

from the “one-way street” discovery currently practiced by the Board, the remaining possibility of intimidation based upon discovered information should not deter the adoption of at least a modified form of discovery. Indeed, contrary to the Second Circuit’s conclusion in *Interboro*, the Board’s current policy in this respect is not a “logical one.” Furthermore, contrary to that court’s denial of knowledge of federal agencies which provide for discovery, a number of agencies now permit such a procedure.<sup>46</sup> Since there is substantial agreement that the Board has the authority to institute a discovery rule and neither Congress nor the courts appears disposed to impose discovery on the Board, it can only be hoped that the Board will follow the lead of the agencies permitting such a procedure. If and when a discovery rule is drafted, the drafters should not be confronted with a choice between administrative efficiency and fundamental fairness. Instead, they must achieve the attainable integration of the former with the latter,<sup>47</sup> while insuring that the rights of *all* parties are properly protected.<sup>48</sup>

## VII. DECISIONS AND SANCTIONS

### *ICC Continuing Jurisdiction*

The Interstate Commerce Commission has been given broad statutory authority to rehear previously decided cases<sup>1</sup> and “reverse, change, or modify” its earlier orders.<sup>2</sup> Moreover, the Commission has asserted that through its inherent power as an administrative agency it may on its own motion reconsider any matter on a theory of continuing jurisdiction.<sup>3</sup> However, once the Commission has issued a certificate of public convenience and necessity, certain statutory

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46. See notes 14-16, *supra* and accompanying text. For a discussion of the Administrative Conference recommendation on discovery, see Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89.

47. Symposium, *The Role of Discovery in Federal Trade Commission Proceedings*, 21 AD. L. REV. 439, 442 (1969).

48. See *NLRB v. Southern Materials Co.*, 345 F.2d 240, 244 (4th Cir. 1965).

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1. Interstate Commerce Act, 49 U.S.C. § 17(6) (1964) (parties may petition for rehearing at any time).

2. *Id.* § 17(7).

3. See *Eazor Express, Inc.—Purchase—Fleet Highway Freight Lines, Inc.*, 101 M.C.C. 719, 720 (1967).

standards<sup>4</sup> and judicial decisions<sup>5</sup> limit this reconsideration power. In *Chicago & North Western Railway v. United States*,<sup>6</sup> which illustrates an unwise use of the reconsideration power, a three judge federal district court<sup>7</sup> upheld an ICC award<sup>8</sup> of a certificate of public convenience and necessity to a motor carrier, reversing a previous denial that had already been challenged by the carrier in court,<sup>9</sup> and reaffirming the ICC's unlimited authority to reconsider.

This controversy began in 1964 when Walter Poole applied for authority to transport farm implements by motor carrier and the hearing examiner recommended that the application be granted. Under a procedural scheme devised for routine cases,<sup>10</sup> the appeal by competing rail and motor carriers was heard by a review board composed of three ICC employees, which reversed the hearing examiner's decision authorizing issuance of the certificate.<sup>11</sup> Poole's petition to reconsider the board decision on his certificate was heard by an appellate division<sup>12</sup> composed of five of the eleven Commissioners, but the appeal was rejected.<sup>13</sup> Commission procedure includes a mechanism for review of appellate division findings by the full Commission but only after a finding on the entire Commission's

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4. Interstate Commerce Act, 49 U.S.C. § 312 (1964) (revocation after notice and hearing possible only on finding of willful violation of act, regulations, or terms of certificate).

5. See *Watson Bros. Transp. Co. v. United States*, 132 F. Supp. 905 (D. Neb. 1955), *aff'd per curiam*, 350 U.S. 927 (1956).

6. 311 F. Supp. 860 (N.D. Ill. 1970).

7. See *Project, Federal Administrative Law Developments—1969*, 1970 DUKE L. J. 67, 177-78 n.2, for a full explanation of the statutory background of the procedure for review of ICC orders under the Urgent Deficiencies Act procedure, 28 U.S.C. §§ 1253, 1336, 2284, 2321-25 (1964).

8. *Walter Poole Extension—Tractors to Ala.*, 105 M.C.C. 511 (1967).

9. *Poole v. United States*, No. 4423-67-P (S.D. Ala., filed January 24, 1967) (dismissed at Poole's request July 23, 1968).

