FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-77 A.O. No. 11-00598-03036 V
v.	:	Eagle No. 2 Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION AND ORDER

By its decision of May 16, 1980, the Commission vacated the trial judge's interlocutory decision of March 5, 1980, proposing assessment of a penalty of $1000 in settlement of this matter. The ground for the Commission's action was its finding that there was a dispute as to (1) whether the condition cited, namely an accumulation of loose coal and coal dust that ranged in depth from 4 to 20 inches and extended for a distance of 900 feet along the east side of the 3 South conveyor belt, was as a matter of law, an "accumulation" within the meaning of the Commission's decision in Old Ben Coal Co., VINC 74-11, 1 FMSHRC 1954 (December 12, 1979); and (2) the failure of the judge to afford Peabody the opportunity to "admit or deny" that "the depths of the spillage were those alleged in the withdrawal order." Peabody Coal Co., LAKE 80-25 et al., 2 FMSHRC 1035, 1036 (May 16, 1980).

Ignoring the fact that the first ground for its position presented only a question of law disposed of by its holding in Old Ben, namely that a spillage of loose coal and coal dust ranging in depth from 2 to 14 inches for a distance of 925 feet was, as a matter of law, an accumulation prohibited by 30 C.F.R. 75.400, and second that neither in its answer nor in its response to the trial judge's pretrial order had Peabody ever suggested that one of its grounds for contest was the depth of the accumulation charged in the withdrawal order, the Commission remanded the matter for a full scale evidentiary hearing on the issue of the "depth of the spillage." 2 FMSHRC at 1037.

In due course, the matter came on for an evidentiary hearing on June 24 and 25 in the U.S. Courthouse in Washington, D.C. As the record of that hearing shows, there was, in fact, no genuine dispute regarding the depth of the spillage observed and measured by the Inspector who issued the withdrawal order on May 3, 1979. 1/ It was also shown that the operator's claim that the condition was not, as a matter of law, an accumulation within the meaning of the standard had been laid to rest by the Commission's decision of June 12, 1980 in C.C.C. Pompey Coal Co., PIKE 79-125-P, 2 FMSHRC ____, which merely reiterated its interpretation of the standard as set forth in December, 1979, in Old Ben.

Despite this, and over the objection of counsel for the Secretary that a full scale evidentiary hearing on the question of liability would be a "frivolous" waste of time, the trial judge deferred to the Commission's view that "unless a case is settled or the respondent defaults, an administrative law judge must afford the parties an opportunity for a [testamentary] hearing" with respect to any issue of fact material to proof of the violation not expressly "admitted" by the operator. 2 FMSHRC at 1036. While this is obviously an incorrect standard for determining when an evidentiary hearing must be held, the Commission and its staff, abetted by the Department of Labor, has long encouraged the view that regardless of the amount of the penalty, the expense to the parties involved, or the nonexistance of a genuine dispute over material adjudicative facts, the parties, or either of them, are entitled to demand as a matter of right a full blown trial-type hearing. 2/

The view that a general denial like a plea of "Not Guilty" in a criminal case triggers an absolute requirement for a testamentary hearing absent settlement or default ignores the fact that neither the Mine Safety Law, the APA, the Constitution, nor the Commission's own procedural rules

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1/ The record shows that after the Commission's decision, Peabody felt compelled to make a pro forma challenge to the depth of the accumulation alleged but admitted it had no evidence to rebut the Inspector's measurements.

2/ See Appendix.

mandates such a result. 3/ Rule 28 of the Commission's Rules of Practice requires the operator to include in its answer "a short and plain statement of the reasons why each of the violations cited . . . is contested." Because the operator ignored this requirement, the pretrial order required:

3/ The suggestion that a general denial in a civil penalty proceeding, like a plea of not guilty in a criminal case, triggers the protections and restrictions available in criminal prosecutions is wholly inapposite to complaints for enforcement of civil penalties. The Commission's rules of practice clearly provide for pretrial discovery against an operator either at the instance of the solicitor or the trial judge. In addition, section 113(e) of the 1977 Mine Health and Safety Act empowers the law judge to "compel the attendance and testimony of witnesses and the production of books, papers, documents, or objects, and to order testimony to be taken." There is nothing in the Act or its legislative history to support the view that because Congress made the same conduct subject to both criminal and civil sanctions it intended to extend to the assessment of civil penalties the procedural protections and restrictions available in criminal prosecutions under the Fourth, Fifth and Sixth Amendments. United States v. Ward, ____ U.S. ____, No. 74-394, slip op., pp. 5-8, (June 27, 1980). The protection against compulsory self-incrimination, of course, does not extend to corporations and there is, therefore, no reason why such respondents may not be compelled to produce for use in civil penalty cases documentary and/or testamentary evidence as to their compliance or noncompliance with the mandatory health and safety standards. Furthermore, in Ward, supra, the Supreme Court held that even an individual may be compelled to report a water pollution violation to support a civil penalty assessment where the statute grants him use immunity for such report. Finally, in Ward the Court cited with approval its earlier holding that in the absence of a genuine dispute as to the material facts the granting of a directed verdict or summary judgment is wholly proper in a proceeding to enforce a civil penalty. Hepner v. United States, 213 U.S. 103, 112 (1909).

> A plain and concise statement by the operator in accordance with 29 CFR 2700.28 of the reasons it contests each violation and/or the amount of the penalty. This must include a detailed statement of the specific facts, conditions and practices and theories of law upon which the contest of each violation and/or penalty is based.

In response, the operator stated:

> 1. Respondent will present evidence at the hearing that will show that the condition or practice cited in the Order of Withdrawal occurred sometime shortly before the Order of Withdrawal was written. Specifically, the preshift examiner, Mr. Terry Gwaltney, will testify that he preshifted the area in question within a few hours of the issuance of the Order of Withdrawal and that he found no accumulation or spillage at that time. Consequently it is respondent's contention that what was found by the inspector must have been a spill that occurred sometime immediately prior to his issuing the Order of Withdrawal . . . Consequently, it will be Respondent's contention that a spillage, the type of which the Commission alluded to in Secretary of Labor, Old Ben Coal Company, December 1979, Vol. I, No. 9, 1954, as being ". . . inevitable in mining operations", occurred sometime just prior to issuance of the Order of Withdrawal and, therefore, did not constitute an accumulation under the criteria set forth in 30 C.F.R. 75.400. ID at 1958.
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> 2. The payment of a maximum penalty for this violation will not impair Respondent's ability to continue in business.

The trial judge submits that any fair reading of this response shows the operator was not contesting the extent or depth of the spillage alleged but only whether, as a matter of law, it constituted an accumulation prohibited by 30 C.F.R. 75.400.

In the absence of a showing that a genuine dispute as to a material adjudicative fact exists, neither constitutional nor administrative due process requires a contested enforcement proceeding be resolved only after the parties are afforded a trial-type hearing. It simply is not true that valid adjudicative actions can be taken only after providing an opportunity to cross-examine witnesses. As the Supreme Court has noted: "No one is entitled in a civil case

to trial by jury unless and except so far as there are issues of fact to be determined." Matter Of Walter Peterson, 253 U.S. 300, 310 (1920) (Brandeis, J).

Due process, therefore, never requires a trial on non-factual issues, such as whether a particular spillage, the extent and depth of which is not in dispute, constitutes as a matter of law an accumulation within the meaning of 30 C.F.R. 75.400. What is needed on such issues is argument, written or oral, not evidence, and certainly not a trial-type hearing. Davis, Administrative Law Treatise § 10.9 (2nd Ed. 1979).

The law clearly is, at a most elementary level, that because a trial is a process for taking evidence, subject to cross examination, and because taking evidence in a trial-type hearing is a waste of scarce and expensive resources except where needed to resolve genuine issues of material fact, 4/ it should be used sparingly and solely for the purpose of resolving such disputes, and never as a matter of right for the resolution of issues of law, policy or discretion. 5/

4/ As the record shows, counsel for respondent recently estimated that the cost to Peabody of an evidentiary hearing is $1500. When a like amount is added for the cost to the Department of Labor and the Commission it is apparent that the cost of unnecessary evidentiary hearings can become very large. As Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit recently stated, "the judicial system is the most expensive machine ever invented for finding out what happened and what to do about it." Time Magazine, May 5, 1980. While financial cost alone is not of controlling weight in determining whether due process requires a particular procedural safeguard prior to an administrative decision, the public interest in conserving scarce fiscal and administrative resources is a factor that must be weighed. Matthews v. Eldridge, 424 U.S. 310, 348 (1976).

