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Peter Woll

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THE DEVELOPMENT OF SHORTENED PROCEDURE IN AMERICAN ADMINISTRATIVE LAW

Peter Woll†

Administrative adjudication is commonly classified as formal and informal. In the informal adjudicative area decisions are made after informal conferences, correspondence, interviews, inspections and other forms of informal negotiation, rather than on the basis of hearings. Formal adjudication, on the other hand, is marked by

hearings in which testimony is taken, subject to cross-examination, and embodied into a record. . . . When formal hearings are held, the record is normally considered by officers of the agency and, after opportunity for oral argument before them, by the agency heads themselves. Thereafter the agency's final decision, except in comparatively few situations . . . is subject either by express statutory provision or by judicial construction, to complete judicial review on the law and more limited review on the facts.¹

This sharp distinction between the hearing and non-hearing phases of administrative adjudication can no longer be maintained in American administrative law. With the development of administrative law informal techniques have been introduced into the formal adjudicative stage substantially altering the character of formal hearings. The purpose of this article is to analyze the limitations that administrative agencies have placed upon the formal hearing process and the implications of this development in terms of the traditional legal protections afforded individuals in the administrative process.

Although most cases arising under the jurisdiction of administrative agencies are settled informally, a significant number reach the formal stage. This stage may be required by statute or the parties themselves may request hearing either because informal settlement has failed or because they feel that the case will be more fairly adjudicated through the process of formal hearing. In analyzing the limitations that administrative agencies have placed upon the formal hearing process this article will first explore the nature and extent of the right to a hearing. Second, the theoretical development of the concept of shortened procedure will be outlined. Third, within the scope of this article, certain pertinent examples of the use of shortened procedure will be noted. An assessment of the significance of this procedure will conclude the preceding remarks.

† See Contributors' Section, Masthead, p. 83, for biographical data.

¹ Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure, Appointed by the Attorney General, Sen. Doc. No. 8, 77th Cong., 1st Sess., 1941: p. 5.

I. OPPORTUNITY TO BE HEARD

Bernard Schwartz notes that

the existence of the right to be heard depends upon the nature of the particular administrative function at issue. The applicability of the notice and hearing requirements of procedural due process to the field of administrative law is largely based upon the distinction between the legislative or rule-making functions of administrative agencies, on the one hand, and their judicial or adjudicative activities, on the other. In rule-making, there is usually no right to be heard in the absence of statutory provisions therefor. . . . Insofar as adjudicatory functions are concerned, conformity with the basic judicial standards of notice and hearing is normally held to be essential.²

As an illustration of this concept consider *Bi-Metallic Co. v. Colorado*³ in which the Court upheld an order of the State Board of Equalization of Colorado, increasing the valuation of all taxable property in Denver by forty per cent. The plaintiff contended that

[t]here was no hearing; there was no notice; the rights of the property owner were ignored, and the decision of the Supreme Court of the State sustaining the order of the boards was state action depriving the taxpayer of property without due process of law, in violation of the provisions of the Fourteenth Amendment.⁴

Speaking for the majority of the Court, which upheld the state action, Justice Holmes said:

Where a rule of conduct applies to more than a few people it is unpracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual argument in such matters if government is to go on.⁵

The size of the group affected by administrative action in the *Bi-Metallic* case rendered a hearing unnecessary.

In *Londoner v. Denver*⁶ a relatively small group of landowners was affected by a tax assessment of a local board for paving a street adjoining their property. Because such action bordered on adjudication the Court held that the taxpayer must have an opportunity to be heard.

² Schwartz, "Procedural Due Process in Federal Administrative Law," 25 N.Y.U.L. Rev. 553-54 (1950).

³ 239 U.S. 441 (1915).

⁴ Id. at 443.

⁵ Id. at 445.

⁶ 210 U.S. 373 (1908).

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By way of limitation, however, Justice Brandeis' opinion in the *Assigned Car Cases*⁷ stated that

in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general.⁸

Since rate-making has specific applicability, it is an adjudicative function.⁹ Thus, in specific rate-making proceedings the courts have held that due process requires notice and hearing.¹⁰

With regard to the general adjudicative activities of administrative agencies, statutes delegating judicial power usually provide for notice and hearing. Exceptions, however, do exist.¹¹ In cases requiring immediate action the significance of such administrative hearings is limited and the courts have upheld the administrative practice of eliminating hearings prior to taking the required action.¹² For example, one cannot obtain a formal hearing to establish the legality of the collection of internal revenue.¹³ In general, in such emergency cases judicial review is relied upon to protect the individual from arbitrary administrative action.

The distinction between opportunity for hearing in adjudicative proceedings on the one hand, and rule-making proceedings on the other, was maintained by the Administrative Procedure Act of 1946.¹⁴ Where rule-making is involved, the requirements of section 4 apply, which means, in essence, that only the required notice of proposed rule-making must be given. Section 4 also includes several broad escape clauses which further limit formal procedure in rule-making. However, even though formal procedure in rule-making is not required by statute and hence not by the Administrative Procedure Act,¹⁵ such procedure can be required if rules have particular applicability, thereby making the decision essen-

⁷ 274 U.S. 564 (1927).

⁸ *Id.* at 583.

⁹ Rate-making is generally considered a legislative function; however, the specific nature of the application of rates makes appropriate the designation of rate-making as adjudication.

¹⁰ *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890); *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1948). A possible contradiction to this decisional trend is evident in *Bowles v. Willingham*, 321 U.S. 503 (1944). Since this decision was made during time of war, however, the case may be considered abnormal.

¹¹ For example, there is no provision for statutory hearing in deportation cases.

¹² *Fahey v. Mallonee*, 332 U.S. 245 (1947).

¹³ *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Hagar v. Reclamation District*, 111 U.S. 701 (1884).

¹⁴ On rule-making § 4; on adjudication §§ 5, 7, 8, 11.

¹⁵ The APA requires formal procedure in rule-making only where there is a statutory specification that rules are to be made on the basis of a record after the agency affords an opportunity for a hearing. APA § 4(b).

tially adjudicative.¹⁶ Under certain circumstances due process may require a hearing even if there is no such statutory requirement.¹⁷

With regard to formal rule-making, *i.e.* where the statute requires that rules be made on the record after the agency affords opportunity for a hearing, section 7 and 8 of the Administrative Procedure Act apply. It is important to note that section 7(c) of the APA provides:

In rule-making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

On the other hand the provisions of the APA are rigid in establishing formal procedure where formal adjudication is required.

II. THE CONCEPT OF SHORTENED PROCEDURE IN THEORY

Although it is evident that an opportunity for a hearing must be offered by administrative agencies under certain circumstances, a strong administrative emphasis upon simplifying hearings has developed in order to save time and expense both to the government and to the private party concerned. To a considerable extent formal administrative hearings are limited by pre-hearing conferences of an informal nature in which the parties involved settle by consent certain points of disagreement between them and determine the nature of the hearing that is to be held. Such pre-hearing conferences are patterned after a court practice based upon Rule 16 of the Federal Rules of Civil Procedure, which provides that:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.¹⁸

Rule 16 further provided that the court should make an order, resulting from the conference, which would control subsequent formal proceedings.

The Report of the President's Conference on Administrative Procedure, issued in 1953, urged administrative utilization of pre-hearing

¹⁶ *American Air Transport v. C.A.B.*, 98 F. Supp. 660 (D.D.C. 1951).