10. See generally 3 W. KNORST, *INTERSTATE COMMERCE LAW AND PRACTICE* 1327-28 (1954). Items assigned to employee boards are generally ones in which the so-called modified procedure is used. General Policy Statement Concerning Motor Carrier Licensing Procedures, 31 Fed. Reg. 6600 (1966). The modified procedure employs verified complaints and omits the formal oral hearing. 49 C.F.R. §§ 1100.45-.54 (1970); 49 ICC ANN. REP. 97 (1935). See also General Policy Statement Concerning Motor Carrier Licensing Procedures, 31 Fed. Reg. 6600 (1966).

11. *Walter Poole Extension—Tractors to Ala.*, 103 M.C.C. 906 (1966).

12. The appellate division assumes the full power of the ICC for the purpose of disposing of the application. 49 U.S.C. § 17(6) (1964); 49 C.F.R. § 1100.101(g) (1970); 49 ICC ANN. REP. 97 (1935); see General Policy Statement Concerning Motor Carrier Licensing Procedures, 31 Fed. Reg. 6600 (1966).

13. 49 U.S.C. § 17(4) (1964); 49 C.F.R. § 1100.101(a)(2) (1970). The loser in the appellate division may petition the appellate division for reconsideration, or at his option, attempt to secure full ICC review. See *id.* § 1100.101(g).

own motion that the matter under review is one of "general transportation importance."<sup>14</sup> Poole's attempt to invoke this discretion was denied. He then instituted court action to review the ICC's refusal to grant his certificate.<sup>15</sup>

While Poole's district court action was pending, the ICC on its own motion vacated the order of the review board which had denied Poole the certificate and reopened the case without mention of any issue of general transportation importance. On the prior record the Commission adopted the findings of the hearing examiner and granted Poole's original application.<sup>16</sup> Two railroads which had appeared in opposition to the application petitioned the ICC for reconsideration, but the Commission denied the petitions and issued the certificate. Although Poole subsequently abandoned his federal court action, four railroads and two motor carriers brought suit in another district court to set aside the ICC order granting the certificate of public convenience and necessity to Poole. In *Chicago & North Western*, the court, in upholding the issuance of the certificate, acknowledged the power of the ICC to subject appellate division rehearing decisions to full Commission review without any explicit finding of general transportation importance.

The *Chicago & North Western* court settled several important procedural points before it reached the merits.<sup>17</sup> Since, as with most federal agency rulings, review of ICC orders on the merits is extremely narrow, the court had little difficulty in finding the order supported by substantial evidence on the record as a whole.<sup>18</sup> It upheld the ICC's interpretation of the scope of its own authority to review previous decisions, relying on section 17(7) of the Interstate Commerce Act<sup>19</sup>

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14. 49 U.S.C. § 17(6) (1964) (Commission may limit its consideration of issues to those of general transportation importance); 49 C.F.R. § 1100.101(a)(2), (4) (1970) (implementing statutory authority). *But see* text accompanying notes 23-30 *infra*.

15. *Poole v. United States*, No. 4423-67-P (S.D. Ala., filed January 24, 1967).

16. *Walter Poole Extension—Tractors to Ala.*, 105 M.C.C. 511 (1967). The vote was 6 to 3.

17. 311 F. Supp. at 864.

18. *See Midwest Emery Freight System, Inc. v. United States*, 293 F. Supp. 403, 405 (N.D. Ill. 1968); *cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

19. If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change or modify the same accordingly. Any decision, order or requirement made after rehearing, reargument, or reconsideration, reversing, changing or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument or reconsideration as an original order. 49 U.S.C. § 17(7) (1964).

and an earlier district court opinion.<sup>20</sup> The court distinguished the concept of administrative finality from the power of an agency to reconsider its own decision, noting that the Interstate Commerce Act, unlike the statutes establishing some of the other regulatory agencies, does not specify when the Commission's power to change its decisions terminates.<sup>21</sup> However, the majority admitted that the Commission's power to reconsider a negative order or denial of a certificate did not imply that the Commission had continuing jurisdiction if a certificate had issued. Finally, the majority explicitly disregarded persuasive dicta from an earlier case involving the crucial issue of whether the full ICC may review orders of an appellate division in any case.<sup>22</sup>