5/ In Co-Op Mining Company, DENV 75-207-P, 2 FMSHRC 784, 785 (April 21, 1980), the Commission emphasized the predictive, discretionary nature of a judge's determination of the amount of the penalty warranted. See also, Peabody Coal Company, BARB 76-117, July 1, 1980, 2 FMSHRC ___. This is in accord with the traditional view that the assessment of a penalty is an "exercise of a discretionary grant of power" not a finding of fact. Brennan v. OSHRC, 487 F.2d 438, 442 (8th Cir. 1973); Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79:8 Columbia Law Review 1435, 1487 (December 1979). Thus,

(continued on next page)

Neither constitutional nor administrative due process mandate a confrontational hearing before a penalty may be assessed. Section 7(c) of the APA, 5 U.S.C. § 556(d), requires confrontational hearings only to the extent that "cross-examination may be required for a full and true disclosure of the facts." If there is no dispute of fact or issue of credibility, there is obviously no need for a full scale trial-type hearing. 6/ In addition, section 7(c) further provides that "In . . . determining claims for money . . . an agency may . . . , when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." Frozen Foods Express, Inc. v. United States, 346 F.Supp. 254, 260-261 (W.D. Tex. 1972) (no absolute right to an oral hearing under section 7(c)). Whether cross-examination is required in an administrative hearing depends on the circumstances presented in each individual case and initially rests in the sound discretion of the trial judge. Attorney General's Manual on the Administrative Procedure Act, p. 78 (1947); Loesch v. F.T.C., 257 F.2d 882, 885 (4th Cir.), cert. denied. 358 U.S. 883 (1958); Delaware River Port Authority v. Tiemann, 403 F.Supp. 1117, 1142 (D.N.J. 1975).

As the Second Circuit recently held, a judgment on the merits does not require a determination of the controversy after a full-scale trial-type hearing:

(Footnote 5 cont.)

where there is no dispute about the fact of violation or the six statutory criteria relevant to the determination of a penalty the Commission should not compel a full-blown evidentiary hearing solely on the issue of the amount of the penalty. The amount assessed is, of course, subject to review on appeal on a claim of inadequacy or excessiveness. Compare, Knox County Stone Company, DENV 79-359-PM (July 23, 1979) appeal pending.

6/ In a variety of situations where due process requirements are involved, something less than an evidentiary hearing can satisfy the right to be heard. Matthews v. Eldridge, supra, 424 U.S. at 343.

> The proverbial "right to a day in court" does not mean the actual presentation of the case in the context of a formal, evidentiary hearing, but rather the right to be duly cited to appear and to be afforded the opportunity to be heard.

Mitchell v. National Broadcasting Co., 553 F.2d 265, 271 (2d Cir. 1977).

As Professor Gellhorn has noted:

> A hearing to take evidence as is done in a trial at law is an obviously silly waste of time if facts are not in dispute. The courts, in their own proceedings, rule on motions to dismiss (or whatever may be the local equivalent of a demurrer); when they do so they assume a set of facts, without receiving and passing upon evidence, and then decide whether the assumed facts add up to something or to nothing. The courts also enter summary judgments when the factual allegations of a party have not been materially controverted by his opponent. Trial hearings may permissibly be omitted in administrative proceedings at least as readily as in their judicial counterparts, when the only things to be determined are the legal consequences of uncontested facts. See, e.g., Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609 (1973); Baxter v. Davis, 450 F.2d 459 (1st Cir. 1971), cert. denied 405 U.S. 999 (1972); Citizens for Allegan County, Inc. v. Federal Power Commission, 414 F.2d 1125 (D.C. Cir. 1969); Compare, Fuentes v. Shevin, 407 U.S. 67, 87 (1972); Kirby v. Shaw, 358 F.2d 446 (9th Cir. 1966).
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> In Recommendation No. 20, the Administrative Conference of the United States proposed that "each agency having a substantial caseload of formal adjudications . . . adopt procedures providing for summary judgment or decision" in order to avoid delays in the administrative process "by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists." 1 Recommendations and Reports of the Administrative Conference of the United States 36 (1968-1970). For discussion, consult E. Gellhorn and W. F. Robinson, Jr., Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612 (1971). The authors state at pages 616-617: "Just as summary judgment is not in conflict with the right to trial by jury because it is available only when there is nothing for the jury to decide, a rule allowing summary decision in administrative

