JUDICIAL REVIEW OF I.C.C. ORDERS UNDER THE HOBBS ACT: A PROCEDURAL STUDY

BY
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On January 2nd, 1975 the Congress of the United States passed Public Law 93-584 the effect of which was felt on March 1, 1975. This Act was the culmination of years of arguments, recommendations, persuasion, counter-argument and lobbying in an effort to make the procedure to test the validity and constitutionality of an Interstate Commerce Commission order[1] conform with the procedures applicable to review of orders of other agencies.

As far back as 1941, Mr. Justice Frankfurter described the prior three judge court appeal procedure as "A serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice". Ever since then, and probably before, there has been an ongoing effort to make the appellate procedure governing I.C.C. orders more efficient and economical in order that the orders may be fully reviewed but under a well thought out viable system.

Such I.C.C. orders are now finally within the fold where they had heretofore been the only remaining federal agency decisions which were routinely reviewed by a three judge court with expedited appeal to the Supreme Court as a matter of right.

The technical changes brought about by the recent enactment generally provide for review by a circuit court as a matter of right and appellate review by the Supreme Court upon petition of certiorari as in most other appeals from circuit court decisions.

The efficiency of this system has been long recognized and the recent efforts to bring I.C.C. orders under such mechanism were unopposed except in two minor areas which were unsuccessfully propounded by the commission.

The I.C.C. initially desired review to be only by the circuit in which the petitioner resided and wished to eliminate the option of having a review petition filed in the District of Columbia circuit. For various

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1. Except an Order for the payment of money or the collection of fines, penalties, and forfeitures, enforcement or suspension of which is vested in the District Courts of the United States, 28 U.S.C.A., §1336(a) as amended.

reasons as set forth in the reports to the House and the Senate[2] this proposal was rejected and jurisdiction remained on an alternative basis of the petitioner's circuit or the D.C. circuit.

The second proposal was that the Commission would have complete control over the defense of its order, independent of the discretion of the Attorney General of the United States.

The Congress saw no merit in this contention particularly since the existing law provided that the agency whose order is under attack may appear on its own motion and has a right to be represented by its own counsel. In addition under the same section[3] the Attorney General may not dispose of the proceeding if the agency objects thereto.

The reports of the houses of Congress conclude by assessing the advantages of placing review of I.C.C. orders under the so-called Hobbs Act[4] in that (1) the problem of multiple suits challenging the commission order in different locations before different courts would disappear; (2) the appeal must now be brought within sixty (60) days of the date of entry (of this, more later); (3) the agency must file the record but only in minimal form and thus ease a financial burden heretofore on the parties; (4) it provides a quorum review by the Courts of Appeals; and (5) this bill would now make the rules and regulations of the I.C.C., reviewed by the same judicial tribunal which has jurisdiction to review adjudicated orders of that agency.

Your writer has been asked to set forth the practices and procedures before the Circuit Courts of Appeal that will now apply to the majority of I.C.C. orders and to provide forms and other technical data so that this new method of review will be more familiar to attorneys who practice before the I.C.C. almost exclusively.

THE HOBBS ACT[5]

Under the Hobbs Act, as amended, the definition of "agency" now includes the Interstate Commerce Commission. The Court of Appeals that has venue of review petitions from orders of the I.C.C. is that circuit within which the petitioner resides or has its principal office or *in the alternative* in the Court of Appeals for the District of Columbia. This is an optional venue which gives the petitioner the choice

2. House of Representatives Report No. 93-1569, 93rd Congress, First Session.
3. 28 U.S.C.A., 23, §2348.
4. 28 U.S.C.A., §2341, et seq.
5. 28 U.S.C.A., §2341 et seq.

in determining in which court the ultimate decision will be made. Under the provisions of the Act,[6] the court in which the petition is *first* filed is the court which has exclusive jurisdiction over appeals from the same I.C.C. order except for its inherent right to transfer said petition to another circuit if it feels that the interest of justice and other considerations so require.[7]

Under Section 2112(a) of Title 28, the agency must file its record in that court in which a proceeding in respect to such order was *first instituted*. Thus the choice of a forum is in the petitioner's hand and counsel will be well advised to become familiar with the various philosophies, procedures, and opinions of that circuit as well as the District of Columbia circuit so that he might best advise in which forum petitioner would receive more favorable consideration.

