THE "WRITE" TO ARGUE:

MODIFIED PROCEDURE IN ICC MOTOR CARRIER CASES

BRUCE A. DEERSON*

INTRODUCTION

In recent years, a barrage of criticism has been directed at both the theory and practice of motor carrier regulation. Advocates of deregulation abound.[1] But, deregulation is not a panacea for all the problems of motor carrier transportation. Indeed, stronger and more efficient regulation in certain areas may be a more viable solution. And in those areas where reform is needed, such reform may often be accomplished, through procedural means, rather than through a wholesale substantive revision of the existing regulatory framework.

An example of reform through procedure is the adoption and use of modified procedure by the Interstate Commerce Commission in motor carrier operating rights cases. This procedural change has had significant substantive effects—a sort of deregulation without deregulation.

In examining modified procedure, in terms of its legal and constitutional aspects and evaluating its practical impact, this paper will study the historical roots of motor carrier regulation and the issues involved in a motor carrier application.

I. *National Transportation Policy: Background Of The Motor Carrier Act.*

By 1935, fierce competition in the trucking industry had resulted in chaotic transportation conditions.[2] The industry was still relatively young, having emerged shortly before World War I. And, although the boom years of the twenties were kind to it, the years of depression were bad years for the industry. Millions of Americans lost their jobs; many turned to trucking. This great influx of unemployed enlarged the trucking

* Student, National Law Center, George Washington Univ., (J.D. 1975), B.A., Johns Hopkins Univ. (1972).

1. One writer has suggested that the abundance of criticism is not based on a widespread failure of the system:

> The avowed purpose of the regulatory structure is primarily to prevent problems from ever arising, rather than to effect their *post hoc* solution. But, paradoxically, the more it succeeds in this objective, the more doubts it raises that there are in fact any problems to be thus forstalled. . . . By contrast, regulatory failures are embarrassingly visible. . . .

Barrett, *Deregulation: A Study in Illogic*, 39 I.C.C. PRACT. J. 8 (1971).

2. S. REP. NO. 482, 74th Cong., 1st session 3, (1935).

industry to enormous proportions. From a total of 85,600 trucks on the road in 1914, the industry had grown to the point where 3,480,939 trucks were in service in 1930. And, the numbers kept increasing.

There were many reasons for this spectacular growth. Small fixed costs compared to variable costs, lack of significant economies of scale, and mobility of resources all resulted in economic conditions conducive to easy entry.[3] Consequently, anyone with the price of a down payment on a single truck could go into the motor carrier business for himself.

In the 1930's, 85 percent of the truckers owned only one truck. Only one percent of the industry owned two trucks, and the average trucker owned 1.6 trucks.[4] As the Supreme Court later observed, the industry had become so "overcrowded with small economic units . . . [that it] proved unable to satisfy even the most minimal standards of safety or financial responsibility."[5]

In addition, the chaos in the motor carrier industry was beginning to have an effect on the railroad industry which quickly realized that the cutthroat pricing by motor carriers was endangering its own rate structure.[6] In an attempt to stabilize the situation, Congress passed the Motor Carrier Act of 1935,[7] investing the Interstate Commerce Commission with authority to regulate the motor carrier industry,[8] and declaring that the National Transportation Policy was

> to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust dis-

3. D. PEGRUM, TRANSPORTATION: ECONOMIC AND PUBLIC POLICY 427; 21 STAN. L. REV. 1204, 1225.

4. Magnuson, *The Motor Carrier Act of 1935: A Legislator Looks at the Law*, 31 GEO. WASH. L. REV. 37 (1962).

5. *American Trucking Ass'n., Inc., v. United States*, 334 U.S. 298, 312 (1952).

6. *See* C. LUNA, THE UTC HANDBOOK OF TRANSPORTATION IN AMERICA, 159-160 (1971); Stillwell, History, Background and Purposes of Part II of the Interstate Commerce Act, in TRANSPORTATION LAW INSTITUTE: OPERATING RIGHTS APPLICATIONS 17 at 18 (1968).

7. 49 U.S.C. 301 *et seq.*

8. There are segments of the trucking industry which were exempted from regulation. These exemptions are not pertinent to this paper. They are substantial enough, however, to account for two-thirds of the highway freight hauled in the U. S., according to one scholar. WILCOX, PUBLIC POLICIES TOWARD BUSINESS, 395 (4th ed., 1971). Note also that in relation to most of this paper the difference between contract and common carrier is meaningless. It will therefore not be discussed. Only in the area of appplication requirements are there any significant differences—proof of additional issues is needed in a contract carrier permit application.

criminations, undue preferences or advantages, or unfair or destructive competitive practices.[9]

II. *I.C.C. Requirements for Motor Carrier Authority.*[10]

The I.C.C. has generally interpreted the transportation policy with a special emphasis on protection of existing carriers "from unintended or unwarranted competition."[11] But, despite its concern for maintaining competitive stability, the Commission has correctly realized that stability is not an end in itself, but, rather a means to the end of providing shippers with "a healthy system of motor carriage to which they may resort to get their goods to market."[12] For example, in *Davidson Transfer and Storage Co. v. United States*, the District Court found that the shipper involved had been unable to obtain proper and sufficient service, particularly on less-than-truckload shipments, resulting in spoilage and a loss of business. In affirming the I.C.C.'s grant of authority, the court stated: "We think one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service."[13] The substantive proof requirements, to be discussed next, should be viewed in light of the framework of the Commission's philosophy of competition.

A. Issues Of Proof

Statutory guidelines for grants of motor carrier authority are set forth in Section 207(a) of the Motor Carrier Act as follows:

> A certificate shall be issued . . . if it is found that applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter . . . and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such applications shall be denied.[14]

This section indicates that there are two issues in every application: (1)

9. *National Transportation Policy*, 49 U.S.C., preceeding §1.

