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would increase safety;⁴¹ (3) he would "have no authority to direct or supervise children who might be attracted by the truck;"⁴² and (4) the statute was too vague.⁴³

The contentions of *Trio* and *Garza* considered together spawn an ugly proposition—a legitimate business cannot be legislated or regulated out of existence, yet it can be adjudicated so.⁴⁴ It is difficult to accept that equity will permit to go unchecked the current judicial determination to cause what is part of every child's heritage to become the passenger pigeon of commerce for "[s]tandards of prudent conduct are declared at times by courts, but are taken over from the facts of life."⁴⁵

Charles J. O'Connor

ADMINISTRATIVE LAW—INTERSTATE COMMERCE COMMISSION PROCEDURE—RECONSIDERATION—ON ITS OWN MOTION, THE COMMISSION CAN REOPEN PROCEEDINGS FOR RECONSIDERATION OF A PREVIOUSLY DENIED APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ON THE EXISTING RECORD. *Chicago and North Western Railway Company v. United States*, 311 F. Supp. 860 (N.D. Ill. 1970).

An action was brought to set aside an order of the Interstate Commerce Commission granting Poole Truck Line, Inc., authority to haul farm tractors and related agricultural machinery. Poole's application for a certificate of public convenience and necessity was granted in its entirety by the hearing examiner. The Commission, through an Operating Rights Review Board, refused to adopt the application. Poole then filed a petition for reconsideration which was denied by Division One acting as an appellate division. Thereafter, he filed a petition to the full Commission alleging that an issue of general transportation importance was involved. This petition was denied by the Commission in November of 1966. In January, 1967, defendant brought an action in the District Court for the Southern District of Alabama to set aside the order denying his application. On its own motion, more than six months after its previous order, the Commission vacated the order of the Review Board and reopened the proceedings for reconsideration on the existing record. The Commission granted Poole an application

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 332.

⁴⁴ See generally *Goff v. Carlino*, 181 So.2d 426 (La. App. 1965)—*writ ref'd* 183 So.2d 653 (La. 1966); *Sidders v. Mobile Softee, Inc.*, 184 N.E.2d 115 (Ohio App. 1961).

⁴⁵ *Pokora v. Wabash Ry.*, 292 U.S. 98, 104, 54 S. Ct. 480, 482, 78 L. Ed. 1149, 1154 (1934).

and the plaintiffs filed petitions for reconsideration which were denied in May of 1968. In June of 1968 the defendant Poole was issued a certificate and this action was subsequently brought. Held—*Plaintiff's petition denied*. On its own motion, the Commission can reopen proceedings for reconsideration of a previously denied application for a certificate of public convenience and necessity on the existing record.

As a general rule, courts have the power to reopen, modify, or correct their own final judgments,¹ but there is no similar general rule for administrative agencies.² The power of reconsideration requires recognition of two policies: first, the policy of ultimately reaching the right result; second, the opposing policy of the desirability of administrative finality.³ These policies require a compromise in each case,⁴ which can be simplified by the doctrines of primary jurisdiction and the exhaustion of administrative remedies.⁵ Since the court's power of judicial review over ICC orders is specifically limited by these two doctrines,⁶ an interpretation of the statutes⁷ and regulations⁸ governing the Commission's power of reconsideration will result in a further clarification of the problem in reaching the desired compromise. The power of reconsideration first appeared in the Interstate Commerce Act, section 16a, by amendment under the Hepburn Act of 1906.⁹ Section 16a was repealed in 1940,¹⁰ and the contents were basically trans-

¹ *Illinois Printing Co. v. Electric Shovel Coal Corp.*, 20 F. Supp. 181 (E.D. Ill. 1937), *aff'd* 97 F.2d 754 (7th Cir. 1938).

² Congress has made detailed statutory provisions concerning the power of reconsideration each designed for an agency's particular problems. Some of the agencies include the Federal Communications Commission, 47 U.S.C. § 405 (1964), the Federal Power Commission, 15 U.S.C. § 717r(a) (1964), the Interstate Commerce Commission, 49 U.S.C. § 17(6) and (7) (1964), and the National Labor Relations Board, 29 U.S.C. § 160d (1964). *But see* Annot., 73 A.L.R.2d 939 (1960) for powers of reconsideration without specific statutory authority.

³ *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 321, 81 S. Ct. 1611, 1617, 6 L. Ed.2d 869, 874 (1961).

