

Summer 1971

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Recommended Citation

Sidor, David S. (1971) "Modification of Procedural Formality in Agency Rule-Making Determinations: Long Island v. United States," *Indiana Law Journal*: Vol. 46 : Iss. 4 , Article 4.

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MODIFICATION OF PROCEDURAL FORMALITY IN AGENCY RULE-MAKING DETERMINATIONS: LONG ISLAND v. UNITED STATES

Since the turn of the century a freight car shortage has existed in the railroad industry.¹ In May, 1966 Congress amended the Interstate Commerce Act² granting new statutory authority to the ICC in an effort to control the problem. Pursuant thereto, the ICC, under its rule-making authority,³ increased the per diem rental fee⁴ for cars as an incentive to car construction.⁵ The rule-making procedure adopted by the Commission did not permit an oral hearing, the right to present

1. "A car famine prevails which brings distress in almost every section (of the country), and in some localities amounts to a calamity." *I.C.C. Annual Reports*, 16 (1906). See also SENATE REPORT No. 386, 89th Cong., 1st session, 1-3 (1966). [Hereinafter cited as SEN. REP.]

2. 49 U.S.C. sect. 1 par. 14(a). Establishment by Commission of rules, etc., as to car service.

(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

The old section ended after the first full sentence. The additional authority conferred upon the ICC was specific in what matters to consider when setting the compensation.

3. 5 U.S.C. § 551(5): "Rule-making means agency process for formulating, amending, or repealing a rule."

4. The per diem fee is the amount one railroad pays to another for the use of its freight cars. Higher per diem charges would serve as an incentive for railroads to invest in the construction of freight cars and to keep the cars as long as doing so is cheaper than renting.

5. 32 Fed. Reg. 20987, (1968).

rebuttal evidence or the opportunity to cross-examine Commission witnesses. The Long Island Railroad and eight other railroads complained that the last sentence of § 553(c)⁶ of the Administrative Procedure Act⁷ applied, and, therefore, the due process required was that of § 556(d)⁸ of the A.P.A.; an oral hearing with an opportunity to cross-examine witnesses and to offer rebuttal evidence. In *Long Island R.R. v. U.S.*⁹ the court accepted petitioners' argument that the last sentence of § 553(c) applied. Although the decision extended the scope of a formal hearing to include the rule-making proceeding of the ICC which was here involved, it modified the elements necessary to constitute a formal hearing by concluding that the final sentence of § 556(d)¹⁰ also applied. Consequently, a formal hearing need not be conducted in the traditional manner.¹¹

I

A brief examination of the Commission's history is necessary in order to evaluate the *Long Island* decision. Congress created the ICC

6. 5 U.S.C. § 553(c) reads:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

7. Hereinafter referred to as the APA.

8. 5 U.S.C. § 556(d) relevant part reads:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

9. 318 F. Supp. 490 (D.C.N.Y. 1970).

10. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. 49 U.S.C. § 556(d).

11. The term formal hearing in the context of this paper shall mean an oral hearing, where the affected parties shall have the opportunity to present their evidence orally and shall be able to cross-examine witnesses. Professor Davis calls a formal hearing, a trial type hearing, see *Administrative Law Treatise* § 7.01. The APA refers to a formal hearing when rule-making or adjudication is required by statute to be made "on the record" after opportunity for an agency hearing. A formal hearing has also been interpreted to mean a full hearing as found in some statutes. An informal hearing allows for all or part of the evidence to be in written form and seldom requires cross-examination.

in 1887¹² to prevent the abuse of monopolistic power¹³ then possessed by the railroads and to represent the public interest in interstate transportation and commerce.¹⁴ The adolescent years proved unfriendly to the ICC¹⁵ and the courts often contributed to its difficulties.¹⁶

Need for additional legislation was voiced by the Commission in 1897,¹⁷ and gradually since 1906 the Commission's powers have been augmented.¹⁸ In 1946, however, when the ICC endeavored to cure the car shortage by fixing compensation for the use of freight cars as a means of promoting greater efficiency in the use and supply of cars, the courts denied the Commission authority to require compensation for regulatory purposes.