¹⁷ A companion case to the *American Air Transport* case *supra*, note 16, but pertaining to adjudication is *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), where hearing was held to be required in a deportation proceeding.

¹⁸ *Rules of Civil Procedure for the District Courts of the United States*, Chicago, American Bar Association, 1938.

conferences to resolve issues. In this regard, the Conference report recommended that all agencies "require that in all proceedings the issues to be adjudicated be made initially as precise as possible, in order that hearing officers may proceed promptly to conduct the hearings on relevant and material matter only. . . ."¹⁹ Further, the Conference report stated that all agencies should "encourage hearing officers to call and conduct pre-hearing conferences and *other conferences during hearings*, with a view to the simplification, clarification, and disposition of the issues involved, and with a further view to the shortening of the proof on the issues."²⁰ (Italics added.) Finally, in attempting to adapt Rule 16, utilized by the courts, to administrative adjudication, the President's Conference recommended that all agencies adopt the following rule, or one similar to it:

In any proceeding the agency or its designated hearing officer upon its or his own motion, or upon the motion of one of the parties . . . , may in its or his discretion direct the parties or their qualified representatives to appear at a specified time and place for a conference to consider

- (a) the simplification of the issues;
- (b) the necessity of amendments to the pleadings;
- (c) the possibility of obtaining stipulations, admissions of facts and of documents;
- (d) the limitation of the number of expert witnesses;
- (e) such other matters as may aid in the disposition of the proceeding.

The agency or its designated hearing officer shall make an order which recites the action taken at the conference . . . , and which limits the issues for hearing to those not disposed of by admissions or agreements; and such order shall control the subsequent course of the proceeding unless modified for good cause by subsequent order.²¹

It is evident that this rule is directly patterned upon Rule 16, with, perhaps, greater emphasis placed upon the necessity for such pre-hearing conferences to control formal proceedings.

In commenting upon the use of pre-hearing conferences by administrative agencies the Conference report stated:

Agencies' rules vary widely on the matter of pre-hearing conferences. In some agencies such conferences are mandatory in certain cases. In other agencies, in the absence of request of the parties, conferences apparently can only be called on motion of the agency. In still others, they apparently can be called only at the request of the parties. . . . All agencies, by rule or otherwise, should urge hearing officers to encourage, at every opportunity, round-table meetings of the parties prior to the commencement of hearings, with the view of culling out those issues upon which there is no real controversy, crystallizing, sorting, simplifying, and analyzing the others. . . .

¹⁹ Report of the Conference on Administrative Procedure Called by the President of the United States on April 29, 1953; p. 36.

²⁰ *Id.* at 37.

²¹ *Id.* at 37-38.

It is believed that pre-hearing conferences could be profitably held in most cases. Frank and informal discussion many times dissipates a reticence and reluctance to agree which exist for no good reason other than the absence of a qualified, disinterested mediator. . . .

Another significant value to be gained by holding pre-hearing conferences is the formulation of a plan for the efficient conduct of the hearing. . . .

In addition, a more generous use of conferences during the course of the hearing would aid in the further narrowing of issues and would stimulate stipulations and agreements between the parties, thereby further shortening records.²²

In summary, the report of the President's Conference on Administrative Procedure reflects the general trend, evident both within and without the administrative branch, to shorten formal adjudication as much as possible. This tendency is characterized by the desire to replace the technicalities of formal proceedings with the flexibility of informal conferences. Those who support the trend question the efficacy of formal proceedings in relation to informal conferences, both with regard to securing efficient operation and with regard to obtaining justice.

The need for a vast improvement in pre-trial methods is manifested in the views of a Federal Communications Commission Hearing Examiner. Writing for the *Journal of the Federal Communications Bar Association*, J. D. Bond noted the importance of "the achievement of smaller records in shorter and less expensive hearings, and thus the gain of quicker and more certain justice for those citizens who toil in the mazes of hearing proceedings. They have a right . . . to less tedious justice. Pre-trial . . . is a remedial measure of tremendous potential, but largely unrealized, value."²³ Noting the tremendous growth of pre-trial techniques in the federal and state courts, Bond feels that

the uncomfortable truth is that whereas the processes of the courts were being rapidly improved and expedited, the hearing processes of the agencies and departments of the Federal government generally remained virtually at a standstill. It has been said, and with a measure of justification, that the utility of the hearing process for deciding controversies more expeditiously than in the courts is too often all but lost in some modern-day proceedings. . . . Many present-day administrative hearing decisions could have been derived more expeditiously, more economically, and upon a much smaller record through pre-trial, trial and decision in a court of law.²⁴

The prevalence of such indictments has generated the present emphasis upon the necessity for infusing the formal administrative process with informal techniques.

²² Id. at 71-72.

²³ "The Use of Pre-Trial Technique in Administrative Hearings," 13 *Journal of the Federal Communications Bar Association* 55 (1953).

²⁴ Id. at 56-57.

III. THE USE OF SHORTENED PROCEDURE BY ADMINISTRATIVE AGENCIES: THE ICC, CAB, AND SEC

The Interstate Commerce Commission provides an interesting case study in the area of the development of informal methods in the formal adjudicative stage. Shortened procedure was first developed by the Interstate Commerce Commission in 1923. Its 1923 Annual Report states:

With a view to simplifying, shortening, and making less expensive the procedure upon complaints filed with us, we have been experimenting during the year with a new method of handling the simpler *formal cases*. This shortened procedure consists of dispensing with the usual method of holding hearings before a commissioner or an examiner, and substituting sworn statements of fact. . . .

After the respective memoranda have been filed, the case is assigned to an examiner, who studies them as he would a formal record, and who then prepares a proposed report. At any time up to the date when such report is issued, any party to the case may request the regular formal hearing either upon the whole complaint or upon certain features of it. . . .

Oral argument may be had upon seasonable request therefor. . . .

A substantial number of attorneys and traffic officials practicing before us have stated that they believe our experiment is a step in the right direction and that many of our formal cases can doubtless, *with the consent of the parties*, be disposed of in the manner suggested.²⁵ (*Italics added.*)

The original I.C.C. shortened procedure provided for oral argument if requested, and depended, as it does today, upon the consent of the parties in order to be put into practice. In general, the value of this form of shortened procedure was dependent upon the extent to which hearings could be entirely eliminated through the use of written memoranda to establish the facts of a particular case.

In commenting upon the use of shortened procedure by the I.C.C. the staff of the Attorney General's Committee on Administrative Procedure noted that shortened procedure is requested either by a private party or by the Commission; however, "the shortened procedure is suggested to the parties in approximately twice as many cases as the number in which the parties consent."²⁶ From the very beginning the necessity of obtaining the consent of the parties to effect shortened procedure was an obstacle to its effectiveness.²⁷

When the I.C.C. used shortened procedure, the primary facts of the case under consideration were not in dispute; therefore, the need for a formal hearing with cross-examination, etc., was eliminated. A former

²⁵ 1923 I.C.C. Annual Rep. 7-8.

²⁶ Attorney General's Committee on Administrative Procedure, monograph, Interstate Commerce Commission, Sen. Doc. No. 10, 77th Cong., 1st Sess., part 10: 23 (1941). (Hereinafter cited as I.C.C. monograph.)

²⁷ *Id.* at 25.