⁴ *Id.*

⁵ The exhaustion doctrine is concerned with the timing of judicial review of administrative action. It is clearly distinguishable from the doctrine of primary jurisdiction, which guides a court in determining whether a court or agency should take initial action. When a court holds that it cannot grant the substantive relief sought because only an agency has jurisdiction to grant such relief, the court is applying the doctrine of primary jurisdiction. When a court determines at what stage of administrative action judicial review may be sought, the court is either applying the requirement of ripeness, the broad doctrine that governs the kinds of functions that courts may perform, or the relatively narrow doctrine of exhaustion, which focuses not upon the functions of the courts but merely upon the completion or lack of completion of administrative action.

K. DAVIS, *ADMINISTRATIVE LAW TEXT*, § 20.01 at 356 (1959).

⁶ *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 59 S. Ct. 754, 83 L. Ed. 1147 (1939).

⁷ Administrative Procedure Act, 5 U.S.C. § 557 (Supp. III, 1967). Interstate Commerce Act, 49 U.S.C. §§ 17(6)-(7) (1964).

⁸ 49 C.F.R. § 1100.101 (1970).

⁹ *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 483, 59 S. Ct. 943, 947, 83 L. Ed. 1409, 1413 (1939).

¹⁰ Repealed September 18, 1940, ch. 722, Title I § 12, 54 stat. 913.

ferred to sections 17(6) and (7).¹¹ Under the Hepburn Act section 16a was "intended to give the commission the right to rehear a matter for the purpose of correcting any injustice in its previous order."¹² The purpose of the power of reconsideration and modification is "to enable the Commission, in light of specific criticism leveled by affected carriers, to reconsider and maturely reflect upon its order."¹³ The self-correction of its own errors is the aim of a well run administrative agency;¹⁴ therefore the courts have interpreted the reconsideration powers as granting the Commission continuing jurisdiction over its orders and decisions.¹⁵ The theory of continuous jurisdiction operates to impose restrictions or conditions on a certificate of convenience and necessity to make certain that the certificate will not operate to defeat the National Transportation Policy.¹⁶ Until the certificate's contents and form are fixed by actual delivery to the carrier, the Commission retains the authority to change the order according to statutory directions.¹⁷ It is well settled that the courts require an exhaustion of administrative

¹¹ 49 U.S.C. § 17(6) (1964):

After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, . . . any party thereto may at any time, . . . make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. . . . Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. 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. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance.

⁴⁹ U.S.C. § 17(7) (1964):

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.

¹² *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484, 59 S. Ct. 943, 947, 83 L. Ed. 1409, 1414 (1939).

¹³ *United States v. Southern Ry.*, 380 F.2d 49, 54 (4th Cir. 1967).

¹⁴ *Alamo Express, Inc. v. United States*, 239 F. Supp. 694, 698 (W.D. Tex. 1965), *aff'd* 382 U.S. 19, 86 S. Ct. 83, 15 L. Ed.2d 14 (1965).

¹⁵ *Sprague v. Woll*, 122 F.2d 128 (7th Cir. 1941), *cert. denied* 314 U.S. 669, 62 S. Ct. 131, 86 L. Ed. 535 (1941); *Alamo Express, Inc. v. United States*, 239 F. Supp. 694 (W.D. Tex. 1965), *aff'd* 382 U.S. 19, 86 S. Ct. 83, 15 L. Ed.2d 14 (1965).

¹⁶ *American Trucking Associations, Inc. v. United States*, 355 U.S. 141, 78 S. Ct. 165, 2 L. Ed.2d 158 (1957).

¹⁷ *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 71 S. Ct. 382, 95 L. Ed. 391 (1951).

remedies before appealing to the courts for review,¹⁸ but at what point is the exhaustion requirement satisfied if a carrier's application for a certificate of convenience and necessity is denied?