10. *See generally* TRANSPORTATION LAW INSTITUTE, 1968, OPERATING RIGHTS APPLICATIONS; J. GUANDOLO, TRANSPORTATION LAW, 57-147, (2nd ed. 1973); M. FAIR & J. GUANDOLO, TRANSPORTATION REGULATION, 3-55, 217-226, (7th ed. 1972).

11. *Fox-Smythe Transportation Co., Extension*, 106 M.C.C. 1, 7 (1967); *cf Smith & Solomon Trucking Co., Extension*, 61 M.C.C. 748, *aff'd*, 120 F. Supp. 277 (D.N.J. 1954); *G.P. Ryals, Extension*, 107 M.C.C. 434 (1968).

12. *Keller Industries, Inc.*, 107 M.C.C. 75, 76 (1968).

13. 42 F. Supp. 215, 219 (E.D. Pa. 1942), *aff'd*, 317 U.S. 587 (1942).

14. 49 U.S.C. 307(a).

the applicant's fitness, and (2) public convience and necessity. These two issues are distinct and do not overlap.[15]

1. Fitness Of Applicant

Proof of applicant's fitness is usually a "routine matter of form."[16] Often the applicant will have appeared before the I.C.C. through prior application proceedings;[17] in such cases the Commission has previously approved its fitness, albeit in a different context. When the applicant's financial status is so weak as to put into doubt the successful maintenance of proposed operations, the I.C.C. may refuse to grant a license. However, the Commission is often lenient in this regard.[18]

If the applicant has had no experience in the conduct of motor carrier operations, the I.C.C. may require some proof as to his ability to perform such service.[19] Failure by applicant to prove access to a sufficient amount of equipment (either leased or owned) to perform the proposed service may result in a denial of the application.

Considering the Commission's leniency and flexibility, it is unlikely that most applicants will have trouble meeting the above-mentioned standards of fitness. Some may, however, run afoul of another fitness principle: "In the absence of extenuating circumstances," an applicant who has, in the past, performed unlawful operations will be considered unfit.[20] While there are no black-letter rules as to what will be considered extenuating circumstances, a few examples may suffice to illustrate the trend of the cases. When the applicant operated under color of right without intention to deliberately circumvent statutory requirements, the I.C.C. granted the requested authority.[21] In addition, when the applicant was unaware of the impropriety of its operations and voluntarily ceased them[22] or was operating under the mistaken belief that it had authority,[23] the Commission has not found lack of fitness.

---

15. Comment, *Public Convenience and Necessity in Federal Motor Common Carrier Cases—What are the Criteria?*, 16 S. DAK. L. REV. 351 (1971).

16. *Id.* at 361.

17. In a recent year, the Commission granted in whole or in part 4,371 applications for authority. Of this number, 443 applications involved an initial license to operate. INTERSTATE COMMERCE COMMISSION, 86TH ANNUAL REPORT TO CONGRESS 33 (1972).

18. In *R.B. "Dick" Wilson, Inc.*, 79 M.C.C. 554 (1959), the I.C.C. approved an application where applicant's current financial information showed an operating loss. The grant was based on the company's ability to perform its present service notwithstanding its poor financial status.

19. *Cf. R. B. Zimmerman Contract Carrier Application*, 27 M.C.C. 650, 652 (1940).

20. *See William P. Hoyt Extension*, 78 M.C.C. 437 (1958).

21. *Howard Sober, Inc., Ext.*, 83 M.C.C. 361 (1960).

22. *Marine Express Co., Ext.*, 81 M.C.C. 155 (1961).

2. Public Convenience And Necessity

If proving applicant's fitness is a "routine matter of form," convincing the Commission that an application should be granted on grounds of public convenience and necessity is far from a simple matter. Decisions are often in conflict and the policy statements in one decision may contradict those in another.

Although, an early Commission case warned that "Public Convenience" and "Necessity" are "not synonymous, but must be given a separate and distinct meaning,"[24] recent Commission decisions have not considered the two terms separately to any meaningful extent. In *Pan American Bus Lines, Operation,* the Commission, in a general way, defined the issues to be examined in deciding whether a grant of authority is warranted:

> The question, in susbstance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operation of existing carriers contrary to the public interest.[25]

a. Whether The New Operation Or Service Will Serve A Useful Public Purpose, Responsive To A Public Demand Or Need

Public need and demand is usually demonstrated through shipper support. Two Commission cases define with great particularity the required information to be included in shippers' statement.[26] The shipper must identify the commodities to be transported, including generic descriptions, total volume, volume to be tendered to applicant, frequency with which proposed service would be used, and any unique or particular characteristics of any of the involved commodities. Again, while the Commission is not inflexible, failure to delineate these characteristics to

23. *Standard Motor Freight, Inc., Ext.*, MC-13640 (Sub-No. 4), (I.C.C., Oct. 29, 1962), not printed.

24. *Pan American Bus Lines, Operation*, 1 M.C.C. 190, 202 (1936).

25. *Id.* at 203. These guidelines still have importance for today. *Compare* GUANDOLO, *supra* note 10 at 59, *with* Comment, *South Dakota Law Review, supra* note 15 at 381, where the conclusion reached is a paraphrase of the *Pan American* opinion.