In *Palmer v. United States* the court interpreted the word "compensation" in § 1-14(a)²⁰ to exclude compensation for regulatory

12. The Commission was created on March 4, 1887 and organized as a body on March 31, 1887.

13. FELLMETH, R.C., *THE INTERSTATE COMMERCE COMMISSION*, 119 (1970). [Hereinafter cited as I.C.O.]

14. For a critical appraisal of how the ICC in fact represents the transportation interests see FELLMETH, I.C.O., *Id.*

15. Professor Sharfman gives an appropriate summary of the first two decades of the ICC:

. . . The entire period of almost two decades disclosed a basic struggle for supremacy between the government and the railroads, a struggle which manifested itself in a great variety of concrete controversies, and in the outcome of which the carriers, the Commission, the courts, and the pressure of public opinion and of vigorous political leadership all played important roles.

I SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION*, 39 (1931). [Hereinafter cited as I SHARFMAN.] See also Aitchison, C., *The Evolution of the Interstate Commerce Act 1887-1937*, 5 GEO. WASH. L. REV. 289 (1937).

16. Originally the Commission's orders were of no effect until passed on by the courts and often the courts overruled the Commission. MCFARLAND, CARL, *JUDICIAL CONTROL OF THE FTC AND ICC*, Harvard University Press, 107, (1937). The court's had gone so far as to make the ICC a "useless" body that in *ICC v. Alabama Midland Ry. Co.*, 168 U.S. 144, 176 (1897), a justice remarked that by judicial interpretations the ICC "... has been shorn to do anything of an effective nature."

Three cases which have had a strong impact on the ICC have been *ICC v. Cincinnati, N.O. & T.P. Ry. Co.*, 167 U.S. 479 (1897), which destroyed the Commission's belief that it had power to prescribe rates; *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913), which compelled the Commission to grant a formal hearing so that the parties would be able to "meet" all the evidence against them; and *Morgan v. U.S.*, 298 U.S. 468 (1936), which also stressed the full hearing concept.

17. *Annual Reports*, 12-13 (1897). This report contains an elaborate discussion of the impaired status of the Commission resulting from the lack of authority as judicially interpreted and the defects originating within the statute itself.

18. The more important being: The *Hepburn Act*, June 29, 1906, c. 3591 § 4, 34 Stat. 589 granting rate making authority to the Commission; *Esch Car Service Act*, August 9, 1917, ch. 50, 40 Stat. 101 amending § 1 of the Interstate Commerce Act obligating carriers to establish and observe just and reasonable rules, regulations, and practices relating to car service; and the *Transportation Act of 1920*, Feb. 28, 1920, c. 91, 41 Stat. 456 and the *Transportation Act of 1940*, Sept. 18, 1940, ch. 722, 54 Stat. 898.

19. 75 F. Supp. 63 (D.C.D.C. 1947).

20. First sentence of 49 U.S.C. § 1-14(a), *supra* at note 2.

purposes. Section 1-14(a) gave specific power to compensate for the use of cars and was not co-extensive with the general power to regulate the use of cars.²¹ The court also concluded that even if § 1-14(a) was sufficient authority to impose compensation for regulatory purposes, the Commission must consider the costs of car ownership and expenses of maintenance and operation before determining an appropriate compensatory and incentive price. In addition, the record before the court was faulty and incomplete in that the Commission had not made sufficient findings of fact to sustain its order.²²

After the *Palmer* decision the lack of sufficient freight cars to meet existing demands, especially during "peak" periods such as the harvest season, continued.²³ Presently, the problem persists as a result of a steady decline in car ownership and an equally steady increase in demand.²⁴ In 1966, cognizant of the *Palmer* decision, Congress explicitly extended the Commission's authority to deal with the problem.²⁵

Despite the increase in authority the Commission moved slowly. Hearings were held but the Commission decided in October, 1967, that it lacked sufficient information upon which to establish any incentive per diem rate. In December, 1967, the Commission commenced investigations to gather additional data, but it was not until June, 1970, that an

21. *Supra* note 19, at 67.

22. *Supra* note 19, at 75.

23. For a discussion of the effects car shortages have had on certain segments of the country, see *Union Pacific Railroad Co. v. U.S.*, 300 F. Supp. 318 (D.C. Neb. 1969); and *FELLMETH, I.C.O.*, *supra* note 13 at 274 & 275.

24. From Jan. 1, 1958 to March 1, 1969 there had been a decrease of 283,412 serviceable boxcars (from 685,276 to 401,864). *ASSOCIATION OF AMERICAN RAILROADS, YEARBOOK OR RAILROAD FACTS (1969)*. In 1966 it was estimated that shippers were demanding 7,500 more cars daily than the Railroads could provide. S. REP. No. 386, 89th Cong., 1st session [hereinafter referred to as *SEN. REP.*].