Chief of the Shortened Procedure Section of the I.C.C. estimated that the facts were contradicted in the memoranda of the parties in only one case out of twenty.²⁸ Further, with regard to the efficacy of this method of resolving disputes, some members of the staff of the Attorney General's Committee on Administrative Procedure were "firmly of the opinion that the shortened procedure sometimes results in better decisions than hearing procedures, by reason of the greater precision that is possible when facts are stated in writing rather than orally."²⁹ Before the second World War approximately thirty-three per cent of all formal cases were settled through shortened procedure each year.

Due to the need for obtaining the consent of the parties to a dispute before using shortened procedure, it was felt by the Commission that the use of informal techniques in the formal administrative process was unnecessarily burdened. The I.C.C. shortened procedure, as it developed, not only required the consent of the parties, but also lacked a provision for a modified hearing; if oral argument was desired the entire case under consideration had to be shifted into the formal hearing stage.

To overcome these obstacles to the effective limitation of the formal hearing process the I.C.C. adopted what it termed a *modified* procedure in 1942, which differed from shortened procedure in that the consent of the parties did not have to be obtained; oral argument was permitted in certain cases without necessitating a shift of the case into the formal process.

The Rules of Practice of the I.C.C. provide that if modified procedure is to be used, either by order of the Commission³⁰ or by desire of the parties, statements of fact and exhibits with regard to a particular case are to be filed in writing by the defendant, followed by the complainant's rebuttal.³¹ "If cross examination of any witness is desired the name of the witness and the subject matter of the desired cross examination shall, together with any other request for oral hearing, including the basis therefor, be stated. . . ."³² And "the order setting the proceeding for oral hearing, if hearing is deemed necessary, will specify the matters upon which the parties are not in agreement and respecting which oral evidence is to be introduced."³³ In this manner, under modified procedure, the I.C.C. has adopted a selective formal procedure with regard to witnesses and evidence.

²⁸ Id. at 24.

²⁹ Id. at 25.

³⁰ 49 CFR 1956 Supp., 1.45(a).

³¹ Id. 1.46(a), 1.47, 1.48, 1.49, 1.50, 1.51, 1.52, 1.54.

³² Id. 1.53(a).

³³ Id. 1.53(b).

The extensive use of modified procedure began in 1952, and was preceded by a change of thinking respecting shortened procedure.

That change was a belief that unnecessary time and effort was being expended in obtaining consent of the parties to use of shortened procedure, and that procedural improvements could be made. Accordingly, respecting Bureau of Formal Cases proceedings, it was concluded experimentally to switch to modified procedure. . . .

The results of increased use of modified procedure have been very gratifying. The elapsed time in disposing of such proceedings has been reduced, and substantial monetary savings to both the Commission and the parties also have resulted. . . . Investigation-and-suspension proceedings (very infrequently handled under shortened procedure) lend themselves very well to modified procedure handling. . . . Another development during the period in question has been increased use of modified procedure in certain proceedings in the Section of Complaints of the Bureau of Motor Carriers. Contemporaneously, use of shortened procedure has declined, and as of April 30, 1954, only six such proceedings were pending on the Commission's entire docket.³⁴

Modified procedure has replaced shortened procedure in the operation of the I.C.C. The increase in the number of cases settled by modified procedure indicates its greater flexibility and usefulness. Further, modified procedure has been employed in effecting settlement of complex cases where shortened procedure could not, in general, be utilized.

Oral hearing has rarely been requested under modified procedure. Between October 1952 and April 1954 (inclusive) there were only six requests for cross-examination or other oral hearing out of 1,130 modified procedure cases.³⁵ Former Commissioner Mahaffie of the I.C.C. noted that even where requests for oral hearing were made, "the resulting hearing, being restricted to cross-examination, or other limited purpose, has taken but a fraction of the time which otherwise would have been necessary had the proceeding been orally conducted throughout."³⁶

In those modified procedure cases where the I.C.C. is able to effect settlement without oral argument (over 99 per cent of the cases) it is, in essence, settling cases by obtaining informal consent of the parties. Therefore, although formal in name, the procedure is informal in substance.

The significance of the use of modified procedure in the formal administrative process of the I.C.C. can be observed in the following table. Figures represent the percentage of proceedings handled by modified procedure.

³⁴ Arpaia, Anthony F., Hugh W. Cross, Charles D. Mahaffie, Dr. Louis A. Jaffe, Nuel D. Belnap, and John R. Turney (Moderator), "A Forum on Improvement of Administrative Procedures," 21 I.C.C. Practitioners' Journal 822, 836 (1954).

³⁵ Id. at 842-43.

³⁶ Id. at 838.

Kind of rate proceeding*	12 month period ending July 31				
	1953	1954	1955	1956	1957
Other than motor carrier:					
Formal complaints	75	76	74	55	56
Investigation & suspension proceedings	58	41	43	33	37
Motor carrier:					
Formal complaints	49	53	72	57	59
Investigation & suspension proceedings	50	60	89	91	90

* Source: 1956 I.C.C. Annual Report 61.
1957 I.C.C. Annual Report 38.

One can conclude that at present sixty per cent of the formal complaints outside of the Bureau of Motor Carriers are handled by modified procedure; the other categories do not seem to be stable except for investigation and suspension proceedings in the Bureau of Motor Carriers, where over ninety per cent of the cases are handled by modified procedure. The trend seems to be toward an increase in this number. It is evident, in general, that substantial inroads upon the formal hearing process have been made by modified procedure.

Arguments have been advanced in opposition to this extensive use of modified procedure from various lawyers dealing with the I.C.C. It has been stated that the lack of a complete oral hearing prevents the examiner from understanding in full all the facets of a particular case; information developed from written memoranda is not entirely adequate in this regard. Demeanor evidence is of importance but, of course, requires oral hearing. Also, it has been stated that lack of oral hearing encourages "claim sharks"³⁷ to file complaints with the I.C.C. which would not stand the test of a full hearing, both because of inadequate evidence and because complainants cannot bother to appear in formal hearing, the complaint not justifying the expense which would be involved. Finally, it has been argued against modified procedure that time is really not saved by avoiding oral hearing for, even under modified procedure, approximately three hundred days elapse between filing and decision.³⁸

In summary, the Interstate Commerce Commission has adopted a form of modified procedure which eliminates the need for hearings in the formal administrative process. The Commission has followed the practice of ordering the parties to a dispute to submit their controversy

³⁷ The "claim shark" is one individual who collects or gathers claims of numerous parties who are attempting to present a collective claim to the Commission. For example, one shark will file a claim on behalf of ninety complainants.

³⁸ For these arguments see the statement of Nuel D. Belnap, a member of the I.C.C. Bar, in "A Forum on Improvement of Administrative Procedure," 21 I.C.C. Practitioners' Journal, 843-49 (1954).

to settlement under this procedure and has thereby greatly increased the effectiveness of modified procedure in relation to shortened procedure, since the latter practice required the Commission to obtain the consent of the parties before eliminating a formal hearing. Although the parties have the opportunity to present segments of their dispute for settlement based upon an oral hearing under modified procedure, they do so in less than one per cent of the cases. The success of this procedure, evident from an examination of the percentage of cases settled by this practice, suggests that those subject to the jurisdiction of the I.C.C. are satisfied with its use. Although certain traditional criticisms have been leveled at the limitation of formal hearings by modified procedure, such criticisms do not seem to be widespread. Finally, it should be noted that the use of modified procedure by the I.C.C. goes far beyond the concept of prehearing conferences in theory and in practice. In general, modified procedure eliminates hearings, whereas prehearing conferences merely define the scope of the hearing. The use of prehearing conferences by the I.C.C. will be discussed *infra* in conjunction with the practices of other agencies in this field.