The Commission has the authority to divide itself into divisions and designate one or more as appellate divisions.¹⁹ Any decision or order of a division may be appealed *at any time* upon application to an appellate division or the entire Commission.²⁰ The appellate division will not reconsider petitions by the same parties on the same grounds,²¹ and the original order becomes final upon denial of the petition for reconsideration.²² The entire Commission's authority to reconsider a matter from a division is limited only by its discretion.²³ Pursuant to that discretion and the authority granted in section 17(6),²⁴ the entire Commission has limited petitions for reconsideration to matters of general transportation importance.²⁵ "[T]he entire Commission, on its own motion, determines and announces that an issue of general transportation importance is involved."²⁶ An appellate division can render a final order or decision;²⁷ and can reconsider its own orders or decisions prior to the time that a certificate is issued.²⁸ When a motion for rehearing is in fact filed, there is no final action until the motion for rehearing is denied.²⁹ Any pending proceeding within the jurisdiction of the ICC precludes a court from entertaining a suit on the same matter,³⁰ but a district court can take jurisdiction and grant an injunction to stay an ICC order without preventing completion of the administrative process.³¹ In such a case, the Commission's broad powers of reconsideration and modification are "plainly adequate to add to the findings or firm them up . . . absent any collusion or interference with the district court."³²

¹⁸ *United States v. Illinois Cent. R.R.*, 291 U.S. 457, 54 S. Ct. 471, 78 L. Ed. 909 (1934); *Railway Express Agency, Inc. v. United States*, 153 F. Supp. 738 (S.D.N.Y. 1957), *aff'd* 355 U.S. 270, 78 S. Ct. 330, 2 L. Ed.2d 257 (1957).

¹⁹ 49 U.S.C. § 17(1) (1964).

²⁰ 49 U.S.C. § 17(6) (1964).

²¹ 49 C.F.R. § 1100.101(g) (1970).

²² 49 U.S.C. § 17(9) (1964).

²³ *Convoy Co. v. United States*, 200 F. Supp. 10 (D. Ore. 1961), *aff'd* 382 U.S. 371, 86 S. Ct. 553, 15 L. Ed.2d 426 (1966).

²⁴ Interstate Commerce Act, 49 U.S.C. § 17(6) (1964).

²⁵ 49 C.F.R. § 1100.101(a)(3) (1970).

²⁶ *Id.*

²⁷ "[T]he full Commission now considers petitions only when the Commission has, on its own motion, decided that the matter is one of general transportation importance. All other matters are decided finally by divisions of the Commission." *City of Philadelphia v. United States*, 197 F. Supp. 832, 834 (E.D. Pa. 1961).

²⁸ *Resort Bus Lines, Inc. v. I.C.C.*, 264 F. Supp. 742 (S.D.N.Y. 1967).

²⁹ *Outland v. C.A.B.*, 284 F.2d 224, 227 (U.S. App. D.C. 1960).

³⁰ *Berg v. Cincinnati, Newport & Covington Ry.*, 56 F. Supp. 842 (E.D. Ky. 1944).

³¹ *American Farm Lines v. Black Ball Freight Service*, 90 S. Ct. 1288, 25 L. Ed.2d 547 (1970).

³² *Id.*, 90 S. Ct. at 1293, 25 L. Ed.2d at 554.

If a carrier's application for a certificate of convenience and necessity is denied, when is the exhaustion of administrative remedies satisfied?³³ The majority's holding in the principal case suggests that the applicant can never exhaust his administrative remedies, i.e., the Commission can at any time reopen a proceeding for the purpose of correcting an error or injustice. The Court relies upon *Baldwin v. Scott County Milling Co.*³⁴ and *Sprague v. Woll*³⁵ for its broad interpretation of the Commission's power of reconsideration. In the *Baldwin* case the Commission determined that tariff rates were excessive and ordered a \$24,000 repayment. After the denial of several petitions for rehearing, the Commission reopened the case and reversed, finding the rates to be reasonable. Understandably the Commission has the authority to reconsider its original order since the Commission is an expert in the field of rate determinations,³⁶ and the courts must respect the Commission's expertise.³⁷ In *Sprague v. Woll* the Commission, on its own motion, reopened a prior determination concerning the status of an electric railroad under the Railway Labor Act. The facts of the non-adversary hearing, concerning the Railway Labor Act, clearly justified the Commission's actions in reconsidering its original order based on incomplete and inadequate evidence.³⁸ The *Baldwin* and *Sprague* cases are excellent examples of the Commission's power to correct any error or injustice. Without this power, both cases, under the court's exercise of the substantial evidence rule, could not have been correctly determined.

The majority in the present case has apparently approved the holding in *Resort Bus Lines, Inc. v. I.C.C.*,³⁹ i.e., that an appellate division can reconsider its own orders. However, the court has refused to follow the logic of *Transamerican Freight Lines, Inc. v. United States*⁴⁰ hold-

³³ Probably the guide to requiring or not requiring exhaustion when administrative jurisdiction is challenged should be the examination of three main variables—extent of injury from pursuit of administrative remedies, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction.