To aid the ICC in boxcar regulation, the Association of American Railroads provides the Commission with a weekly form which shows shortages by railroad, region, and kind of car. However, for various reasons the Commission will not release these figures. *FELLMETH, I.C.O.*, *supra* note 13, at 276.

Generally, railroads have found it less expensive to rent cars from other lines than to build their own: "There is nothing mysterious about the cause of the drastic decline in the number of freight cars. The public never hears about the railroad cars being junked; instead, railroads announce with pride their car building programs." *SEN. REP.*, *supra* note 1, at 3. In this same report a witness for an Eastern railroad owning 30% of the nation's cars remarked, "It takes guts, sir, to spend money on freight cars even if you have got the money." *SEN. REP.*, *supra* note 1, at 2. It costs approximately \$15,000 to build a car and about \$3.00 a day to rent one.

While renting cars is a major factor in the shortage crisis, other reasons have been suggested. See generally, *FELLMETH, I.C.O.*, *supra* note 13, at 276-9, where it is suggested that the ICC itself and the Dept. of Defense contribute heavily by certain of their practices.

25. The 1966 congressional grant of authority augmented § 1-14(a) by adding the second sentence. See note 2 *supra*.

increase in per diems was ordered. During this period Congress criticized the Commission for its delay,²⁶ and one prominent critic voiced similar sentiments by stating that the ". . . Commission has chosen to act in a ponderous quasi-judicial fashion, which, in the regulation of freight car movement, it is to say that it has not acted at all."²⁷

It was within this background that the court in *Long Island* concluded that rule-making under § 1-14(a) must include a formal procedure. Initially this meant a cumbersome and time-consuming process, but by virtue of the last sentence of § 556(d) the court modified the requirements of this procedure.

II

The ICC's order increasing the per diem rental costs was an exercise of its rule-making authority.²⁸ When an administrative agency so acts, the appropriate procedure is governed by § 553(c) of the APA²⁹ which provides two alternatives. The first is an informal procedure by means of written arguments, views or evidence. The other alternative requires that when rules are compelled by statute to be made "on the record," after opportunity for an agency hearing, § 556 and § 557 are applicable. Section 556(d) provides:

. . . [A] party is entitled to present his case or defense by oral or

26. Hearing in the *Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 91st Cong., 1st session, serial no. 19-18 (1969) [hereinafter cited *Subcommittee*]. On April 7, 1970 in public letters to Chairman Brown, Senators Magnuson, Hartke, and Pearson wrote in part:

The events of the past year indicate quite clearly, we think, that the situation will continue to deteriorate unless the ICC implements without delay the authority delegated by Public Law 89-430 concerning the revision of per diem changes.

See, FELLMETH, I.C.O., *supra* note 13, at 280.

27. FELLMETH, I.C.O., *supra* note 13, at 284.

28. 318 F. Supp. 495 (D.C.N.Y. 1970).

"Rule-making," as defined by the APA, means an ". . . agency process for formulating, amending or repealing a rule." 5 U.S.C. 551(5). "Rule" is defined as:

. . . the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates. . . . 5 U.S.C. 551(4).

29. 5 U.S.C. § 553(c).

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full disclosure of the facts.³⁰

Petitioners contended that the ICC must act in accordance with this provision of § 556(d) because of § 1-14(a) of the Interstate Commerce Act. Section 1-14(a) does not explicitly use the wording "on the record" as indicated in § 553(c) but requires only a "hearing." The court, however, interpreted this to mean "on the record," and, therefore, regarded § 556(d) as applicable.³¹ It relied on the tradition and practice of the ICC to support its conclusion that § 1-14(a) was intended to so provide.

Historically the Commission has demonstrated considerable concern for procedural due process and hence has generally permitted parties maximum procedural protection.³² Several theories can be postulated to explain the willingness of the ICC to employ formal procedures. As one of the first governmental regulatory agencies,³³ the ICC was often suspect, and reacted by formalizing its proceedings to gain public confidence.³⁴ The courts encouraged this due process formalization by overruling decisions that lacked due process standards.³⁵ In addition, trial

30. 5 U.S.C. § 556(d).