A further significant case study of shortened procedure in the formal administrative process is presented by certain phases of the operation of the Civil Aeronautics Board. The Civil Aeronautics Act requires hearings with respect to cases in which application is made for certificates of public convenience and necessity and for foreign air carrier permits.³⁹ In air-mail rate proceedings orders are to be made only after notice and hearings.⁴⁰ It is interesting to observe that the staff of the Attorney General's Committee on Administrative Procedure felt that the hearing requirement with respect to certificates and permits was unwise. Concerning the provisions relating to air-mail rate proceedings the Attorney General's staff noted:

True, the statute says that orders are to be made after notice and hearing. Elsewhere in the administration of the act, however, like requirements have been interpreted as connoting only that notice be given and that a hearing be held if desired by the parties. . . . The whole subsidy program, it is believed, could be carried forward more expeditiously and without the paraphernalia of examiners' reports, exceptions, briefs, and the like if it were subjected to a process of negotiation and consultation, rather than directed toward the holding of formal hearings.⁴¹

Regardless of statutory provisions to the contrary, the staff of the At-

³⁹ Sections 401(c); and 402(e).

⁴⁰ Section 1002(d).

⁴¹ Attorney General's Committee on Administrative Procedure, monograph, Civil Aeronautics Authority, 77th Cong., 1st Sess., Sen. Doc. No. 10, part 6: 32 (1941). (Hereinafter cited as Monograph, C.A.A.)

torney General's Committee felt that, in this area, formal proceedings were not as effective as informal negotiation and consultation in the settlement of air-mail rate cases.

In the light of the remarks of the Attorney General's Committee staff it is interesting to observe that in 1942 the C.A.B. adopted a new shortened procedure with regard to compensation to carriers for the transportation of air mail. In its Annual Report of that year the Board stated:

The major objective sought by the Board in prescribing a new procedure was to accord the carrier and any other interested party an opportunity for a full hearing, while at the same time expediting final disposition of the case. The show-cause procedure adopted by the Board achieves this end by placing before the carrier a complete statement of a proposed disposition of the rate proceeding by the Board, and then affording the carrier an opportunity to contest any such portions of that statement as do not meet with its agreement. By this method all interested persons are fully informed of the Board's tentative conclusions. To the extent that the parties are in agreement . . . there is no occasion for further procedure of any kind. Accordingly, the issues in any hearing in a rate case are effectively limited to those concerning which there is a real controversy. It is no longer necessary for the carrier or other persons to introduce extensive testimony and lengthy argument on matters simply to guard against the possibility that the Board might dispose of them contrary to the parties' views.⁴²

In this manner the C.A.B., rather than automatically granting a hearing, merely gave the parties to a particular air-mail rate case an *opportunity* for a hearing.

A further limitation of formal procedure in the air-mail rate field has been the adoption, by the C.A.B., of an informal conference procedure *before a show-cause order is issued*. In 1948 the Board noted that:

Because of the transitional nature of the periods through which the carriers were passing, the difficulties were greatly increased in establishing final rates for the future, as well as for the substantial periods that have accumulated with the filing of petitions. If rates were to be established within a reasonable time, a way had to be found to shorten the normal procedures. It was felt that considerable time and effort could be saved in the long run if, in advance of the issuance of a show-cause order, the Board's staff and the carrier met for the purpose of developing all the facts essential to the establishment of a rate, as well as exchanging views toward a more thorough mutual understanding of the carriers' problems. In that way, it was hoped that many issues would be resolved in accordance with well-established principles, and those issues that remained would be clearly defined. Thus the time that normally elapses between the issuance of a show-cause order and the final establishment of a rate would be

⁴² 1942 C.A.B. Annual Report 23.

considerably shortened. Accordingly, the Board officially authorized certain conference procedures on November 14, 1947.⁴³

It should be noted here that the C.A.B. has not only attempted to supplant formal air-mail rate hearings with informal conferences for the purpose of expediting business but has also developed informal procedure to establish a more effective *modus vivendi* with the groups coming under its jurisdiction. Formal procedure and adversary hearings do not establish the mutual understanding necessary for effective regulation.

Reflecting the success of these informal conferences before the issuance of show-cause orders, the present Rules of Practice of the C.A.B. set forth this procedure in detail. The rule with regard to the invocation of informal air-mail rate conference procedure is that "conferences between members of the Board's staff, representatives of air carriers, the Post Office Department and other interested persons may be called by the Board's staff for the purpose of considering and clarifying issues and factual material in pending proceedings for the establishment of rates for the transportation of mail."⁴⁴

With regard to the scope of the conferences, it is specified that "the mail rate conferences shall be limited to the discussion of, and possible agreement on, particular issues and related factual material in accordance with sound rate-making principles."⁴⁵ Recommendations are to be made to the Board on the basis of these conferences. Information obtained from these informal conferences is to remain secret until the Board makes a decision, or until ninety days have elapsed after the termination of the conference.⁴⁶ Data requested by the Board, defined, in general, by the Rules of Practice,⁴⁷ must be submitted by the carrier concerned. Then

after a careful analysis of these data, the Board's staff will, in most cases, send the carrier what might be termed a statement of exceptions showing areas of differences. Where practicable, the carrier may submit its answer to these exceptions. Conferences will then be scheduled to work out a clear understanding and resolution of the issues and facts from the standpoint of sound rate-making principles.⁴⁸

. . . [T]he rate conferences not being in the nature of proceedings, no briefs, or argument, or any formal steps, will be entertained by the Board. The form, content and time of the staff's presentation to the Board are entirely matters of internal procedure. . . .⁴⁹

⁴³ 1948 C.A.B. Annual Report 12.

⁴⁴ 14 CFR 302.311 (1956 ed.).

⁴⁵ Id. 302.312.

⁴⁶ 14 CFR 302.314 (1956 ed.).

⁴⁷ 14 CFR 302.315 (1956 ed.).

⁴⁸ 14 CFR 302.316 (1956 ed.).

⁴⁹ 14 CFR 302.318 (1956 ed.).

With regard to the legal effect of these informal conferences

[n]o agreements or understanding reached in rate conferences as to facts or issues shall in any respect be binding on the Board or any participant. Any party to mail rate proceedings will have the same rights to file an answer and take other procedural steps as though no rate conference had been held. The fact, however, that rate conferences were held and certain agreements or understandings may have been reached on certain facts and issues renders it proper to provide that upon the filing of an answer by any party to the rate proceeding all issues going to the establishment of a rate shall be open, except insofar as limited in prehearing conference. . . .⁵⁰

Although these conferences, in contrast to prehearing conferences, may have no binding legal effect, they, in substance, settle the case under consideration except where irrevocable differences exist among the parties.