26. *Novak Contract Carrier Application*, 103 M.C.C. 555, 558 (1967) and *Ashworth Transfer, Inc., Ext.*, 111 M.C.C. 860, 867, 868 (1970).

the extent possible will result in a denial of application.[27]

In addition, the applicant should also identify points from and to which service is sought, including, if possible, specific volume to be transported to each of these points. In *Ashton Trucking Co., Extension—Kirtland, New Mexico,* the Commission denied an application for a certificate on the following grounds:

> Moreover, while shippers assert a need for a single carrier capable of serving all of the involved origins, the fact still remains that unless and until the records establish specific volumes from and to specific points involved herein, we are unable to determine whether or not to what extent the existing service is or will be inadequate. Accordingly, the application will be denied.[28]

The applicant must prove that Public Convenience and Necessity require the service even in the absence of opposition to the application.[29] Furthermore, mere preference, unsupported by a specific showing of need will not be enough to support a grant of authority.[30]

b. Whether The Public Purpose Can And Will Be Served As Well By Existing Lines Or Carriers

Although early case law may have indicated that applications for motor carrier authority would be granted only where there was an affirmative showing of the inadequacy of existing service,[31] this requirement

27. In *Hyder Trucking Lines, Inc., Ext.*, 155 M.C.C. 600 (1972), the Commission stated:
> In this proceeding Hormel has failed to present any evidence indicating the volume of traffic it would tender to applicant, and the relative volume of each of its products that now moves or will move in the forseeable future. . . . Hormel's remaining testimony is not sufficiently detailed to enable us to ascertain its actual transportation requirements so that we rationally may frame a grant of authority responsive to its needs.

See also *Smith Transit, Inc., Ext.*, 74 M.C.C. 337 (1958), and *Chemical Leaman Tank Lines, Inc., Ext.*, 98 M.C.C. 452 (1965).

28. MC-75880 (Sub-No. 12) (I.C.C., 1970), not printed.

29. *See Hearin-Miller Transporters, Inc., Ext.*, 100 M.C.C. 50, 55 (1965).

30. The Commission has denied an application, explaining that:
> The evidence shows a mere preference on the part of the shippers for applicants service. A mere preference or desire for applicants service over that offered by existing carriers is insufficient in the absence of evidence showing that carriers now authorized cannot or will not render a reasonable service. *Oscar A. Carter, Ext.*, 74 M.C.C. 385, 388, 389 (1958); *accord, Clyde R. Sauers Ext.*, 61 M.C.C. 65 (1952).

31. *See, e.g., Hudson Transit Lines, v. United States,* 82 F. Supp. 153, 157 (S.D.N.Y. 1948) *aff'd* 338 U.S. 802 (1949), where the court stated:
> The Commission has frequently held that under §307, there must be an affirma-

has now been eased considerably. Changing case law has rendered adequacy of service only one element to be proved in motor carrier application cases;[32] failure to prove inadequacy of existing service is no longer fatal in and of itself in most applications,[33] especially where an increasing volume of total shipments means that existing carriers will not be adversely affected to any significant extent (i.e., they will lose little, if any, traffic[34]). On the other hand, where applicant is unable to support his application with any other important elements of proof, his failure to prove inadequacy of existing service will result in a denial of the application.[35]

c. Whether The Public Purpose Can Be Served By Applicant With A New Operation Or Service Proposed Without Endangering Or Impairing The Operations Of Existing Carriers

Although the Commission's consideration of this criteria has already

---

tive showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination (sic) of public "necessity." This does not mean that a holder of a certificate is entitled to immunity from competition under any and all circumstances. The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service. No such finding has here been made, nor is there any evidence to support such finding. (citations omitted).

32. In *Nashua Motor Express, Inc. v. United States*, 230 F. Supp. 646, 653 (D.N.H. 1964), the court stated that "other elements of importance appear to be desirability of competition, the desirability of different kinds of service, and the desirability of improved service;" *accord G. P. Ryals, Ext.*, 107 M.C.C. 434, 438 (1968).

33. *See generally* 45 WASH. L. REV. 817 which traces the development of I.C.C. policy from a "protectionist tack" which appeared to favor "regulated monopoly" to a policy favoring "regulated competition."

In *I.C.C. v. Parker*, 326 U.S. 60, 70 (1945), the Supreme Court upheld an I.C.C. grant of authority holding "the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service; *accord U.S. v. Dixie Highway Express*, 389 U.S. 409, 411 (1967).

In *Texas Mexican Railway v. United States*, 250 F. Supp. 446, 950 (S.D. Tex. 1966), the court indicated that the Commission should have leeway to make its decision and that a failure to prove inadequacy of existing service does not obligate the board to deny the application.

34. *See, e.g., Guy Heavener, Inc., Ext.*, 83 M.C.C. 216, 220 (1960). In addition, *see* FAIR AND GUANDOLO, *supra*, note 9 at 218. Note that this reasoning is directly in line with the Commission's interpretation of the National Transportation Policy (*see* text accompanying fns 10-13).

35. *See Drum Transport, Inc. v. United States*, 298 F. Supp. 667 (S.D. 1969).

been touched upon,[36] one or two additional points might be noted here. The Commission has made it a policy that existing carriers should be accorded the right to transport all the traffic they can handle adequately, efficiently, and economically in the territory served by them before additional authority is granted.[37]

It is important to note that the initial burden of proof in relation to whether or not the proposed operation will serve a useful public purpose is on applicant. If applicant meets that burden of proof by whatever means, including inadequacy of service, the burden then shifts to protestants.[38] Protestants then have the burden of proving either that the public need for the service can be adequately filled by existing carriers, or else that the grant of the application will be injurious in terms of revenue to the existing carriers.

IV. *Modified Procedure*

A. Why Did It Arise?

In 1964, motor carrier applications numbered 5,655. The number of new filings rose to 7,658 by 1965 and in that year made up about 85 percent of the Commission's formal case docket.[39] During the year ending 1966, 8,700 motor carrier applications were disposed of through oral hearings. The informal nature of I.C.C. pleadings made large records and meant that the issues were not sharply drawn when the matter was presented for oral hearing. Protestants would often appear at hearings only to find that they had no real interest in the traffic to be moved, once that traffic had been finally defined by explanations from witnesses. The I.C.C.'s liberal approach to rules of evidence resulted in long records crammed with irrelevant and immaterial portions.[40]

In addition, various abuses increased the burden of I.C.C. officials. In 1964, 5,379 applications were dismissed at the request of applicant; 1,091 of these represented cases which had already been scheduled for hearing. In some of them several days and even weeks had been set aside for those hearings.[41] Those cancellations were often made at the last minute, too

36. See text accompanying fns. 10-13.

37. *See, e.g., Petroleum Carrier Corp., Ext.*, 82 M.C.C. 727, 730 (1960).