Under the same section all other courts of appeals in which proceedings are subsequently filed concerning the same order must transfer them to the original court of appeals.

The only exception to this is provided in Section 2112(a) wherein the circuit court first having venue may "for the convenience of the parties in the interest of justice" thereafter transfer all proceedings to any other court of appeals. While this transfer authority exists, a search of the cases does not reveal that it is often exercised.

It is thus clear that THE CHOICE OF FORUM IS THE PETITIONER'S.

The petition must be filed within 60 days after "entry of the order", since the statute[8] authorizing the appeal of the agency controls.

It is interesting to note that while section 2344 states this period as "within 60 days after its (the order) final entry" the reports of the Congress do not seem to distinguish between "entry of the order" and "service of the order", often treating the two items as equivalents. In fact, the conclusion reached by the House report makes the statement[9] that one of the advantages to be derived from the change is that an appeal must be filed within 60 days "from the date of service".

Despite this congressional statement, it is clear that the statute as enrolled measures the time period from the *date of entry*. While even some cases have talked about 60 days from "service",[10] lawyers would

6. 28 U.S.C.A., §2349(a) together with 28 U.S.C.A., §2112(a).
7. 28 U.S.C.A., §2112(a) last sentence.
8. 28 U.S.C.A., §2344.
9. House Report 93-1569, p. 9.
10. Mont Ship Lines, Ltd. v. Federal Maritime Board, 295 F.2d 147 (D.C. Cir. 1961).

be well advised to make their decision and file the petition based upon the date of entry even though that as a practical matter may well shorten the time within which the petitioner has for consideration of steps to be taken.

In this regard, it is to be noted that under Section 2344 the agency is required to "promptly give notice" of the final order. If the agency does not live up to this mandate of prompt notification and thereby reduces the period within which the petitioner has to consider appeal, get the documents prepared, etc. to an unreasonably short period of time, it might well be that the circuit court, in the exercise of its equitable powers, would permit a late filing. However, the testing of this proposition is not to be encouraged.

It is interesting to note also that in a few cases concerning appeals from other agencies heretofore subject to the Hobbs Act, the running of the 60 day period has been held to commence with the entry of the last order dealing with the agency decision being appealed, such as a denial of a petition for rehearing, although the circuit courts differ in this conclusion[11]

It is thus obvious that SAFETY DICTATES THE PETITION BE FILED WITH THE APPROPRIATE CIRCUIT CLERK 60 DAYS AFTER THE ENTRY OF THE ORDER being appealed, pending petitions for rehearing notwithstanding.

The actual document bringing about review of the final order of an agency is a Petition for Review setting forth the four requirements contained in Section 2344 and naming the United States as respondent.

Any party aggrieved by a final I.C.C. order must file a petition containing a concise statement of (1) the nature of the proceedings as to which review is sought; (2) the facts upon which venue is based; (3) the grounds upon which relief is sought, such as an arbitrary, capricious abuse of discretion, unconstitutionality, evidentially unsupported order or other such; and (4) the relief prayed for. The petition must attach as an exhibit a copy of the order being appealed.

In preparing the petition counsel should also review in great detail Federal Rule of Appellate Procedure 15(a) which sets forth the items that must appear within the petition and indicates the agency shall be named as respondent also.

Upon the filing of a petition the Clerk of the Court serves a copy upon the agency and upon the Attorney General.

11. Mont Ship Lines, Ltd. v. Federal Maritime Board, supra; Northwest Marine Terminals Association v. Federal Maritime Board, 218 F.2d 815 (9th Cir. 1955).

While the Attorney General is responsible for the Government's interest, the agency or any party in interest who may be affected if the order of the agency is or is not enjoined may appear on their own motion as of right and be represented by counsel.[12]

The Circuit Court has a number of options as to the subsequent handling of the petition.[13] Briefly it may hold a prehearing conference with the parties or direct a judge of the court to hold such. This particular option does not seem to have been invoked often, or if so, the matter has never been judicially discussed. Presumably each circuit court acts on its own in the handling of such possible conferences.

The matter may also be determined on a motion to dismiss if the respondent so files.

Unless so determined, the court will hear the case on the record made before the agency when the agency has held a hearing.

However, when the agency has not held a hearing, the court of appeals *shall* determine whether hearings are required by law. If it determines that a hearing is so required it will remand it to the agency to hold such.

If, however, it determines that a hearing was not required or was in fact held whether required or not, it will pass on the issue presented based upon the pleadings and affidavits filed *if* they reveal no genuine issue of material fact.