31. See note 8 *supra*.

32. "The Commission . . . has meticulously refrained from summary determinations, however conducive such more or less arbitrary action might seem to be, at the moment, to the attainment of desirable results. . . ." IV SHARFMAN, *supra* note 15, at 254. See also, The Report on Practices and Procedures of Government Control, (letter from the Chairman, Board of Investigation and Research); HOUSE DOCUMENT No. 678, 78th Cong., 2nd session (1944). FELLMEYER, I.C.O., *supra* note 13, at 13-24 & 284 who contends that the ICC acts as in quasijudicial nature more than it should. See also, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE OF ADMINISTRATIVE PROCEDURE, 77th Cong., 1st session, Doc. No. 10, Part II, 97-8 (1941).

33. See note 12 *supra*.

34. See generally, I, IV SHARFMAN, *supra*, at note 15 and Aitchison, *supra*, at note 15. The I.C.C.'s position was unsteady during its first decade. The railroads were well organized and influential. They carried their influence to Congress where they found friends of private enterprise and enemies of governmental control. The Courts during this period were often unsympathetic and openly hostile to the Commission. I SHARFMAN, *supra* note 15, at 24.

"Administrative agencies have constantly been obligated to contend with public mistrust of their motives, their internal processes, and their competence to deal with matters carefully and fairly. . . . Lacking the support of such confidence an agency is likely to be increasingly hampered by the courts and the legislature." REPORT ON PRACTICES AND PROCEDURES OF GOVERNMENT CONTROL, *supra* note 32, at 63.

35. Interstate Commerce Commission v. Louisville and Nashville R.R. Co., 227 U.S. 88 (1913), U.S. v. Baltimore & Ohio Southwestern Railroad Co., 226 U.S. 14 (1912). The Commission has generally incorporated those procedures described in Morgan v. U.S., 298 U.S. 468 (1936) into its processes. IV SHARFMAN, *supra* note 15, at 256. See also, REPORT ON PRACTICES AND PROCEDURES OF GOVERNMENT CONTROL, *supra* note 32, at 60.

processes are commonly associated with proceedings on the record;³⁶ since most of the Commissioners had legal backgrounds and thereby generally considered their work judicial in nature, inertia and convenience suggested the advantage of relying upon judicial techniques which were well-known and available.³⁷

Ignoring these possible explanations for the Commission's past practices, the court, in *Long Island*, utilizes the 1937 Attorney General's manual on the Administrative Procedure Act³⁸ to support its conclusion that § 1-14(a) requires a formal rule-making procedure. Although the manual acknowledges that nothing in the Interstate Commerce Act requires the Commission to act "on the record", it determines that the ICC and the courts ". . . have long assumed that . . . rate making orders must be based upon the record. . . ."³⁹

The court's primary justification for deciding that "hearing" in § 1-14(a) means "on the record" is its interpretation of what the 1917 Congress thought a hearing ought to be. Congress's 1966 grant of authority was attached to a 1917 enactment,⁴⁰ and the court deemed, therefore, that the meaning of a hearing must be perceived from the 1917 Congress's point of view.⁴¹ As support, the court relies on a 1913 Supreme Court case, *ICC v. Louisville and Nashville R.R. Co.*⁴²

The *Louisville* case involved an ICC decision that certain class and commodity rates were unfair, unreasonable and discriminatory. In 1913 the Commission was limited to setting aside unreasonable rates, and then only after a statutorily required "full hearing."⁴³ However, in declaring

36. DAVIS, ADMINISTRATIVE LAW TREATISE, § 7.01.

37. REPORT ON PRACTICES, *supra* note 32, at 60. Throughout its history the ICC: has been profoundly influenced by the procedures and traditions of the courts.

So marked has this influence been that within the Commission's as well as without, there is a strong inclination to regard a large part of its major work as essentially judicial in nature. *Id.* at 52.

See also, FELLMETH, I.C.O., *supra* note 13, at 13, where the author infers that the Commission still has a profinity for judicial proceedings.

38. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1937).

39. *Id.* at 33-34. The court, however, failed to distinguish between the different types of rate making orders. In *Long Island* the ICC used rate making in a legislative manner in order to regulate the entire rail industry in the rental of freight cars, but this can be distinguished from a rate order as in *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913) where the commission acted prospectively against one railroad in a quasi-judicial manner.

40. The first sentence of § 1-14(a), note 2 *supra*.

41. *Supra* note 9, at 497.

42. 227 U.S. 88 (1913).

43. 49 U.S.C. § 15(1).

Commission empowered to determine and prescribe rates, classifications, etc. Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing

the rates unreasonable the Commission utilized evidence that was not introduced at the hearing. The court held this practice invalid, stating:

. . . all parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can it test the sufficiency of the facts to support the findings.⁴⁴

The court in *Long Island* concluded that this is precisely what a "hearing" under § 1-14(a) involves in the first instance.