adjudications would not improperly deny the right to a hearing since it would allow the [law judge] or agency to dispense with an evidentiary hearing only if the absence of a hearing could not affect the decision."

Gellhorn and Byse, Administrative Law, Cases and Comments, (6th ed.) at 584 (1974).

As the record shows, the penalty initially proposed for this violation was $2000, reduced after conference, and after consideration of the claim that the accumulation had existed for only 2 to 6 hours, rather than 24 hours, to $1000. After contest and compliance with Part A of the pretrial order, regional counsel for the Secretary proposed a further reduction to $550, again on the ground that the accumulation had existed for only 2 to 6 hours as shown by the operator's preshift and on-shift reports. Noting that this claimed factor in mitigation had already been taken into account by the assessment conference officer, the trial judge denied the proposal to settle the matter for $550 on the ground that the assessment had already been appropriately discounted by the assessment office, and that no new facts were asserted that would warrant a further reduction. For this reason, the trial judge proposed an assessment of $1000 in settlement and thereafter denied the operator's request for reconsideration. 7/

In frustration over its inability to bargain the penalty away, the operator appealed to the Commission demanding acceptance of the $550 settlement. Granting an interlocutory appeal after the trial judge had set the matter for a hearing limited to the amount of the penalty warranted -- the only matter that was ever in genuine dispute -- the Commission, without the benefit of briefs and after the operator had moved to withdraw its appeal, decreed the need for a full

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7/ The power to "assess" penalties (section 110(i)) when coupled with the power to "approve" compromises, mitigations, and settlements (section 110(k)) necessarily includes the power to propose an increase or reduction in the penalties based on an independent evaluation of the circumstances. See, 31 U.S.C. §§ 951-953; Divers, The Assessment and Mitigation of Civil Money Penalties, supra, note 5, at 1444. This is a discretionary function not reviewable as a finding of fact, but only for an abuse of discretion. Co-Op Mining, supra; OSHRC v. Brennan, supra; American Power Company v. S.E.C., 329 U.S. 90, 112 (1946); Butz v. Grover Livestock Company, 411 U.S. 182, 185 (1973).

scale evidentiary hearing to resolve a fact that was never in dispute, namely the depth of the alleged accumulation. 8/

Congress long ago warned against the inefficiency, confusion, and uncertainty that results to the administrative process when the members of an agency rely on faulty staff analysis in an effort to control the day-to-day conduct of adjudicatory proceedings. The use of piecemeal interlocutory appeals to attempt to control the conduct of trial proceedings is, experience has shown, counterproductive to the just, speedy and inexpensive disposition of enforcement proceedings.

This was certainly the case in this instance. For, as the record shows, after a full day spent taking evidence from the Inspector, the preshift examiner, and the operator's safety director, the matter originally offered and accepted in mitigation of the penalty for the purposes of a prehearing settlement of $1000 became largely irrelevant. And it became irrelevant because the testimony of the operator's preshift examiner disclosed and emphasized other violations which existed contemporaneously with the overlooked accumulation and which indicated that the condition was significantly more serious than originally disclosed. These disclosures clearly made a penalty of $1000 inappropriate, whether or not the abatement shown on the preshift and on-shift reports for May 2 were correct. With the matter in this posture, and in the interest of cutting the loss to effective and efficient enforcement already experienced, the trial judge suggested a settlement conference.