In *Transamerican Freight Lines, Inc. v. United States*<sup>23</sup> the court had expressed the view that the statute grants the ICC two mutually exclusive procedures for reviewing the decisions of its inferior bodies.<sup>24</sup> The decisions of boards, single Commissioners, or divisions are to be referred for final review to *either* the full Commission or to an appellate division.<sup>25</sup> Petitions for reconsideration may then be filed to the same body,<sup>26</sup> be it the full Commission<sup>27</sup> or an appellate division.<sup>28</sup> When these procedures were proposed, the ICC noted that "[t]he decisions of the appellate division in such cases [will be] final the same as if [they] were by the entire Commission."<sup>29</sup> The *Transamerican* court specifically disapproved the procedure later used in *Chicago & North Western* for full ICC reconsideration of an appellate division decision.<sup>30</sup> *Resort Bus Lines v. United States*,<sup>31</sup> relied on in *Chicago &*

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20. *Resort Bus Lines, Inc. v. United States*, 264 F. Supp. 742 (S.D.N.Y. 1967). See text accompanying note 31 *infra*.

21. Interstate Commerce Act, 49 U.S.C. § 17(6) (1964); *cf.* National Labor Relations Act § 10(e), 29 U.S.C. § 160(e) (1964); Natural Gas Act § 19, 15 U.S.C. § 717(r) (1964) (filing of record in court terminates agency power to reconsider).

22. 311 F. Supp. at 863.

23. 258 F. Supp. 910 (D. Del. 1966).

24. 258 F. Supp. at 916-18.

25. After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board . . . any party . . . may . . . make application for . . . reconsideration. . . . If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. 49 U.S.C. § 17(6) (1964).

26. *Id.*

27. 49 C.F.R. § 1100.101(a)(3) (1970).

28. *Id.* § 1100.101(g).

29. 49 ICC ANN. REP. 197.

30. 258 F. Supp. at 918.

31. 264 F. Supp. 742 (S.D.N.Y. 1967). 49 C.F.R. § 1100.101(a)(4) (1970) allows ICC review of appellate division orders, but only after a purely discretionary prior ICC finding of a question of general transportation importance.

*North Western*, had held that an appellate division might reconsider its own orders, leaving open the question of whether the full Commission was empowered to reconsider appellate division orders. In *Chicago & North Western* the court disregarded *Transamerican's* rationale as "sua sponte and . . . totally unnecessary to the holding of the case"<sup>32</sup> relying primarily on the ICC's own disregard of the *Transamerican* dicta.<sup>33</sup> The court added that the parties had demonstrated no detrimental reliance or prejudice although the authorities cited<sup>34</sup> did not clarify what effect such prejudice would have on the instant case—a grant of a license after an earlier denial.<sup>35</sup>

The dissent adopted the *Transamerican* dicta that the full ICC does not have power to reconsider the orders of an appellate division.<sup>36</sup> It dismissed the pronouncements of the ICC on the matter as "not controlling, for it is the role of the judiciary and not of self-serving administrative bodies to construe the law."<sup>37</sup> The dissent also noted the obvious distinction between *Resort Bus Lines* and *Chicago & North Western*: *Resort Bus Lines* holds only that an appellate division may reconsider its own orders, making no reference to the power of the full Commission to review decisions of an appellate division.<sup>38</sup> It attacked the ICC's theory of continuing jurisdiction at the foundation, noting that in the cases on which the majority relies some aspect of the proceeding was still pending before the Commission when the case was reopened.<sup>39</sup> Alluding to *City of Chicago v. United States*,<sup>40</sup> where a decision to terminate an investigation was held final and subject to court review, the dissent contended that a definite cut-off point for Commission action is desirable.<sup>41</sup> "[It] would be more consistent if we found that a negative

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32. 311 F. Supp. at 863.

33. See *Resort Bus Lines, Inc. v. United States*, 264 F. Supp. 742, 745 n.5 (S.D.N.Y. 1967); *Eazor Express, Inc.—Purchase—Fleet Highway Freight Lines, Inc.*, 101 M.C.C. 719 (1967); *Walter Poole Extension—Tractors to Ala.*, 105 M.C.C. 511 (1967).

34. The court cited: *Upjohn Co. v. Pennsylvania R.R.*, 381 F.2d 4 (6th Cir. 1967); *Atchison, Topeka & Santa Fe Ry. v. United States*, 231 F. Supp. 422 (N.D. Ill. 1964); *Watson Bros. Transp. Co. v. United States*, 132 F. Supp. 905 (D. Neb. 1955).

35. 311 F. Supp. at 864 (investment of \$200,000 in new equipment usable for class of service at issue insufficient to show prejudice).

36. 311 F. Supp. at 868.

37. *Id.*

38. 264 F. Supp. at 745 n.5.