38. *See, e.g.*, Comment, S. DAK. L. REV., *supra* note 15 at 377.

39. The most recent statistics available indicates that these applications still account for more than 80 percent of the Commission workload. I.C.C. REPORT, *supra*, note 17 at 33.

40. *See* ANDERSON AND FEENEY, MANUAL OF PRACTICE AND PROCEDURE BEFORE THE INTERSTATE COMMERCE COMMISSSION (1967), 36.

41. *See* Murphy, *The Transportation Profession* 33, I.C.C. PRACT. J. 571, 573, 575 (1966).

late to schedule another hearing, resulting in a complete waste of Commission time. Other applicants attended hearings with the hope that none of the protestants would appear. When they did appear, the applicants would dismiss or amend their applications to eliminate all opposition. Once again, the time scheduled for hearings was lost.[42] Because of all of these abuses, the pending docket of motor carrier applications had been bloated to 6,534 cases by April 1, 1966.[43] The Commission's solution was to adopt a new application form and a modified procedure for motor carrier cases.[44]

B. How Does It Work?

The new application form required written proof in the form of affadavits from shippers, that they were willing to support the application, in order to demonstrate that there was public need for the service proposed. An application fee of $250 (at this writing-$350) was required. This was designed to eliminate the practice of last minute withdrawals of applications.[45] Modified procedure is defined in the Interstate Commerce Commission General Rules of Practice, Rule (5)(j). It is described in Rules 45 and 54, inclusive, as well as in Special Rule 247. The Commission has stated that, "[i]n processing the motor carrier case load, the scheduling of unnecessary oral hearings will be avoided to the extent

---

42. *Id.*

43. *General Policy Statement Concerning Motor Carrier Licensing Procedures* (Ex Parte No. 55), 31 F.R. 660. In that policy statement the Commission noted:

> Motor carrier application proceedings involve issues of substantial interest not only to the regulated transportation industry, but to every shipper and receiver of goods, regardless of the size of his operation; to manufacturers, wholesalers, distributors, and retailers; and to all members of the general public, both as buyers and consumers, and as travelers over the lines of the nation's common carriers of passengers. To delay a determination that a newly proposed motor transportation is required by the public convenience and necessity or would be consistent with the public interest and the national transportation policy can result in an irretrievable loss of sales and can unjustifiably deprive the public of needed products in transportation services. For the regulated surface transportation industry to continue to thrive, to grow, and to keep pace with the expanding national economy, the mechanics of regulation must be such that administrative decisions are not only fair and impartial, but are rendered with reasonable dispatch and efficiency. The regulatory process in which competing claims are considered and adjudicated must be geared to the type of proceeding involved and must not entail an expenditure of time and money, either for the parties or the Government, which is disproportionate to the scope, importance, and economic significance of the particular proceeding.

44. 49 C.F.R. 1100 247.

45. See text accompanying fns. 41 and 42.

possible. Where the issues presented are well defined or where the matters involved are not of sufficient moment to justify the expense of an oral hearing, parties will be required to submit their evidence in the form of verified statements under the modified procedure."[46] Requests for oral hearing must be contained in the application. All applications are published in the Federal Register.

Timely protests must be filed, because failure to do so will be considered a waiver of both opposition and participation in the proceedings.[47] Protests must set forth the specific grounds upon which they are made, including a copy of any of protestant's authority which is claimed to be in conflict. They must describe in detail the method by which protestant intends to meet and provide the service proposed. If an oral hearing is desired, the protestants must "specify with particularity the facts, matters, and things relied upon." Protests phrased in general terms may be rejected.[48] Requests for oral hearing must be supported by an explanation as to why the evidence cannot be presented in written form.[49] Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross-examination.[50]

Under Rule 51 as amended, applicant is required to serve upon the other parties a statement of all the evidence upon which it relies within twenty days of the date of an order requiring modified procedure. Defendant must submit its reply within thirty days thereafter. Applicant then has twenty days in which to serve a rebuttal statement.[50.1]

The evidence filed by the parties usually consists of "verified statements" submitted by witnesses on their behalf, in addition to a written argument. Under modified procedure, there is no means of cross-examining the opposing witnesses. The only effective means of undermining their statements are (1) utilization of Commission discovery and deposition procedures,[51] or (2) convincing the Commission that a material issue of fact is in question so that the application will be placed in the oral hearing docket. The lack of opportunity to utilize cross-examination —"the greatest legal engine for the discovery of the truth"[52]—has had many practical ramifications for motor carrier operating rights proceedings.

---

46. *General Policy Statement, supra* note 43.
47. Rule 247 2 (d)(2).
48. Rule 247 2 (d)(3).
49. Rule 247 a (d)(4).
50. Rule 53(a).
50.1 In practice, Commission orders often provide for more time to submit these statements.
51. Rule 57-66 and Rule 102.
52. 5 WIGMORE, EVIDENCE, §1362 at 29 (3rd ed. 1940).

C. *Practical Effects Of Modified Procedure*

While an applicant continues to bear the burden of proof in operating rights proceedings, the use of modified procedure represents nothing less than a "gift from heaven" to applicants.[53] Applicant has the advantage of having the "last word," because, it can respond to protestants' statements and cite case law through the rebuttal statement. Its response to protests are made easier because: (1) there is more time to respond to protestants' contentions, and (2) the exact scope and extent of protestants' objections will be known. This enables applicant to point out protestants' deficiencies from the standpoint of (a) commodities and territory, (b) equipment, and (c) transportation facilities. Proof of these deficiencies may then be bolstered by supporting arguments with citation to the case law. As a result, applicant can formulate issues in the light most favorable to it. Alternatively, applicant may restrictively amend its application to eliminate opposing interests. In addition, applicant has the opportunity to precisely describe its existing operations and transportation facilities, especially as they relate to the requested authority and the interest of protestants.