After agreeing with petitioners that the third sentence of § 553(c) applied and that the ICC must therefore grant a formal hearing in accordance with § 556(d),⁴⁵ the court stated that "[w]hat Congress gave by that provision of the APA, it partially took away by another."⁴⁶ The court refers to the final sentence of § 556(d):

In rule making or determining claims for money or benefits or application for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.⁴⁷

This means that though Congress ". . . determined that even when rule-making had to be done 'on the record', the record did not always have to be made in the traditional manner."⁴⁸

The Long Island Railroad, the court concluded, was not prejudiced by the procedure which required that in the absence of a further showing all the evidence be in written form, and which dispensed with cross-

made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what would be the just and reasonable individual or joint rate, fare or charge, or rates, fares, or charges, to be thereafter observed in such case or the maximum or minimum, or maximum and minimum, to be charged and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable. . . .

44. Louisville, *supra* note 42, at 93.

45. 5 U.S.C. § 556(d), *supra* note 8.

46. *Supra* note 9, at 498.

47. See note 8 *supra*.

48. 318 F. Supp. 498.

examination. All the factual information gathered by the ICC as a basis for its action was made available to the Long Island Railroad. In addition, the railroad failed to produce a specific showing of need for oral presentation of evidence or cross-examination, for which the Commission's rules of practice provided.⁴⁹

III

Employing the final sentence of § 556(d) to eliminate some of the characteristics of a formal hearing substantially increases administrative flexibility. If an agency is directed by statute to extend a formal hearing, then it can determine whether the parties would be prejudiced by having all or part of the evidence in written form and whether cross-examination should be permitted.⁵⁰ If the agency determines that a party will not be prejudiced, then an "informal" formal procedure may be conducted.⁵¹

The *Long Island* court appears to limit its holding to those proceedings which are required by statute to be made "on the record." Consequently, in order for the last sentence of § 556(d) to operate, permitting written presentation of evidence, there must be a determination that § 556(d) itself applies, which in turn depends on a determination that the statute governing the agency requires the rule to be made "on the record", as set forth in § 553(c). This is a restrictive interpretation because only a few agencies have rules that are to be made "on the record."⁵² Although the ICC is able to achieve this status when its statutes require only a hearing, the sole reason may be a result of the Commission's unique history.⁵³ Furthermore, to confine the applicability of § 556(d) to "on the record" proceedings increases the likelihood of formal rule-making hearings continuing "ad nauseum."⁵⁴ The *Long Island* decision, therefore, should have rested on the principle that, regardless of the standard imposed by the statute governing the method of agency proceedings, *e.g.* hearing, full hearing, or "on the record",

49. CODE OF FEDERAL REGULATIONS, Title 49 *Subchapter B—Practice and Procedure* § 1100-1100.247, § 1100.53 (1971).

50. The basic requirements of the final sentence of § 556(d), *supra* note 8.

51. Whether a party will be prejudiced has no fixed meaning, but a finding by the agency that an oral hearing with cross examination would serve no useful purpose and only prolong the proceedings, might be used as a general test.

52. Davis, ADMINISTRATIVE LAW-TREATISE, § 6.06. The Food, Drug and Cosmetics Act is the prime example of an agency having to act "on the record" in rule-making that does not deal with rates.

53. See *Seigal v. Atomic Energy Commission*, 400 F.2d 778 (C.A.D.C. 1968) where the court held that the formal procedure required by § 556(d) does not apply to the AEC because the APA only required a formal hearing when the agency statute, in addition to providing a hearing, explicitly prescribes that the hearing be made on the record.

54. McFarland, C., *Landis Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 431 (1961).

the final sentence of § 556(d) applies under the appropriate circumstances.⁵⁵

The *Long Island* case is an example of when formal procedures would serve no useful purpose. The railroad had no disagreement with the evidence presented, but only with the interpretation which the Commission made concerning the facts. When the objective is to influence interpretation of facts, rather than to dispute their accuracy, only oral or written arguments are required.⁵⁶ Undisputed factual evidence need not be subjected to formal hearings whereby the parties then debate the inferences to be drawn.⁵⁷ In *NLRB v. Jochin Manufacturing Co.*,⁵⁸ the court addressed itself to this issue:

... we in no way criticize the Board thus conditioning the right to a hearing on a showing that factual issues are substantial and material, a requirement not only proper but necessary to prevent dilatory tactics by employees or unions. . . .⁵⁹