8/ The Commission's uncritical acceptance of the general counsel's apocryphal finding of a triable issue of fact to justify a remand for trial or acceptance of the parties' settlement proposal was a questionable usurpation of the trial judge's authority to regulate the course of the proceeding. A trial judge should not on the basis of a premature, sua sponte, prejudgment of the merits by the Commission be faced with the Hobson's choice of approving an improvident settlement or facing an unnecessary, burdensome or oppressive requirement for an evidentiary hearing. If, on the other hand, the Commission wished to approve the parties' proposed 75% reduction in the penalty it obviously had the authority to do so, without the concurrence of the trial judge. A proper respect for the trial judge's decisonmaking autonomy militates against the adoption of procedural devices designed to undermine or intrude on that autonomy.

At that conference the trial judge expressed the view that the undisputed facts as to the spillage observed on May 3, 1980, warranted a finding that under the attendant circumstances the accumulation violation charged was serious and the result of a high degree of ordinary negligence. He further expressed the view that he could not approve a settlement in an amount less than $2,500. After conferring with their principals, the parties agreed to a settlement at the figure proposed. The subsequent motion to approve settlement made on the record in open court on June 25, 1980, was approved from the bench.

Accordingly, it is ORDERED that the bench decision and order approving settlement in this matter be, and hereby is, ADOPTED and CONFIRMED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $2,500, on or before Tuesday, July 15, 1980, and that subject to payment the captioned matter be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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Attachment: Appendix

APPENDIX

At the behest of the solicitor's appellate staff, the Commission has recently granted an ex parte review of a clearly provisional decision where the trial judge proposed a penalty reduction of $24.00 or 20% in a total penalty of $144.00 for each of three failure to provide safe access violations initially assessed at $48.00 each. The claim is that even where the record shows the operator admits liability and there is no dispute about the gravity, negligence or any other criteria, the trial judge is without power and authority to reduce a proposed penalty absent a full scale "on the record" trial-type hearing. And this despite the fact that the operator said he did not want a hearing, the solicitor never asked the trial judge for a hearing, and the operator because of the de minimis amounts involved cannot afford to attend a testamentary hearing. Interestingly enough, it is also claimed that because the decision was, despite its obviously provisional nature, "final" the judge "lacked jurisdiction to accord the parties" the opportunity for a settlement conference or evidentiary hearing if the proposed reduction was not acceptable. New Jersey Pulverizing Co., YORK 79-94-M, Direction for Review, dated June 25, 1980.

The Commission did not afford the trial judge an opportunity to pass on these claims as required by section 113(d)(2)(a)(iii) of the Act, nor did the Commission state in its Direction for Review the question of law, policy or discretion involved in its review as required by section 113(d)(2)(B) of the Act.

Had the trial judge been afforded the opportunity to be heard as contemplated by the Act he would have asserted the following. It is well settled that section 7(c) of the APA, 5 U.S.C. § 556(d) incorporated by reference in section 105(d) of the 1977 Mine Health and Safety Act, 30 U.S.C. § 815(d) permits "on the record" hearings where the parties involved file only written submissions, particularly where the trial judge's decision is provisional and affords the parties an opportunity to show the need for a testamentary hearing. Thus, wherever it appears that cross examination is not necessary to a "full and true disclosure of the facts" a case may properly be adjudicated without the waste of time and expense involved in setting, traveling and holding a hearing to take testimony that will add nothing to the record. Davis, Administrative Law Treatise, §§ 10:7, 12:1, 12:2 (2d ed 1980). In fact, the last sentence of section 7(c),

5 U.S.C. § 556(d), specifically provides that claims for money, which civil penalty cases clearly are, may be decided entirely on the basis of written submissions, unless a need is shown for a confrontational type hearing. See, FPC v. Texaco, 377 U.S. 33, 39 (1964); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972); United States v. Florida E.C. Ry. 410 U.S. 224 (1973); Matthews v. Eldridge, 424 U.S. 319 (1976); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Dixon v. Love, 431 U.S. 105 (1977).

Thus, where the amount in controversy is small, there are no issues of credibility or veracity critical to the decisionmaking process, and there is a strong public interest in conserving fiscal and administrative resources, neither constitutional nor administrative due process requires an evidentiary hearing on small claims for money. Gray Panthers v. Califano, 466 F.Supp. 1317 (D.D.C. 1971) (no due process right to evidentiary hearing on claims of less than $100).