It is much easier to obtain shipper support, for the only imposition on shipper is the submission of a verified statement, which is usually prepared by applicant and merely signed by the supporting shipper.[54] Contrast this with the requirement under oral hearing that the shipper must (1) attend the hearing wherever held, (2) be examined, and (3) be cross-examined. At an oral hearing, an inexperienced shipper, unfamiliar with the I.C.C. requirements for motor carrier authority may become confused or omit material evidence. There is no danger of this in modified procedure. In an oral hearing, applicant has the additional worry that scheduling difficulties may make it impossible for the supporting shipper to appear, even if he wants to do so. This problem too is non-existent when modified procedure is employed.[55]

---

53. *See Panel Discussion: Modified Procedure—a Curse or a Blessing* in MOTOR CARRIER LAWYERS ASSOCIATION 1972 CONFERENCE.

54. In effect, this means that the verified statement is prepared by applicant's *attorney*. This has two effects: (1) it reduces the burden of the shipper to merely reading and signing the statement, and (2) it enables the attorney to submit the shippers' evidence in the best possible light, i.e., it is the lawyer (not the witness) who is actually "testifying."

The Commission is not unaware of this situation, and has noted that obvious "fill-in-the-blank" statements will not be given much weight. *Empire Feed and Transfer Co., Common Carrier Application*, 113 M.C.C. 38 (1971).

55. This advantage should not be over-emphasized. Even in oral hearings, if the supporting shipper cannot be present, applicant may use a supporting shipper statement. It is

Finally, the use of modified procedure relieves applicant of the financial burden of having shippers appear at a hearing.[56] Instead, the financial burden, from the standpoint of travel, deposition taking, and hearing expense is shifted to the protestant.

All of these tremendous advantages to applicant are not balanced by corresponding advantages to protestant. It is true that the absence of an expensive oral hearing makes it easier for protestant to continue a protest to an application. This advantage, however, is quite probably illusory. For, although his ability to protest more frequently is increased, his ability to protest effectively is decreased. As will be seen, requests for oral hearing will probably not be granted in the absence of utilization of expensive deposition and discovery procedures.[56.1] If the protestant deems the denial of an application to be vital, he must first undertake deposition and discovery and then, if he is successful and is granted a hearing by the Commission or the court, he will have to bear the expense of a hearing anyway. If he does not consider the denial of the application vital, he may still, of course, protest. But, in view of the way advantages stack up for applicant, such protests may be meaningless and ineffective in blocking grants of authority.

In light of these practical effects it is not surprising that the vast majority of applicants seek modified procedure, while a correspondingly vast majority of "serious" protestants seek oral hearings. When requests for oral hearings were denied by the Commission, protestants sought to overturn the use of modified procedure on the grounds that it constiuted a denial of due process.

C. Legal Aspects Of Modified Procedure

1. *Constitutional Attacks*

Procedural due process has been defined in terms of "fair play."[57] Various factors will be examined in determining the requirements of due process, including "the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding."[58] Modified

arguable, though, that a supporting shipper statement in lieu of oral testimony is less impressive than a supporting shipper statement submitted as per modified procedure.

56. The new application form does require a $350 "application fee." Two things may be noted in relation to this fee: (1) all applicants must pay it, whether the application is to be handled under modified procedure or oral hearing, and (2) compared to the expense required in an oral hearing, this fee may aptly be termed "chicken feed."

56.1. See text accompanying fns. 62-63 *infra*.

57. *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

58. *Id.*

procedure seems clearly to meet due process requirements.

Thus, to this date all due process attacks on modified procedure have been rebuffed by the courts. While there are no Supreme Court decisions dealing directly with its use in operating rights applications, the Supreme Court has affirmed federal court judgements that modified procedure fulfills the constitutional due process requirements in cases of *modification* of carrier authority.[59]

Although those cases involve modification of existing authority, logic suggests no significant distinction between modification resulting in "encroachment" upon protestants' property rights and a grant of original authority resulting in a conflict with protestants' property rights. Thus, the Supreme Court affirmances would seem to apply equally well to cases involving original grants of authority.

Indeed, federal courts have continuously upheld the use of modified procedure in granting original authority. Of course, this judicial approval of the substance and form of modified procedure has not overlooked the fact that abuses may occur. When they do occur, courts have not hesitated and should not hesitate to remand the case to the Commission.[60]

The leading case approving the use of modified procedure is *Allied Van Lines Co. v. United States*.[61] The protestants in that case demanded the right to cross-examine at an oral hearing every supporting "witness" who submitted verified statements favoring applicant's service. The court noted that, although the protestants had had an opportunity to rebut applicant's evidence, they did not do so. The request for cross-examination failed to specify the facts in dispute and the alleged defects in supporting shipper's statements. No attempt was made to utilize the Commission's discovery procedures,[62] the use of which might have eliminated the necessity for oral hearing.[63]

---

59. *Motor Convoy, Inc., v. United States*, 235 F. Supp. 250 (N.D. Ga. 1964) *affm'd* 381 U.S. 436, (1965); *United Transport, Inc., v. United States*, 245 F. Supp. 561 (W.D. Okla. 1965) *affm'd* 383 U.S. 411 (1966). Note that both of these cases arguably involve a grant of *new* authority rather than a modification of existing authority. 245 F. Supp. at 566, Dohanon J. Dissenting.