To exclude formal hearings when the factual issues are not disputed is especially conducive to rule-making procedures. Rule-making is prospective and concerned with facts that are general in nature, not limited to the immediate parties, and facts that are useful primarily as a basis for determining law or policy.⁶⁰ The rule-making process involves a consideration of economic and social factors of an industry to which the rule will apply. When undisputed facts are utilized in a quasi-legislative manner to make choices of law or policy, written arguments can be

55. To extend the concept of the final sentence of § 556(d) to other hearings and even to adjudicatory proceedings is a logical step. "On the record" rule-making is intended to be as formal as the trial type procedures of adjudication. Under the proper circumstances the reasons for informalizing a formal rule-making procedure can be utilized to accomplish the same result in adjudicative proceedings without prejudicing the parties.

56. Davis, *The Requirement of Opportunity to be Heard in the Administrative Process*, 51 YALE L. REV. 1093, 1100, 1107 (1951). [Hereinafter cited as REQUIREMENT.]

57. See *Anti Defamation League of B'nai B'rith, Pacific Southwest Regional Office v. FCC*, 403 F.2d 169, 171 (C.A.D.C. 1968), where the court concluded:

Our examination of the record satisfies us that the Commission acted within its authority in denying an evidentiary hearing as to undisputed facts which formed the basis of appellant's claims. The disposition of appellant's claim turned not on determination of facts by inferences to be drawn from those facts.

58. 314 F.2d 627 (2d Cir. 1963).

59. *Id.* at 632.

60. Davis, REQUIREMENT, *supra* note 56, at 1100.

... except when the truth of specific allegation of fact is in dispute, the most efficient vehicle both for presenting and for rebutting legislative facts is normally written and oral argument, not testimony and cross-examination. PRACTICE AND PROCEDURE, *supra* note 32, at 74, 201-2.

used,⁶¹ and formal procedures are seldom necessary.⁶²

Limiting administrative flexibility to "informalizing" formal hearings in rule-making determinations only, without extending the same to adjudicative proceedings, is to ignore the possibility that not all adjudicative proceedings need be conducted in a formalized manner.⁶³ Adjudicative proceedings differ from rule-making in that they customarily involve the formulation of judgments or orders that apply to named individuals.⁶⁴ Adjudicative proceedings focus upon facts about specific parties and their past activities.⁶⁵ Adjudicative facts, however, need not always be disputed.⁶⁶ Thus, to require a formal hearing merely because the function is defined as adjudicative, is to default on the issue of whether that type of hearing is in fact necessary.⁶⁷

To avoid the requirements of a formal hearing in adjudicative proceedings, administrative agencies are characterizing their procedures as rule-making.⁶⁸ To acknowledge that under the appropriate circumstances some of the essentials of a formal hearing can also be modified in adjudicative proceedings would cause less prostitution of procedural nomenclature.

To determine when "appropriate circumstances" are presented, the final sentence of § 556(d) states that an agency ". . . may when a party will not be prejudiced thereby, adopt procedures for the submission of *all or part* of the evidence in written form."⁶⁹ (Emphasis added.) Extend-

61. Davis, *REQUIREMENT*, *supra* note 56, at 1106. *See also*, *Automotive Parts and Accessories Association, Inc. v. Boyd*, 407 F.2d 330 (C.A.D.C. 1968); *Flying Tiger Line, Inc. v. Boyd*, 244 F. Supp. 889 (D.C.D.C. 1965); Davis, *ADMINISTRATIVE LAW TREATISE* §§ 6.06 and 7.01.

62. Fuchs, *Procedure in Administrative Rule-Making*, 52 *HARV. L. REV.*, 263-4 (1938).

When, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.

WBEN, Inc. v. U.S., 396 F.2d 601, 618 (9th Cir. 1968).

63. The last sentence of § 556(d) applies only to rule-making but by borrowing from the theory behind this section the Commissions and the courts will have a working reference when determining what procedures are appropriate for adjudicatory proceedings.

64. Fuchs, *Fairness and Effectiveness in Administrative Agency Organization and Procedures*, 36 *IND. L. J.*, 44 (1960).

65. Shapiro, D., *The Choice of Rule-Making or Adjudication in the Development of Administrative Policy*, 78 *HARV. L. REV.* 921, 924 (1965). *See also* Fuchs, *Procedure in Administrative Rule-Making*, 52 *HARV. L. REV.* 259, 264-5 (1938).

