the seriousness of the violation is reflected in the flagging standard which makes only such breaches actionable as are past and uncorrected, and/or which denote an indifferent attitude on the part of the carrier "towards lawful standards of behavior." The rules clearly specify that differences of opinion and the like do not constitute grounds for flagging.[132]

As to the degree of relevance between the violation and the proposed application, the rules stress that the applicant must be informed of the nexus that the Bureau of Enforcement or Department of Transportation believes to exist between the infraction and the application. The applicant is then permitted to answer the contentions and to petition for reconsideration if its written representations are denied. Also, in any order raising a flag, the Commission must make findings on the record which at least in general terms show the alleged nexus.

Pervasive throughout the rules is the Commission's concern for mitigating delay and expediting the procedures. An entirely separate section provides that the "application proceeding. . .will be processed on an expedited basis to the extent consistent with the Commission's other responsibilities,"[133] and another section provides that the flagging "order . . . will be disposed of as promptly as possible."[134] This concern for handling the procedures with dispatch parallels the published Commission policy favoring the speedy processing of applications.

Although the rules do not mention any consideration of the public interest factor or the immediacy of need for a proposed service, the Commission is empowered under the Interstate Commerce Act to issue temporary operating certificates and has done so in the past.

131. North American Van Lines, Inc. v. ICC, 386 F. Supp. 665, 676-77 (1974).
132. 41 Fed. Reg. 33309 (1976) (proposed 49 C.F.R. 1067.2).
133. *Id.* at 33310 (proposed 49 C.F.R. 1067.14).
134. *Id.*

VIII. Possible Reaction of the Courts to the New Procedures

In view of the Supreme Court's recent reaffirmation of the limited scope of judicial review of Commission decisions in *Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc.*,[135] it would seem likely that, under the new rules promulgated by the Commission, the courts will accord a presumption of validity to flagging orders and will be reluctant to overturn them unless the orders are arbitrary or capricious on their face.

In *Bowman*, the Supreme Court unanimously reversed the district court's opinion in *Arkansas-Best Freight System, Inc. v. United States*[136] which had set aside Commission orders authorizing the granting of certificates of public convenience and necessity. In so doing, the Court held that the arbitrary and capricious standard of the Administrative Procedure Act is a narrow one whereby the reviewing court need only consider whether the decision was based upon a consideration of the relevant factors and whether it reflects a clear error of judgment.[137]

Under the new flagging rules, the statutory requirement that the Commission orders set forth findings with respect to the Commission's publicly announced standard would make it unlikely that the courts will ever subject an order to the intense scrutiny involved in the *North American* cases.[138] Thus, the requirement that the Commission decisions be supported by adequate findings will be satisfied "if the report of the Commission, read as a whole, discloses the essential basis of the decision."[139]

IX. Conclusion

The promulgation of the new fitness flagging procedures represents an increased recognition that regulatory agencies should attempt to act on the basis of articulated policies and standards. This belief is reflected in Recommendation No. 71-3 of the Administrative Conference of the United States, which provides that:

> Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible. To this end, each agency which takes actions affecting substantial public or private interests. . .should, as far as feasible in the circumstances, state the

135. 419 U.S. 281 (1974), *rehearing denied*, 420 U.S. 956 (1975).

136. 364 F. Supp. 1239 (W.D. Ark. 1973).

137. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (1975).

138. *But see*, White, *Allocating Power Between Agencies & Courts: The Legacy of Justice Brandeis*, 43 ICC Prac. J. 79, 116 (1975).

139. National Freight, Inc. v. United States, 359 F. Supp. 1153, 1156 (D. N.J. 1973); Soo Lines R.R. v. United States, 271 F. Supp. 869, 872 (D. Minn. 1967).

standards that will guide its determinations in various types of agency action.[140]

The procedural safeguards of the new rules, with their increased notice, opportunity to be heard, and record requirements, place the fitness flagging procedures more in line with the Interstate Commerce Act and the Administrative Procedure Act. As such, the rules represent a positive step in the right direction.

Kathleen MacDevitt

140. 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 24 (1970-1972). This increased recognition that agencies should establish standards to guide discretion is a trend also discussed by Professor Davis in the 1976 Supplement to his ADMINISTRATIVE LAW TEXT.