60. *See Crouse Cartage Company v. United States*, 343 F. Supp. 1133 (N.D. Iowa, 1972). In *Crouse*, failure of a joint review board to review any of the evidence contained in the "voluminous written submission of either party" was held to be violative of both due process and statutory dictates. 343 F. Supp. at 113.

61. 303 F. Supp. 742 (D. Cal. 1969).

62. 49 C.F.R. §1100.56-.67.

63. 303 F. Supp. at 749. Note that the court's requirement that protestants use discovery procedures before being allowed to protest the lack of a hearing, may often place a great financial strain on protestants. If the shippers are located over a diverse geographical area, the financial burden placed upon protestants by the court may have serious effects on

The court acknowledged that *Movers Conference of America v. United States*[64] established that the holder of a certificate of public convenience and necessity possesses a property right which is entitled to constitutional protection. Nevertheless, it held that plaintiffs had no "absolute right to an oral hearing . . . and they have not cited any cases which specifically hold that an application for a certificate of public convenience and necessity requires an oral hearing."[65]

Subsequent cases have agreed with *Allied* that procedural due process is not violated by the use of modified procedure.[66] All of these cases emphasize the rule: *Unless material facts are in dispute, there is no right to cross-examination and confrontation.* In *National Trailer Convoy,* the court stated:

> In our view, the effect of the plaintiffs request for cross-examination is to attack the weight of undisputed facts, not the credibility of the affiants. Clearly, the weight of evidence is arguable but due process does not require that this be done orally. We find no denial of fundamental fairness on the face of the Commission's modified procedure, nor in the present application of it.[67]

One case that is sometimes misread as holding that modified procedure cannot be used is *Drum Transport, Inc. v. United States.*[68] The confusion stems from language in *Drum* to the effect that "they [the affidavits] are not sufficient, untested by a full hearing and cross-examination to prove inadequacy of service."[69] A close examination of the case reveals just how misleading this language is. *Drum* involved a proposal by applicant for a new service from Mexico to specific points in the United States. The

---

protestants' ability to successfully oppose the application. While this burden itself may raise due process questions, other courts have not hesitated to impose upon protestant a similar burden of utilizing discovery procedure before acknowledging the right to request an oral hearing. *Frozen Foods Express, Inc. v. United States*, 346 F. Supp. 254, 261 (1972); *Ashworth Transfer, Inc., v. United States*, 315 F. Supp. 199, 202 (D. Utah 1970).

64. 205 F. Supp. 82 (S.D. Cal. 1962).

65. One case that could be cited to a court is *L. P. Wilson, Inc. v. Federal Communications Commission*, 170 F.2d 793 (D.C. Cir. 1948) The court in *Wilson* held that the protestant to an F.C.C. proceeding who argued that the grant of a broadcast license to applicant would interfere with his business, had a constitutional due process right to an oral hearing.

66. *See Ashworth Transfer, Inc. v. United States*, 315 F. Supp. 199 (D. Utah, 1970); *National Trailer Convoy v. United States*, 293 F. Supp. 634 (N.D. Oklahoma, 1968); *Frozen Foods Express, Inc. v. United States*, 346 F. Supp. 254 (W.D. Tex. 1972); *Land Air Delivery, Inc. v. United States*, 327 F. Supp. 803 (D. Kansas 1971).

67. 293 F. Supp. at 636.

68. 298 F. Supp. 667 (S.D. Ill. 1969).

69. *Id.* at 673.

grant was to be accompanied by the restriction that there was "no authorization to transfer property from one vehicle to another." The service would have therefore been unique; since none of the protestants had authority to operate in Mexico, as did applicant, their service to points in Mexico could only be accomplished through transfer at the border to other carriers. After examining the case under modified procedure, the Commission declined to include the proposed restriction. The reviewing court found that without the prohibition of transfer, applicant's service might be substantially similar to that of protestants. In such case the court felt that there should be some proof of inadequacy of service.[70] In remanding the case, the court indicated that the record was not sufficient to uphold a broad grant absent the "prohibition of transfer" restriction, and it presented the I.C.C. with two alternatives. The Commission could either enter the restriction in applicant's authority in which case the grant would be perfected, or hold a hearing to determine the adequacy of service. The first alternative clearly involves an explicit approval of modified procedure. The second alternative does not represent a decision that modified procedure violates due process, but, rather, a finding that material facts as to the inadequacy of service were in dispute in this case, and therefore modified procedure was improperly employed.

The court decisions are correct. Despite the many practical advantages that accrue to applicant once modified procedure is utilized, the decision as to whether or not to employ it (i.e., are material facts in dispute?) is not inapposite to notions of "fair play." There are appropriate safeguards,[71] which have been judicially approved and, if used properly, seem adequate. The primary safeguard is, of course, the provision that where material facts are in dispute, oral hearings will be held.[72]

Further justification for modified procedure may be found in a recent Supreme Court trend indicating a reliance on a functional analysis in due process decisions.[73] This analysis involves balancing the function of the safeguard in assuring a proper result, against the cost to society of providing the safeguard. Chief Justice Burger has pointed out that an overzealous search for constitutionally-rooted remedies leaves no room

70. See text accompanying fns. 31-35.

71. It has been generally suggested that the extent of the procedural safeguards necessary is dependent upon what is at stake. *See, e.g.*, Comment, *The Growth of Procedural Due Process Into A New Substance*, 66 NW. U.L. REV. 502, 547-550.

72. In *Howard Hall Co. v. United States*, 332 F. Supp. 1076, 1080 (D.C. Alabama 1971), the court found that "the proper safeguards for procedural due process exist under the I.C.C. modified procedure, which provides for a specific method of obtaining an oral hearing where material facts are in dispute."