66. *National Trailer Convoy, Inc. v. U.S.*, 293 F. Supp. 634 (D.C. Okl. 1968).

67. Davis, *REQUIREMENT*, *supra* note 56, at 1107, 1112.

68. Fuchs, *Agency Development of Policy Through Rule Making*, 59 *Nw. U. L. REV.* 781, 799 (1965). [hereinafter cited as *AGENCY DEVELOPMENT*] *See generally*, Shapiro, *THE CHOICE*, *supra* note 65.

69. 49 U.S.C. § 556(d), *supra* note 8.

ing the theory of this section to modify the elements of adjudicative hearings would not automatically eliminate all the due process of a formal hearing, but only that which would not prejudice the parties. So long as parties are given an opportunity to meet the evidence against them in an appropriate fashion, they would not be prejudiced.⁷⁰

Recognition of the fact that due process in administrative procedure has never been a fixed concept and will continue to vary according to the circumstances of each case⁷¹ adds further support for extending informal procedures into the realm of adjudicative hearings. The likelihood of abuse is minimized by the fact that administrative agencies have an interest in providing adequate due process: substandard procedural protection would result in loss of public confidence in that agency⁷² and risk judicial intervention in its processes.

The possibility of using the theory behind the final sentence of § 556(d) is evidenced in the case of *Upjohn Co. v. Finch*.⁷³ Plaintiff in adjudicative hearings was denied an oral hearing with the opportunity to confront and cross-examine members of a panel which concluded that certain of its products were ineffective. Upjohn insisted that the proceedings were adjudicatory and required a formal procedure but the FDA countered by saying the proceedings were rule-making and, hence, no formal hearing was required. The court concluded that either proceeding may be conditioned upon reasonable grounds that a genuine and substantial issue of fact was present to warrant an evidentiary hearing.⁷⁴ In *Upjohn* the plaintiff was able to appraise the evidence against it and was afforded an opportunity to submit written documents to rebutt that evidence. The FDA found the documents insufficient to warrant an oral hearing and cross-examination. Therefore, the court concluded that Upjohn was not prejudiced, since no amount of cross-examination would have changed the scientific studies and data. As a practical matter, the

70. PRACTICE AND PROCEDURE, *supra* note 32, at 74, 233. See also Davis, ADMINISTRATIVE LAW TREATISE § 7.02. Davis states that the opportunity to know and meet unfavorable evidence of adjudicative facts should include rebuttal evidence, cross-examination and argument. But if the material issues are not disputed and the parties only desire is to persuade the Commission or to cross-examine witnesses that are unlikely to change their opinions, it is doubtful whether these procedures would be employed. See note 11 in *Pfizer, Inc. v. Richardson*, 434 F.2d 536 (2d Cir. 1970).

71. Fuchs, *Administrative Rule-Making*, 52 HARV. L. REV. 259, 274, 280 (1938). [Hereinafter cited as RULE MAKING.]

72. Fuchs, *Fairness and Effectiveness in Administrative Agency Organization and Procedures*, 36 IND. L. J. 1, 29 (1960). Professor Fuchs states that ". . . the pursuit of agency objectives cannot wisely be pushed to the length of overriding due process; and due process cannot validly be required to the extent of paralyzing important governmental operations."

73. 422 F.2d 944 (6th Cir. 1970).

74. *Id.* at 954.

court invoked the principle of the final sentence of § 556(d): the denial of an oral hearing and cross-examination would not prejudice the plaintiff.

Another FDA case denying an evidentiary hearing was *Pfizer, Inc. v. Richardson*.⁷⁵ The Food, Drug and Cosmetic Act provides for a formal hearing but conditions it upon a showing of "reasonable grounds therefor."⁷⁶ The court admitted that a controversy over the efficacy of a particular drug raised an issue of "adjudicative facts", but concluded that there was no denial of due process in Congress directing an agency that it need not accord a formal hearing unless the affected party demonstrates that there is something substantial to be heard. The court emphasized that its conclusion in no way casts doubt upon its decision in *Pharmaceutical Manufacturers Association v. Richardson*,⁷⁷ wherein it permitted the FDA, by its own regulations, to condition a hearing upon an applicant's showing that "reasonable grounds" exists, although by statute the FDA was required to conduct some of its rule-making proceedings "on the record."⁷⁸

75. 434 F.2d 536 (2d Cir. 1970).