In 1952 the C.A.B. noted in discussing the trend to eliminate formal hearings with special reference to air-mail rate proceedings that new rules incorporating the Board's practice in this area were "designed to expedite formal hearings, insure more uniform application of the rules, and to save time for the Board members, staff, and parties appearing before the Board by simplification of procedures."⁵¹ Specifically, in the new Rules of Practice "the procedure providing for pro forma mail-rate hearings was eliminated, and written statements and informal negotiations are now utilized in lieu of formal hearings in certain commercial rate cases."⁵²

It is important to note that informal conferences are used by the C.A.B. not only to simplify issues before formal orders are made in the air-mail rate field, but also to resolve disputed points during the course of formal hearings in this area. For example, in 1954 the Board noted that "by an increased use of informal conferences during the course of a litigated mail-rate proceeding to resolve disputes such proceedings have been expedited."⁵³

The operation of the Securities and Exchange Commission presents another example of the administrative trend to limit the formal hearing process. The Securities Act of 1933, the Securities Exchange Act of 1934, and the Public Utility Holding Company Act of 1935 require formal hearings in certain cases.⁵⁴ The provisions of the Holding Company Act

⁵⁰ 14 CFR 302.319 (1956 ed.).

⁵¹ 1952 C.A.B. Annual Report 35.

⁵² *Id.* at 35.

⁵³ *Ibid.*

⁵⁴ See § 8(b) and § 8(d) of the Securities Act of 1933; §§ 6(e), 19(a)(2), of the Securities Exchange Act of 1934; and §§ 7(b), 10(d), 20(c) of the Holding Company Act of 1935.

of 1935 generally require no more than an opportunity for hearing with respect to certain applications to, and orders of, the Commission. "Accordingly, where the Commission itself is of the opinion that the application should be granted, and no person objects or requests a hearing, at least as far as the express statutory terminology is concerned, there appears to be no bar to dispensing with a hearing."⁵⁵ The staff of the Attorney General's Committee felt, in this respect, that

where the application or declaration presents no difficult problems and has no far-reaching consequences, dispensing with a hearing is desirable. The Holding Company Act provides for extraordinarily close supervision over utilities; myriad minor transactions are required to be licensed by the Commission. The Commission and its staff even now devote an enormous amount of time to matters under the Holding Company Act; on the other hand, the utilities themselves are placed under considerable burden of time and expense if they are required to go to hearing in all cases.⁵⁶

The staff noted the "rarity with which persons appear and object at hearings on applications and declarations."⁵⁷

The S.E.C. has taken steps to eliminate hearings where there is no substantial objection to a particular application or Commission order. For example, "the frequency with which respondents failed to appear in proceedings to suspend offering sheets of oil and gas interests ultimately led the Commission to adopt a rule under which a permanent order will be issued forthwith unless the person filing the offering sheet makes written request for a hearing."⁵⁸ With regard to Commission revocation of security registration for exchange trading a rule was put into effect that if forty days elapsed after a deficiency notice⁵⁹ was sent, and neither the issuer nor the exchange made a written request for a hearing, the registration was withdrawn automatically.⁶⁰ Again, with regard to applications by national securities exchanges for the extension of unlisted trading privileges to securities listed and registered on another national securities exchange, the S.E.C. in 1947 "put into effect a simplified procedure to eliminate hearings on applications for unlisted trading privileges in cases where none of the interested parties or public investors desire a hearing."⁶¹ If there is no request for a hearing, the

⁵⁵ Attorney General's Committee on Administrative Procedure, Securities and Exchange Commission, monograph No. 26, June, 1940; p. 73. (Hereinafter cited as Monograph, S.E.C.) [Also published as Sen. Doc. No. 10, 77th Cong., 1st Sess., part 13 (1941).]

⁵⁶ *Id.* at 73-74.

⁵⁷ *Id.* at 77-78.

⁵⁸ *Id.* at 153-54.

⁵⁹ A letter sent by the Commission which describes the deficiency of a particular application which does not accord with the law or the rules of the S.E.C. An opportunity for correction is given by the Commission.

⁶⁰ Monograph, S.E.C. 154.

⁶¹ 1947 S.E.C. Annual Report 35.

disposition of the application is based upon Commission files. This procedure, extended to applications for delisting of securities from exchange trading, was further extended by the Commission into other areas in 1947.⁶²

Aside from the complete elimination of hearings where they are not requested, the S.E.C. limits the formal hearing process by an extensive use of informal conferences during the course of a formal proceeding. The Attorney General's staff noted that informal conferences

continue informally in the course of the hearing; it is not uncommon for counsel for the Commission and other counsel to call a recess during a hearing, confer over the method of procedure, and return shortly with an agreement on the best method of producing evidence or otherwise presenting the issues with a minimum of waste motion and a maximum of expedition.⁶³

The present S.E.C. procedural rules provide that

during the course of the hearing, the staff is generally available for informal discussions to reconcile bona fide divergent views not only between itself and other persons interested in the proceedings, but among all interested persons; and, when circumstances permit, the staff endeavors to narrow, if possible, the issues to be considered at the formal hearing.⁶⁴

This use of informal conferences during the course of formal proceedings was noted above with regard to the Civil Aeronautics Board. Such instances of their use demonstrate an administrative tendency to utilize informal procedures during the course of formal hearings if informal methods fail to settle the case.

IV. THE USE OF PREHEARING CONFERENCES

Unquestionably one of the most widely used devices to limit and simplify formal hearings throughout the administrative process is the prehearing conference. Modeled on a practice prevalent in the federal and state court system, the prehearing conference is essentially an informal conference in which the agency and the parties involved participate to limit the scope of the hearing and thereby expedite the proceeding.

In 1954 Commissioner Mahaffie of the Interstate Commerce Commission stated that:

Contemporaneously with the increased use of modified procedure another related procedural experiment has been under way. But first the reason for it. All parties who have had experience in rate cases know that many pages of transcript are not helpful; and they cost money. At a hearing

⁶² Id. at 110.

⁶³ Monograph, S.E.C. 200-01.

⁶⁴ 17 CFR 202.3(d) (1949 ed.).

frequently large numbers of exhibits are literally thrown into the record without opportunity for previous study and with the necessary consequence of requests for continuance in the hearing. Lengthy testimony of a complex character is not easy to comprehend in the hearing room, nor can satisfactory cross-examination follow immediately upon its conclusion. Hence, cross-examination of witnesses may frequently be wasteful and not always conducive to a better understanding of the issues. . . . The opportunity to study carefully thought out and supported issues in advance of the hearing . . . tends to reduce materially the size of records and to facilitate orderly presentation and full understanding on the part of all concerned.⁶⁵

Faced with this problem the I.C.C. began extensive employment of its established prehearing procedure in an attempt to limit subsequent oral hearing.

The Rules of Practice of the I.C.C. specify that parties to a proceeding may be directed, by the Commission or an officer thereof, to appear for a conference either prior to or during the course of a hearing.⁶⁶ Written suggestions may be requested for the purpose of expediting the proceedings. Conferences of this type are directed to consider:

- (1) The simplification of issues; (2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation; (3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by either or both parties of matters of public record, such as annual reports . . . , to the end of avoiding the unnecessary introduction of proof; (4) The procedure at the hearing; (5) The limitation of the number of witnesses; (6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and (7) Such other matters as may aid in the simplification of the evidence and disposition of the proceeding.⁶⁷

An order, a stipulation, or a statement of agreement on the record shall record and effect the results of the pretrial conference.⁶⁸ The parties shall have an opportunity to present objections to the conference record, but the final order, stipulation, or agreement shall control the subsequent course of the proceeding "unless modified to prevent manifest injustice."⁶⁹

It is evident that this form of prehearing conference used by the I.C.C. is somewhat more extensive than that recommended for use by the President's Conference on Administrative Procedure.⁷⁰ To the extent to which these conferences are successful the subsequent formal hearing is

⁶⁵ "A Forum on Improvement of Administrative Procedure," 21 I.C.C. Practitioners' Journal 840 (1954).