73. Note, *The Supreme Court 1965 Term: Highlights*, 80 HARV. L. REV. 125 (1966).

for adjustment if a particular hearing process is too costly.[74] Besides meeting the "fair play" standard, modified procedure can be justified by these functional standards as well. The cost, both financial and time wise, to impose a requirement of oral hearing upon all motor carrier applications before the I.C.C., whether or not material facts are in dispute, would be prohibitive.[75]

It is extremely unlikely that protestants (or applicants) will be able to convince a court to overturn modified procedure on due process grounds. However, a protestant may be able to convince courts that the safeguard of an oral hearing should have been applied because material facts were in dispute. To best accomplish this he should (1) attempt, in his own affidavits, to controvert or deny as specifically as possible the factual material contained in opposing affidavits, (2) utilize discovery and deposition-taking procedures, if at all possible, and (3) at appropriate times continue to enter objections to the use of modified procedure so as not to waive any procedural rights.

2. Statutory Attacks

Attacks on modified procedure based on Section 5 of the Administrative Procedure Act[76] will not be sustained by the courts. The Supreme Court interpreted Section 5 in *Wong Yang Sung v. McGrath*.[77] Justice Jackson, speaking for the court, wrote:

> We think that the limitation to hearings "required by statute" in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion.

The court held that in deportation proceedings, due process required

74. *Wheeler v. Montgomery*, 397 U.S. 280, 283, 284 (1970), Burger C. J., dissenting. *See* also Justice Black's dissent in *Goldberg v. Kelly*, 397 U.S. 254, 278 (1970).

75. According to Mr. J. Patterson King, Assistant Deputy Director, Section of Operating Rights, about 80 percent of motor carrier applications are now being decided under modified procedure. This raises some questions as to whether or not the "no material fact in dispute" test is being abused by the I.C.C. The courts should review such decisions wherever necessary. And the reviewing test to be used should be broader than the "substantial evidence" and "rational basis" test often used. *See, e.g., Illinois C.R. Co. v. Norfolk & W.R. Co.*, 385 U.S. 57 (1966). Here the question for review is whether or not material facts are in dispute. There seems to be no reason why administrative expertise should be deferred to by the judiciary in such a basically judicially question.

76. 5 U.S.C. §554(a).

77. 339 U.S. 33, 50 (1950).

oral hearings. *Wong Yang* has been interpreted by federal courts as standing for the proposition that Section 5 of the Administrative Procedure Act applies only to agency action "which the agency statute provides must be preceded by a hearing."[78] Courts dealing with the question of modified procedure in motor carrier applications have adopted this interpretation,[79] and, since the statute does not require oral hearing, have held that A.P.A. does not compel the I.C.C. to conduct an oral hearing.

The suggestion has been made that when applications for motor carrier authority involve not more than three states, a line of cases indicates that modified procedure may not be employed.[80] These cases apply Section 205 of the Motor Carrier Act[81] which states:

> The Commission shall when operations of motor carriers or brokers ducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this chapter with respect to such operations as to which a hearing is required or in the judgement of the Commission is desirable.

Jones Truck Lines, Inc. v. United States[82] refused to require joint board referral when there were no material facts in dispute. The court in *Land—Air Delivery, Inc. v. United States*[83] relied on *Jones* to state the converse: mandatory referral to a joint board would be maintained whenever (1) an application was protested and (2) material issues of fact were presented. The final building block was added by the decision in *Garrett Freight Lines, Inc. v. United States.*[84] *Garrett* held that the protests placed the following issues in dispute: (1) Protestants' ability to transport the traffic in question, and (2) Public necessity for the service proposed by applicant. The court ruled that since there were material

78. *LaRue v. Udall*, 324 F.2d 428, 432 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 907 (1964).

79. *Slay Transportation Co. v. United States*, 353 F. Supp. 555 (E.D. Mo. 1973); *Allied Van Lines v. United States*, 303 F. Supp. 742 (C.D. Cal. 1969); *see generally* cases cited *supra* note 82.

80. Grossman, *Panel Discussion: Modified Procedure—A Curse or Blessing—Preparation of Protestant's Case on Modified Procedure* 7-10, in MOTOR CARRIER LAWYERS ASSOCIATION 1972 CONFERENCE.

81. 49 U.S.C. §305.

82. 321 F. Supp. 821 (W.D. Ark. 1971).

83. 327 F. Supp. 808 (D. Kan. 1971).

84. 333 F. Supp. 1267 (D. Idaho 1971).

issues of fact in dispute in an application involving less than three states, the I.C.C. was required to refer it to a joint board under Section 305(a).[85]

The "jury is still out" as to whether or not the *Garrett* court realized what it was doing. Since the issues found to be in dispute in that case are issues that will be in dispute whenever protests to an application are filed, *Garrett* seems to require hearing before a joint board in all contested applications involving three states or less. Hearings would also appear to be required for larger area applications, along the same lines of reasoning. That the *Garrett* court was confused is evidenced by their statement that "we express no opinion on the propriety of . . . [modified] procedure on a reference to a joint board."[86] Clearly, if material facts are in dispute, as the court felt there were, an oral hearing should be *required*. The Court's problem was a confusion of "issue" and "fact." It confused the dispute over issues of adequacy of existing service and public convenience with a dispute over facts presented by witnesses. Thus, while *Garrett* may appear to protestants to be a lightning bolt of good fortune in a sky full of bad luck, the bolt should not be relied on. It should fizzle out rather quickly, and do little damage to the "legitimacy" of modified procedure.

CONCLUSION

It is not the intention of this author to delve deeply into the controversy over deregulation of the motor carrier industry. The issue has been debated by writers with far more expertise and experience.[87]

Specific criticism of regulation has included price collusion and high

85. The court further ruled that neither the I.C.C. nor the parties involved could cure the jurisdictional defect by consent; *Contra Howard Hall Company v. United States*, 332 F. Supp. 1076, 1081, (N.D. Alamaba 1971) where the court determined that "Hall waived any right that it had to insist upon a joint board hearing by participating in the modified procedure without complaining."

86. *Garrett, supra*, note 7 at 1269, fn. 2.