76. 21 U.S.C. § 357(f) relevant part reads:

Any interested person may file with the Secretary a petition proposing the issuance, amendment, or repeal of any regulation contemplated by this section. The petition shall set forth the proposal in general terms and *shall state reasonable grounds therefor*. The Secretary shall give public notice of the proposal and an opportunity for all interested persons to present their views thereon, orally or in writing, and as soon as practicable thereafter shall make public his action upon such proposal. At any time prior to the thirtieth day after such action is made public any interested person may file objections to such action, specifying with particularity the changes desired, *stating reasonable grounds therefor*, and requesting a public hearing upon objections. (Emphasis added.)

77. 318 F. Supp. 301 (D.C. Del. 1970).

78. 21 U.S.C. § 355(d)(e):

If the Secretary finds, after due notice to the applicant and giving him an opportunity for a hearing, that (1) the investigations, reports of which are required to be submitted to the Secretary pursuant to subsection (b) of this section, do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof; (2) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions; (3) the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity; or (4) upon the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions, he shall, prior to the effective date of the application, issue an order refusing to permit the application to become effective.

The effectiveness of an application with respect to any drug shall, after due notice and opportunity for hearing to the applicant, by order of the Secretary

The *Upjohn*, *Pfizer* and *Pharmaceutical* opinions have continued the trend of permitting greater discretion in administrative procedures.⁷⁹ The emphasis is to extend only those parts of a hearing that are necessary for parties to appropriately meet the evidence against them without prejudicing their cause. If an oral hearing or other elements of a formal procedure would provide no benefit, modification of that procedure is a proper way of insuring greater efficiency in administrative proceedings.

The *Long Island* decision, restricting the application of the final sentence of § 556(d) to rule-making that is required to be "on the record", would hamper agency efforts to substitute written for oral evidence in formal proceedings, whether rule-making or adjudicatory. The theory behind the last sentence of § 556(d) should be used to modify, when the conditions warrant, existing statutes that require formal procedures. Professor Davis considers the sole guide of administrative due process as a ". . . practical one of choosing whatever means will be most efficient in providing to the agency the desired understanding while at the same time safeguarding private interests."⁸⁰ The principle

be suspended if the Secretary finds (1) that clinical experience, tests by new methods, or tests by methods not deemed reasonably applicable when such application became effective show that such drug is unsafe for use under the conditions of use upon the basis of which the application became effective, or, (2) that the application contains any untrue statement of a material fact. The order shall state the findings upon which it is based.

79. The *Pharmaceutical* decision follows the trend, beginning with *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1955) (*see also* *Federal Commission v. Texaco*, 377 U.S. 33, 39 (1964)) that have demonstrated a tendency to allow greater discretion in administrative procedures. In *Storer* the Court upheld a FCC decision to deny a hearing to a party because it failed to comply with statutory standards. Administrative discretion has been extended to deny a hearing to those who violate the agency rules on their face. *Total Telecable, Inc. v. FCC* 411 F.2d 639 (9th Cir. 1969). Other decisions have distinguished the word "hearing" from the words "on the record," thereby permitting informal procedures. *Siegal v. Atomic Energy Commission*, 400 F.2d 778, 785 (C.A.D.C. 1968). Still others have permitted a more relaxed procedure when the rule-making order is a general directive, *Airlines Pilots Assoc., International v. Quesda*, 276 F.2d 892 (C.A.D.C. 1960), or when an adjudicative hearing would only prolong a proceeding without gaining additional relevant information. *WBEN, Inc. v. U.S.*, 396 F.2d 601 (2d Cir. 1968).

A recent decision by the Federal Power Commission, *Ashland Oil and Refining Co.*, 27 Ad. L.2d 654 (1970) applied §556(d) to a rule-making proceeding where the statute required a full hearing, thus overcoming the limitation of *Friendly's* decision of permitting the section to apply only when rules are required to be made "on the record." The arguments advanced by the FPC in allowing for an informal procedure are similar to those previously mentioned: the rule-making was of general applicability, there was no showing of substantial controversy concerning the facts and the parties did not demonstrate the value of oral presentation or cross-examination. *Id.* at 659.

80. Davis, *REQUIREMENTS*, *supra* note 63, at 1107. "Like the constitution, old statutes take on new meaning by reason of new facts, including such legal facts as the existence of the APA." Fuchs, *Agency Development of Policy Through Rule-Making*, 59 Nw. U. L. REV. 781, 799 (1965).

behind the last sentence of § 556(d) should be utilized to this end.

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