⁶⁶ The use of informal conferences during the course of hearings is similar to the practice of the C.A.B. and the S.E.C.

⁶⁷ 49 CFR 1956 Supp., 1.68(a).

⁶⁸ 49 CFR 1956 Supp., 1.68(c).

⁶⁹ 49 CFR 1956 Supp., 1.68(d).

⁷⁰ See *supra*, Part II.

deprived of any meaning. In commenting upon pretrial procedure used by the I.C.C., however, a practitioner before that agency noted that:

The opinion seems to be almost unanimous that pretrial conferences, while good in theory, have not worked very well in practice. In the first place, it is difficult to hold such conferences elsewhere than in Washington, which means that a great deal of expense is involved in traveling to and from the pretrial conference. I am inclined to agree . . . that while such conferences are helpful in court proceedings, they have not proved helpful in I.C.C. practice. John Turney thinks that the pretrial conference has been too much of a "free-for-all town meeting" and that the "pretrial conference" is generally a farce. But Mr. Turney seems to believe that the pretrial conference could be made to work if the commissioners and examiners would take them more seriously and work hard to bring about a clear definition of the issues and limitation of the scope of the proceeding before the hearing starts.⁷¹

Not only do I.C.C. practitioners seem to be skeptical as to the value of prehearing conferences, but a genuine need for improving this procedure is recognized by the Commission as well.

The procedural statement under which the Securities and Exchange Commission operates provides that

the hearing officer on his own motion may, or at the request of any party shall, call a conference of the parties at the opening of the hearing or at any subsequent time for the purpose of specifying and agreeing on the procedural steps to be followed or omitted in the proceeding.⁷²

Any such agreement with regard to procedure shall determine the course of the proceeding unless the parties themselves, or the Commission, after notice, decide that a change is necessary. The use of prehearing conferences by the S.E.C. dates to the thirties, and the staff of the Attorney General's Committee noted that "the Commission makes extensive use of the prehearing conference technique, especially in reference to cases issuing under the Holding Company Act."⁷³ The nature of these conferences has been described by a former Chairman of the S.E.C.:

We and our staff, before a hearing, try to assist the companies and their lawyers, accountants and engineers, so that the facts presented will lead to decisions which are both in accordance with the statute and business-like. In those preliminary discussions, we employ the informal method of the round-table conference. . . . We and those with whom we confer think out loud and in the vernacular; we and they put our feet on the table and unbutton our vests.⁷⁴

⁷¹ LaRoe, Wilbur, Jr., "I.C.C. Procedure and Practice," 19 I.C.C. Practitioners' Journal 119 (1951). This statement was made before the I.C.C. began to use pre-trial procedure extensively. See *supra*, p. 59 statement of Commissioner Mahaffie. Turney, a prominent I.C.C. practitioner, was a President of the Assoc. of I.C.C. Practitioners.

⁷² 17 CFR 201.3(e) (1949 ed.).

⁷³ Monograph, S.E.C. 103.

⁷⁴ Quoted from an address by Jerome Frank before the Association of the Bar of the City of New York, May 5, 1940; in Monograph, S.E.C. 103.

The success of these conferences is so unqualified that normally

no substantial factual issues remain for the hearing, and, indeed, not seldom the only remaining purpose of the hearing is to make a record which will embody and support the fruits of the conferences. It seems clear that the Commission has been highly successful in simplifying and diminishing the usual formal litigious process through its conference technique.⁷⁵

In view of the complexity of operation of the S.E.C. prehearing conferences are used to "assist" the parties, not only in agreeing among themselves but to arrive at business-like decisions. To a considerable extent, these conferences have, in essence, replaced the formal hearing. In this way, even though a hearing may be required by law, effective prehearing conferences can reduce such hearings to mere formalities.

The Civil Aeronautics Board provides for prehearing conferences where formal procedure is deemed necessary and where hearings are required by law. The C.A.B. Rules of Practice state that:

Prior to any hearing there will ordinarily be a prehearing conference before an Examiner. . . . Written notice of the prehearing conference shall be sent by the Chief Examiner to all parties to a proceeding and to other persons who appear to have an interest in such proceeding. The purpose of such a conference is to define and simplify the issues and the scope of the proceeding, to secure statements of the positions of the parties, . . . to schedule the exchange of exhibits before the date set for hearing, and to arrive at such agreements as will aid in the conduct and disposition of the proceeding. For example, consideration will be given to: (1) Matters which the Board can consider without the necessity of proof; (2) admissions of fact and the genuineness of documents; (3) admissibility of evidence; (4) limitation of the number of witnesses; (5) reducing of oral testimony to exhibit form; (6) procedure at the hearing, etc. If necessary, the Examiner may require further conference, or responsive pleadings, or both. The Examiner may also on his own motion or on motion of any party direct any party to a proceeding (air carrier or non-air carrier) to prepare and submit exhibits setting forth studies . . . relevant to the issues in the proceeding.⁷⁶

This form of prehearing conference is similar to that employed by the other administrative agencies under examination.

After the prehearing conference, "the Examiner shall issue a report of the prehearing conference, defining the issues, giving an account of the results of the conference, specifying a schedule for the exchange of exhibits and rebuttal exhibits. . . ."⁷⁷ This prehearing report is then sent to the parties to the proceeding. These parties may file objections to the report, and on the basis of these objections the examiner may issue

⁷⁵ Monograph, S.E.C. 103-04.

⁷⁶ 14 CFR 302.23 (1956 ed.).

⁷⁷ 14 CFR 302.23(b) (1956 ed.).

a new report. The final report "shall constitute the official account of the conference and shall control the subsequent course of the proceeding, but it may be reconsidered and modified at any time to protect the public interest or to prevent injustice."⁷⁸

Under the C.A.B. Rules of Practice, the examiners have a general power to "hold conferences, before or during the hearing, for the settlement or simplification of issues."⁷⁹ These conferences are supplementary to the regular prehearing conferences.

The C.A.B. prehearing conference procedure is an old one. The staff of the Attorney General's Committee noted that "the prehearing conference procedure was first employed in proceedings for the fixing of air-mail rates, where its success caused it to be extended . . . to proceedings on new route applications. The result has been to shorten hearings and to reduce the cost of transcribing the record of the hearing."⁸⁰ In 1941 the C.A.B. stated that prehearing conferences "are held in the great majority of economic cases, and experience has shown that they aid materially in expediting the procedure and in avoiding delays resulting from the introduction of new exhibits at the last minute which catch opposing counsel by surprise."⁸¹

The following is an example of a prehearing conference case:

The applicant seeks authority to operate along the routes of several major air carriers a supplemental service which would pick up mail at many small towns at which the larger planes could stop neither profitably nor physically. The air carriers have no objection to the establishment of the proposed service if they can be assured that the applicant will not eventually establish a competing nonstop service. The prehearing conference was devoted largely to an exploration of the possibilities of providing such assurance as an alternative to intervention by the existing air carriers in the proceeding. This case suggests the potential advantages to be obtained by an informal show of cards.⁸²

In this instance an informal conference averted an adversary hearing, to the advantage of all concerned.