39. 311 F. Supp. at 870.

40. 396 U.S. 162 (1969); see Project, *Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 177.

41. 311 F. Supp. at 871.

order . . . rejecting an application . . . constituted administrative finality and foreclosed further Commission consideration of the matter."<sup>42</sup> Basically, the dissent contended that the majority sanctions administrative reconsideration whenever a court challenge to an order seems in the offing. It pleaded for a "firm decision . . . whether positive or negative, [which] would both permit redress in the courts and preclude further administrative reconsideration, whether initiated by the parties or by the Commission."<sup>43</sup> The majority sanction of a separation of administrative finality and judicial reviewability is intended to allow the ICC to correct its own errors,<sup>44</sup> thereby serving judicial economy by possibly avoiding the necessity for judicial review. However, the dissent argued persuasively that the aggrieved party will most likely appeal anyway and the courts will probably be asked to decide both the propriety of reconsideration as well as the merits whenever an agency reopens a decision which the parties thought to be final. The dissent noted finally that

restricting administrative "self-correction" will not result in any uncorrectable injustice. If the Commission's error is serious, that is, not based on any substantial evidence, then the aggrieved party may gain relief in court. If the matter before the Commission is closely contested and different results may be reasonably said to be based on substantial evidence, allowing the Commission to change its mind achieves little in regard to administrative justice or better interstate commerce.<sup>45</sup>

While agency power to police mere clerical errors<sup>46</sup> is certainly desirable, indecision on the merits of an issue can result in a costly waste of time by both courts and agencies. Sudden switches by an agency from one result to another may cause substantial and unnecessary prejudice to the parties.<sup>47</sup> The dissent, quoting Professor Davis, points out that some of the factors to be weighed are

the advantages of repose, the desire for stability, the importance of administrative freedom to reformulate policy, the extent of party reliance upon the first decision, the degree of care or haste in making the earlier decision, [and] the general equities of each problem.<sup>48</sup>

In *Chicago & North Western* it was perhaps unfortunate that the

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42. *Id.*

43. *Id.*

44. *Id.* at 863.

45. *Id.* at 872.

46. See *Watson Bros. Transp. Co. v. United States*, 132 F. Supp. 905 (D. Neb. 1955).

47. *Cf. CAB v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961).

48. 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 18.09 (1958).

majority felt constrained to uphold the ICC's freedom of action. Here the Commission seemed bent on frustrating its own procedure for the disposition of minor matters.<sup>49</sup> "[C]onstant re-examination and endless vacillation may become ludicrous, self-defeating; and even oppressive."<sup>50</sup> Surely, the question of whether a small trucker should be allowed to transport tractors from factory to dealer could be decided without the full ICC's wisdom. No one would contest the undesirability of limiting consideration of issues of general transportation importance to an appellate division. However, the ICC should be prepared to live with the decisions of its appellate divisions when it initially elects the procedure designed for review of less important matters, leaving to the courts the task of correcting any errors committed by an appellate division. Where a case has originally reached the highest stages of agency review, is decided by the agency, the losing party appeals, and the matter is pending in the courts, stability of regulatory policy is hardly served by an agency reversal long after the parties thought the decision final. Such vacillation only invites further appeal by the party who suddenly finds himself on the losing side and consequent loss in decision-making efficiency.

#### *Change of Agency Practice Without Adequate Statement of Reasons*

In *FTC v. Crowther*<sup>51</sup> the Court of Appeals for the District of Columbia Circuit held that the FTC must fully explain its reasons for departing from the approach adopted in a previous proceeding which governed the disclosure of business information usually regarded as confidential. The Commission had instituted Clayton Act<sup>52</sup> proceedings against the Lehigh Portland Cement Company challenging its acquisition of several ready-mix concrete companies. Lehigh requested that business information be subpoenaed from its competitors and potential competitors. On a motion by the competitors to quash the subpoena, the issue narrowed to the competitors' request that the information be furnished only to an independent accounting firm for compilation to prevent attribution to any single company. The examiner felt compelled to follow the

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49. 49 ICC ANN. REP. 97; General Policy Statement Concerning Motor Carrier Licensing Procedures, 31 Fed. Reg. 6600 (1966).

50. Weiss, *Administrative Reconsideration: Some Recent Developments in New York*, 28 N.Y.U.L. REV. 1262 (1953).

51. 430 F.2d 510 (D.C. Cir. 1970).

52. Clayton Act § 7, 15 U.S.C. § 18 (1964).