K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.10 at 371 (1959).

³⁴ *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 59 S. Ct. 943, 83 L. Ed. 1409 (1939).

³⁵ *Sprague v. Woll*, 122 F.2d 128 (7th Cir. 1941), cert. denied 314 U.S. 669, 62 S. Ct. 131, 86 L. Ed. 535 (1941).

³⁶ "[M]atters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked." *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 139, 59 S. Ct. 754, 761, 83 L. Ed. 1147, 1157 (1939).

³⁷ *Campbell Sixty-Six Express, Inc. v. United States*, 258 F. Supp. 529 (W.D. Mo. 1966); *DeCamp Bus Lines v. United States*, 224 F. Supp. 196 (D.N.J. 1963); *Capital Transit Co. v. United States*, 97 F. Supp. 614 (D.C. 1951).

³⁸ All decisions of the Commission are measured by the reviewing courts against the substantial evidence rule. It would be a grave injustice to not allow the Commission to reconsider where the evidence is clearly inadequate. See *Lang Transp. Corp. v. United States*, 75 F. Supp. 915 (S.D. Cal. 1948).

³⁹ *Resort Bus Lines, Inc. v. I.C.C.*, 264 F. Supp. 742 (S.D.N.Y. 1967).

⁴⁰ *Transamerican Freight Lines, Inc. v. United States*, 258 F. Supp. 910 (D. Del. 1966).

ing that the entire Commission cannot review an order of an appellate division since such order is administratively final.⁴¹ The majority contends that the *Resort* case is identical to the present case in all relevant respects. However, it does not concern itself with the fact that the appellate division in the *Resort* case reopened the proceedings on the existing record to consider petitions filed for rehearing. The present case was reopened without any petitions for rehearing. Chief Judge Swygert admitted two instances when the Commission's power of reconsideration is limited,⁴² but refused to recognize the need for a distinction between the granting of a certificate and the denial of one.⁴³ The Commission's authority to reopen a proceeding on its own motion, without petitions and on the existing record is justified when "the best interests of judicial economy and administrative responsibility" are served.⁴⁴ While the power of administrative reconsideration and the power of judicial review do not "collide,"⁴⁵ the absence of any certainty created by the principal case contributes to this nebulous and confusing period for the applicant who is denied a certificate. Generally the Commission will refuse successive petitions for reconsideration on the same grounds,⁴⁶ but the present decision allows the Commission to reopen a case, on its own motion, without any new grounds or new evidence. The doctrine of *res judicata*, although not applicable to ICC proceedings,⁴⁷ suggests that some restrictions should be imposed. Should the Commission's unabridged power of reconsideration permit relitigation of the same matter by the same parties in the absence of any new evidence? The effect of the present decision is to destroy the exhaustion of administrative remedies. It further subjects the applicant to costly court preparations, only to have the Commission later reopen the proceedings. If the Commission's continuing jurisdiction results in the continual relitigation of the same matter by the same

⁴¹ Transamerican's interpretation of 49 U.S.C. § 17 found no provisions for reconsideration of an appellate division's order by the entire Commission. Judge Marovitz, dissenting in the instant case, feels that the logic of Transamerican's interpretation should not be affected by its precedent as dicta.

⁴² "[T]he apparently unlimited power given to the Commission to reconsider its orders may be limited in cases where the objecting party demonstrates [a] detrimental reliance or the passage of a long period of time" *Chicago and North Western Ry. v. United States*, 311 F. Supp. 860, 864 (N.D. Ill. 1970).

⁴³ The Commission's power of reconsideration appears to be another "wild ass of the law which the courts cannot control." *Anderson v. Buchanan*, 168 S.W.2d 48, 55 (Ky. 1943).

⁴⁴ *Chicago and North Western Ry. v. United States*, 311 F. Supp. 860, 863 (N.D. Ill. 1970).

⁴⁵ *American Farm Lines v. Black Ball Freight Service*, 90 S. Ct. 1288, 1294, 25 L. Ed.2d 547, 554 (1970).

⁴⁶ 49 C.F.R. § 1100.101(f) (1970).

⁴⁷ *Worster Motor Lines, Inc. v. United States*, 226 F. Supp. 603, 608 (W.D. Pa. 1963); *Convoy Co. v. United States*, 200 F. Supp. 10 (D. Ore. 1961), *aff'd* 382 U.S. 371, 86 S. Ct. 553, 15 L. Ed.2d 426 (1966).