87. For views favoring deregulation, *see generally* FELLMETH, THE INTERSTATE COMMERCE OMMISSION (1970); KOHLMEIER JR., THE REGULATORS (1969); Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548 (1969); Meyer, *Competition, Mkt. Structure and Regulatory Institutions in Transportation*, 60 VA. L. REV. 212 (1964); C. PHILLIPS, THE ECONOMICS OF REGULATION (1965); D. PEGRUM, TRANSPORTATION: ECONOMICS AND PUBLIC POLICY (3rd ed. 1973); *cf.* C. WILCOX, PUBLIC POLICIES TOWARD BUSINESS (4th ed. 1971).

For views opposing deregulation, *see generally* M. FAIR, ECONOMIC CONSIDERATIONS IN THE ADMINISTRATION OF THE INTERSTATE COMMERCE ACT (1972); Barrett, *Deregulation: A Study in Illogic*, 39 I.C.C. PRACT. J. 8 (1971); D. P. LOCKLIN, THE ECONOMICS OF TRANSPORTATION 665-666 (1966); *cf.* Johnson, *An Analysis of the "Small Shipments" Problem*, 39 I.C.C. 646 (1972). Johnson cogently argues that the "small shipments" problem can best be solved by more rather than less regulation.

costs,[88] lack of service to small shippers,[89] internal subsidation resulting in misallocation of resources,[90] and lack of incentive for technological innovation.[91]

Those who favor deregulation face a "dilemma" as to how to proceed, and indeed as to whether deregulation can be satisfactorily accomplished at all.[92] While the more extreme opponents of regulation advocate *complete* deregulation,[93] the more reasoned analyses admit that "the existence of regulation is perhaps best accepted as an established fact and the focus must therefore be upon identifying means of more effectively and equitably performing the regulatory power within the competitive environment of the market economy."[94]

Proponents of regulation have pointed to the valid accomplishments of regulation: (1) protection of common carriers from excessive competition, (2) encouragement of adequate investment in modern equipment, (3) improvement of standards of service, (4) avoidance of wasteful competition and investment, (5) maintenance of higher safety standards, (6) assurance of operating stability, (7) promotion of liability and responsible service, (8) promotion of rate stability, and (9) reduction of unfair rate discrimination.[95]

---

88. *See, e.g.*, FELLMETH, *supra* note 87 at 126.

89. *See, e.g.*, PEGRUM, *supra*, note 87 at 334.

90. Posner, *supra*, note 87 at 607, 609. Posner's other criticisms of internal subsidiation are (1) that it limits consumer choice and (2) that it is a crude instrument for assessing the needs of many elements of society. These criticisms, while applicable to public utilities, seem to have little relevance to the motor carrier industry.

91. *See Ash Report*, 72-74; Meyer, *supra* note 87 at 223. But, note that although the problem of lack of technological innovation is generally found in regulated industries, highway transportation regulation has less effect on innovation than other forms of regulation have. Gellman, *Technological Changes in Regulated Industries*, in CAPRON, ed., SURFACE FREIGHT TRANSPORTATION 166, 178-181 (1971).

92. FRIEDLANDER, THE DILEMMA OF FREIGHT TRANSPORT REGULATION (1969).

93. *See* FELLMETH, *supra* note 87 at 131, 132. Fellmeth argues that "no study contradicts" the rosy picture he has painted of unregulated, exempt transport. But *see* LUNA, *supra*, note 6 at 194 summarizing the findings of the Doyle Report: "increased highway hazards due to low safety standards, less financial responsibility (particularly in reference to cargo insurance), and less economic stability of participating carriers. In some instances, many rates fluctuate often and in an irregular manner, according to the supply of trucks and the column of shipments to be moved in a given locality. There is discrimination among shippers in regard to rates, and a tendency to cut rates in the face of hard competition, significantly slashing the income of exempt carriers."

94. Meyer, *supra*, note 87 at 230.

95. *See, e.g.*, FAIR, *supra* note 87 at 158 (1972). The I.C.C. has stated:

> Entry control encourages investment and provides a practicable and effective tool by which those carriers may be required to live up to their common carrier commitments. I.C. C. REPORT, *supra*, note 17 at 33.

Modified procedure should provide both proponents as well as opponents of deregulation with some measure of solace. In a practical sense, applicants' burden of proof in motor carrier applications has been greatly reduced. As a direct result, ease of entry into the motor carrier industry has increased.[96] This should serve somewhat to pacify those who demand deregulation in the motor carrier industry.

This accomplishment—easing of entry control—through procedural rather than substantive changes in I.C.C. regulation should also satisfy opponents of deregulation. Increased competition should result in better quality service to shippers; the absence of substantive deregulation means that small shippers and others may continue to depend on the stability of the nation's motor carrier industry.

Maintaining stability in the motor carrier industry has become more important in light severe that could result in a severe disruption of the national economy. Transportation accounts for 15 percent to 20 percent of our gross national product.[97] Chaos and ruinous competition in the transportation industry would inevitably result in chaos in the national economy. Stability in the transportation industry can have an important, steadying effect on the economy in the crisis to come.

---

96. In 1963, 4, 457 applications for operating authority were received. Out of this number, 2,657 were granted, in whole or in part. INTERSTATE COMMERCE COMMISSION, 77th ANNUAL REPORT 44 (1963).

In 1972, 5,945 applications were received and 4,371 were granted in whole or in part. INTERSTATE COMMERCE COMMISSION REPORT, *supra* note 17 at 33.

In 1973, 5,240 applications were received and 4,299 were granted in whole or in part. INTERSTATE COMMERCE COMMISSION, 87th ANNUAL REPORT 31 (1973).

The percentage of applications granted rose from 60 percent in 1963 to 73 percent in 1972 to 85 percent in 1973.

97. FELLMETH, *supra*, note 87 at 13.