But, if a genuine issue of material fact is presented by the pleadings and affidavits, it shall transfer the proceedings to a district court in and for the petitioner's district for determination of such issues of fact.

A party also has the option,[14] once the petition has been filed with the circuit court, to apply to the court for leave to adduce additional evidence by satisfying the court that (1) the additional evidence is material and (2) there is a reasonable explanation for the party's failure to present such evidence before the agency. In this instance the court may order the additional evidence and contrary evidence to be taken by the agency.

Interestingly enough, the agency may thereafter modify its finding of fact and modify its order or set it aside. If it does so, it would file with the Court of Appeals the additional evidence, the modified findings of fact and modified order and could even set aside its original order.

12. 28 U.S.C.A., §2348.
13. 28 U.S.C.A., §§2345-2347.
14. 28 U.S.C.A., §2347(c).

Once the Circuit Court has received the agency file and/or docket that particular court has jurisdiction of *all* proceedings involving that order. It has the power to vacate stay orders or interlocutory injunctions previously granted by any court and has exclusive jurisdiction to enter a judgment determining the validity of enjoining or suspending in whole or in part the order of the agency.[15]

STAY OF THE ORDER

However, the filing of the petition does not itself act as a stay but the Court of Appeals may in its discretion restrain or suspend the entire order or any part thereof pending such final hearing and determination.[16]

If the petitioner wishes to make application for such an interlocutory injunction, at least five days notice of the hearing must be given to the agency and to the Attorney General.

In cases where irreparable damage would otherwise result, the court after a hearing of which "reasonable notice" to the agency and the Attorney General has been given may enter a stay of suspension of the order for not more than sixty days. Specific findings by the court of irreparable harm must however be made.

The procedure for a stay is further governed by Federal Rule of Appellate Procedure 18 which requires that application for a stay pending direct review by a Court of Appeals should ordinarily be made to the agency in the first instance.

Under this Rule a motion for such relief may be made to the Court of Appeals or a judge thereof but must show that (1) the petitioner has applied to the agency for the relief sought and has been denied the relief with the reasons given for its denial or (2) an application for relief to the agency is not practicable or (3) the action of the agency in response to the application did not afford the relief which the applicant had requested.

A motion for a stay under Rule 18 must also show the reasons for the relief requested and the facts relied upon. The court may condition relief by bond or other appropriate security.

Hearings on applications for interlocutory injunctions are to be given preference by the circuits and expedited hearings shall be held at the earliest practicable date.[17]

15. 28 U.S.C.A., §2349(a).
16. 28 U.S.C.A., §2349(b).
17. 28 U.S.C.A., §2349(b).

SUPREME COURT REVIEW

The order granting or denying an interlocutory injunction or a final judgment of the Court of Appeals in a proceeding to review an agency order are subject to review by the Supreme Court by a normal writ of certiorari. Application for the writ must be made within 45 days after the entry of the order and within 90 days after entry of the judgment, as the case may be.[18]

Petitions for certiorari are of course governed by the rules applicable to the Supreme Court of the United States and counsel should refer to Chapter 133 of Title 28 which governs miscellaneous provisions for review by the Supreme Court. Particular attention is directed to two subparagraphs[19] which specifically govern appeals from circuit courts and the timing thereof. The petition must be filed within 90 days of the entry of the circuit judgment or decree which time period may be extended by a justice for a period not exceeding 60 additional days. A stay of the circuit court order may be granted either by a circuit judge or a justice and conditioned as they desire. Another section of Title 28[20] provides a method review by the Supreme Court can be accomplished before or after rendition of the circuit court judgment but from a review of the annotations thereunder it would appear that this section is invoked rarely.

The third remaining rule generally applicable to petitions of certiorari is Federal Rule of Appellate Procedure 41 which governs the timing of the issuance of the court's mandate and provides that the timely filing of a petition for rehearing will stay the mandate. A stay of the mandate may also be obtained by a motion requesting such pending application to the Supreme Court for a writ of certiorari. This stay shall not exceed 30 days but if during that period the clerk of the circuit court receives from the clerk of the Supreme Court notice that a petition has been filed the stay, of course, will continue.

18. 28 U.S.C.A., §2350.
19. 28 U.S.C.A., §2101(a) and (f).
20. 28 U.S.C.A., §1254(3).