The Federal Communications Commission exhibits the same trend towards limiting the formal hearing process through prehearing conferences as those agencies already examined. The Rules of Practice provide for a prehearing conference when initiated by the Commission or an officer thereof, or at the request of any party to the proceeding. An informal conference may also be called during the course of a hearing.⁸³ Such conferences are directed to consider among other things:

⁷⁸ 14 CFR 302.23(b) (1956 ed.).

⁷⁹ 14 CFR 302.22 (1956 ed.).

⁸⁰ Monograph, C.A.A. 15.

⁸¹ 1941 C.A.B. Annual Report 7.

⁸² Monograph, C.A.A. 16.

⁸³ 47 CFR 1956 Supp., 1.813(a).

(1) The necessity or desirability of simplification, clarification, amplification or limitation of the issues; (2) The possibility of stipulating with respect to the facts; (3) The procedure at the hearing; (4) The limitation of the number of witnesses; (5) The necessity or desirability of prior mutual exchange between or among the parties of prepared testimony and exhibits; (6) In cases arising under Title II of the act, the necessity or desirability of amending the pleadings and offers of settlement or proposals of adjustment.⁸⁴

The results of the conference, including any agreements reached between the parties themselves, will, subject to the approval of the Hearing Examiner, be incorporated into an order controlling subsequent proceedings.⁸⁵

With regard to one of the most important aspects of the work of the Federal Communications Commission, the adjudication of applications for authority to construct broadcast facilities, the Rules of Practice provide for the exchange of exhibits relating to the matter under consideration at least twenty days before the scheduled hearing.⁸⁶ The exchange of exhibits is governed by the agreements that have been reached at the *first* prehearing conference.⁸⁷ After exhibits are exchanged a *second* prehearing conference takes place, which "shall be held at least ten days prior to the . . . hearing looking toward agreement on all matters relating to the conduct of the hearing and not already the subject of agreement."⁸⁸ This conference is directed to consider any matters which will aid the disposition of the hearing, including any evidentiary issues raised with respect to the exhibits which the parties have previously exchanged, the limitation of cumulative evidence and number of witnesses, and the length of testimony. Again, the order made on the basis of this conference will control the course of the subsequent hearing.⁸⁹

The F.C.C. noted the limitation of the formal hearing process in 1954:

One of the current major objectives of the Commission is to reduce the hearing procedure to bare essentials. One step has been to open hearings with a conference in which the parties can agree on fundamental facts which need not be gone into in the subsequent argument. This antedates but reflects the Government's interest in simplifying the hearing process through the President's Conference on Administrative Procedure. . . .

In addition, the Commission, where possible to do so, makes findings on basic qualifications of competing applicants (legal, financial, and technical) before designating them for hearing. This has helped to eliminate testimony upon which no controversy exists.

⁸⁴ *Ibid.*

⁸⁵ 47 CFR 1956 Supp., 1.813(b).

⁸⁶ 47 CFR 1956 Supp., 1.841(a).

⁸⁷ *Ibid.*

⁸⁸ 47 CFR 1956 Supp., 1.841(c).

⁸⁹ 47 CFR 1956 Supp., 1.841(d).

The Commission and the bar are working together to reduce the amount of oral testimony at hearings, and to make the hearing record a written one insofar as possible. . . . As of February 17, 1954, the Commission limited the number of pleadings that may be filed in these proceedings. This was done because numerous and repetitious pleadings have delayed and complicated consideration of cases. . . . The Commission also believes that briefer "briefs" would help to expedite the hearing procedure.⁹⁰

The statement is evidence that the Commission hopes to keep oral testimony to a minimum. Furthermore, the Commission has found that in determining the legal, financial, and technical qualifications of applicants the hearing process is not always appropriate. Important adjudicative decisions are made in this area without benefit of hearing.

The development of prehearing techniques by the F.C.C. stemmed from an increase in the volume of adjudicative decisions. For some time the F.C.C. had maintained a "freeze" on the expansion of television stations, but in 1952 strong pressure was exerted upon the Commission to expand the number of television stations and thereby increase coverage throughout the nation. As a result the Commission was forced to expedite application cases involving new and expanded television stations. A number of procedures were altered to meet their need. Among the more important changes was the rule providing for the prehearing conferences. The Bar Association commented with respect to this rule:

Certainly the most constructive Commission achievement . . . was its adoption on February 6, 1953, of an amended Rule 1.841 providing for a prehearing conference. . . . This pioneer step . . . resulted from the . . . desire "to speed up the administrative process," . . . by shortening and expediting the many hearings that stood in the way of the early initiation of television service.⁹¹

In addition it was noted that "those hearings already held under revised Section 1.841 make clear that this new prehearing conference will sharpen and limit the issues in a hearing and result in the hoped-for savings of time and effort therein."⁹²

A final example of the use of informal conferences in the formal hearing process may be found in the operation of the National Labor Relations Board and the Federal Trade Commission. The Rules of Practice of the N.L.R.B. state only that trial examiners may "hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases."⁹³ A further limitation to the formal process used by the N.L.R.B. stems from Section 10(c) of the National Labor

⁹⁰ 1954 F.C.C. Annual Report 17.

⁹¹ Report of the Committee on Communications, American Bar Association, 6 Ad. L. Bull. 34 (1953).

⁹² *Id.* at 35.

⁹³ 29 CFR 1956 Supp., 102.35(g).

Relations Act which provides that unless the parties to a proceeding before the Board file exceptions to a proposed report and recommended order of an examiner, "such recommended order shall become the order of the Board and become effective as therein prescribed."⁹⁴ It has been noted with regard to this provision that "the finality which thus flows from the absence of exceptions is, in effect, the consequence of a consent determination. . . ."⁹⁵

The Federal Trade Commission uses a prehearing procedure similar to those already discussed, whereby the hearing examiner may direct all parties to a proceeding to meet with him to limit the scope and procedure of the formal hearing, by simplifying the issues, limiting the number of witnesses, introducing stipulations of fact rather than using oral testimony, etc.⁹⁶ Further, the F.T.C. began to use stipulations of fact in formal proceedings from the very beginning. In 1918 the Commission stated:

It has been the policy of the legal department . . . to bring, whenever possible, formal proceedings to a conclusion by stipulation or agreement as to the facts, thereby reducing the volume of litigation, resulting in a saving of time and expense. . . . This has been accomplished by submitting cases to the Commission for its consideration and determination upon agreed statements of facts wherein it is stipulated between the counsel for the Commission and the respondents, that the Commission shall proceed forthwith upon such agreed statements of facts to make and enter its findings and order to cease and desist from the practices charged without the introduction of evidence.⁹⁷

This method has always been used by the Commission to limit oral testimony.

V. CONCLUSION

The administrative trend toward the limitation of the formal administrative process reflects a general approval of this development. Generally, various forms of shortened procedure which, in fact, eliminate the significance of the oral hearing, if not the hearing itself, are successful because the particular nature of many administrative determinations precludes the need for adversary hearings. As the staff of the Attorney General's Committee noted:

In the typical case tried in a court of law, there is frequently conflicting testimony by lay witnesses as to matters of ordinary fact; as a corollary, there is a distinct advantage in having the witnesses personally testify before the court in order that their veracity may be gauged from their

⁹⁴ 61 Stat. 147 (1947), § 10(c).

⁹⁵ Dunau, "Consent Adjustment Under the National Labor Relations Act," 12 Federal Bar Journal 220 (1952).

⁹⁶ 16 CFR 1956 Supp., 3.10.

⁹⁷ 1918 F.T.C. Annual Report 55-56.

conduct and demeanor. In a proceeding to fix rates or to determine the need for additional transportation facilities, much of the evidence is documentary in character, presented in the form of exhibits, and it is safe to say that at least 90 per cent of the material which is presented by direct testimony of witnesses could as well have been prepared in exhibit form. The information relevant to the fixing of rates is largely taken from the records of the carrier and the Authority and relates to such matters as traffic trends and operating costs. Conflicts as to the accuracy of data involving a determination of the veracity of particular witnesses are almost nonexistent.⁹⁸

Although the staff was, in this instance, speaking of the Civil Aeronautics Board, its conclusions could be extended to the other agencies under consideration since the procedural problems of these agencies are basically similar. The essential reason for the extensive development of various forms of shortened procedure is that both the government agencies and the parties under their jurisdiction have found that justice can be realized and time and expense saved through limitation of the formal administrative process. The facts of a particular case can be developed either independently by the agency or by the introduction of various forms of exhibits and stipulations of fact. The trend will, undoubtedly, be toward greater limitation of formal administrative procedures in the future.

Criticisms have been advanced against the widespread use of informal techniques in the formal stage of the administrative process. Representatives of the American Bar Association speaking on the utilization of pre-hearing conferences by the Federal Communications Commission noted that the cases settled through this procedure demonstrate that

[t]he new procedure is not without its defects and disadvantages. . . . For one thing, the new procedure requires and results in Examiners taking a more active and affirmative role in determining the areas of conflict between the parties and the evidence to be adduced as proof of them than heretofore thought necessary or desirable. This may result in *the substantial determination of a case in its early pleading stages rather than after the fullest hearing upon its complete merits*. . . . In addition, there is the very real danger that the concerted efforts to shorten hearings may, if not judiciously kept within reasonable bounds, lead to the denial of a full and fair hearing for one or more of the parties.

As a major example thereof the Commission's repeated emphasis on the desirability of written evidence in order to speed the hearings has had a definite tendency to cause Examiners to cut down sharply on the oral presentation of testimony in comparative hearings, with the result that in some instances the parties' entire direct case may be required to be presented in writing and the appearance of witnesses may be limited to such cross-examination as is sought by opposing counsel.⁹⁹ (Emphasis supplied.)

⁹⁸ Monograph, C.A.A. 38.

⁹⁹ Report of the Committee on Communications, American Bar Association, 6 Ad. L. Bull. 35 (1953).

This Bar Association committee went on to consider some traditional legal concepts in its interpretation of shortened procedure in the administrative process.

The growing limitation on witnesses' appearance and oral testimony eliminates one of the fundamental and long-established features of adjudicatory proceedings and takes away one of the material points of difference traditionally relied upon for a choice between contesting parties; i.e., credibility, particularly so here where character qualifications are so vital to a Commission decision. . . .

It may rightfully be questioned whether proved and valuable legal procedures can be abandoned in order to satisfy the momentary needs of expediency without damaging the full and fair hearing required by due process and without risking greater harm to the public interest than is sought to be avoided.¹⁰⁰

In terms of common-law theory the implications of the limitation upon the formal administrative process are evident, for the formal hearing is deprived of its meaning to the extent to which these forms of shortened procedure are successful. Within the common-law frame of reference it is doubtful that justice can be realized without traditional legal formalities.

Common-law doctrine, as manifested in the case law, and in the Administrative Procedure Act of 1946, requires that fundamental procedures of notice and hearing be followed by administrative agencies exercising adjudicative functions. Provisions of the APA pertaining to formal adjudicative procedure are operative only when such procedure is required by statute; such formal adjudicative procedure is not applicable in certain exempt areas.¹⁰¹ Nevertheless, with respect to the agencies examined herein, the I.C.C., the C.A.B., the S.E.C., the F.C.C., the N.L.R.B., and the F.T.C., the statutes under which they operate require that opportunity for hearing be given in certain cases; in certain classes of cases hearings *must* be held, regardless of whether they are desired by the parties or the agency.

The agencies concerned, however, have not followed the formal adjudicative procedure set out for them by statute; rather they have introduced informal techniques into the formal adjudicative stage to expedite the hearing process. These techniques consist primarily of informal conferences and correspondence by means of which the agencies attempt to settle the case under consideration. The success of these informal techniques in effecting settlement of *formal* cases is so striking in those agencies examined that the conclusion that informal procedure is rapidly replacing formal procedure in the formal adjudicative stage itself is

¹⁰⁰ *Id.* at 36.

¹⁰¹ APA, § 5.

inevitable. In other words, where informal procedure fails to prevent a case from reaching the formal administrative process, it is usually successful in settling the case after appeal to the formal process. The informal techniques employed by these agencies vary from the I.C.C. practice of requiring parties to submit their controversy to settlement through informal adjustment, to the general practice of using prehearing conferences, of an informal nature, to limit and define or settle issues before holding hearings. These conferences before hearings are frequently so successful that the hearing becomes essentially a formality, merely recording what has already been settled informally beforehand. In addition, informal conferences are frequently employed during the course of the hearing. It is evident that administrative agencies are using informal techniques to aid adjudication wherever possible.

Although certain criticisms have been advanced against this extensive use of informal procedure in the formal administrative process, the prevailing opinion, on the part of the agencies, the parties coming under their jurisdiction, and the legal profession seems to favor this method of settlement. Kenneth Culp Davis has noted that

the solution of the problem of determining when to require opportunity to be heard in the administrative process lies in discovering the best practical means in the varying circumstances for assuring enlightened administrative action which will protect those affected by considering their evidence and their argument and by letting them subject to their testing processes the materials on which the agency acts. Methods other than hearings are often most effective for this purpose; private interests frequently may be best protected by such methods as interviews, conferences, questionnaires, submission of tentative orders or regulations for written comments, collaboration between agency representatives and private representatives in drafting rules, consultation of agency officials with advisory groups which represent private parties, reception of written evidence and argument without an oral process. . . . [S]uch devices as the I.C.C. shortened and modified procedures are of vast significance and their further development and more extensive use should be encouraged.¹⁰²

Finally, the implications of the use of shortened procedure by administrative agencies are evident. Davis has noted that

the prevailing judicial doctrine is that improper denial of administrative hearing may be remedied by availability of judicial review of sufficient scope, but widespread reliance upon this doctrine is unfortunate. Safeguards at the administrative stage are clearly superior to safeguards by a theoretical right of review which in practice is often illusory.¹⁰³

The question must necessarily be asked: What means can be employed to

¹⁰² Davis, "The Requirement of Opportunity to be Heard in the Administrative Process," 51 *Yale L.J.* 1140-41 (1942).

¹⁰³ *Id.* at 1142.

secure responsible action by administrative officials in the area where cases are, in fact, not adjudicated by traditional common-law procedure but by informal means determined for itself by each agency? As a result of the widespread use of informal procedure in the formal administrative process it is no longer accurate to assert that private parties subject to the jurisdiction of administrative agencies have recourse to traditional adjudicative procedure to settle their cases.