In New Jersey Pulverizing, the provisional decision was predicated on "the information submitted in the official file", i.e., the information presented by the parties. The proper procedure, therefore, was for the solicitor to appeal the correctness of the decision made or to show a need for a trial-type hearing to supplement the record.

A former Assistant Attorney General, in commenting on the "acceptability" of cases decided on the basis of written, on the record, submissions noted that what the trial judge or the litigating public think is proper and acceptable procedure often runs contra to the self-interest of the lawyers:

> There is a tendency on the part of lawyers to think of acceptability in terms of traditional patterns of legal thinking. Since lawyers have valued and enjoy adversary proceedings, it is assumed that members of the public also feel the same way. This assumption, however, is questionable. The issue is one of acceptability of procedures to the persons affected and not to any group of professionals in the community . . . Just as war is too important to be left to the soldiers, justice is so important that it should not be left to the desires (and profits?) of lawyers . .

Cramton, A Comment on Trial-Type Hearings, 58 Va. L. Rev. 585, 593 (1972) (criteria for evaluating procedures).

As Chief Judge Irving Kaufman remarked, "our current emphasis on early judicial intervention is . . . the culmination of the efforts of many of our greatest legal thinkers to induce the judges to . . . take an active part in the control of litigation . . . Contrary to what most of us have accepted as gospel, a purely adversarial system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done." The Philosophy of Effective Judicial Supervision over Litigation, 29 F.R.D. 207, 208, 211 (1962).

Finally, the contention that the Commission's procedures are not flexible enough to permit a judge to issue a tentative, provisional or interlocutory decision proposing an increase or decrease in the amount of a penalty proposed by the parties is without merit. The Commission has held that for good cause shown the time for filing a petition for discretionary review may be extended and such an extension would obviously extend the time for finality even assuming finality could ever attach to a tentative, provisional or interlocutory decision. See, Victor McCoy v. Crescent Coal Co., PIKE 77-71, June 23, 1980; Sunbeam Coal Company, 2 FMSHRC 775 (1980).

The above was written before receipt of the Commission's decision of July 2, 1980 in New Jersey Pulverizing. Instead of dismissing the appeal as frivolous, the Commission brushed aside the Department of Labor's fustian demand for a full scale trial-type hearing but vacated the trial judge's decision of May 16, 1980 on the ground that the claimed reservation of a "right to reconsider" rendered the decision ultra vires the decisionmaking powers conferred by the Commission's "rules and precedents." I have no difficulty with this in the context in which the rule speaks, namely, a "final disposition" but I believe its application to a decision proposing a settlement conflicts with the power and authority granted the trial judge under sections 5(b) and 7(b)(6) of the APA, 5 U.S.C. §§ 554(c), 556(c). These provisions when read together clearly confer discretion on the trial judge to afford the parties an opportunity to settle before setting a hearing and to advise the parties of the terms and conditions upon which such a settlement may be approved. This authority is reinforced by the provisions of section 110(i) and (k) of the 1977 Mine Health and Safety Act and its legislative history. The trial judge has repeatedly suggested that under its de novo authority to "assess" penalties and to "approve" proposals to "compromise, mitigate, or settle" penalties, the Commission encourage the use of informal pretrial procedures to effect just, speedy and inexpensive dispositions of cases or violations where the amounts involved do not warrant the convening of a trial-type hearing or there is no genuine dispute of material adjudicative fact.

Ignoring the fact that the trial judge's provisional decision clearly afforded the parties an opportunity to propose a settlement, the Commission noting the operator's plaintive plea to be relieved of this administrative whirlwind adopted that procedure as its own invention and remanded the matter with directions to afford the parties "an opportunity to propose a settlement before any hearing is scheduled or prehearing order issued." So after making itself, the trial judge and the administrative process look ridiculous, the Commission has arrived at the same common sense procedure for the resolution of these de minimis violations as was proposed in the judge's decision and order of May 16, 1980. I think the lesson learned is that whenever the Commission tilts the scales of procedural fairness in favor of a powerful constitutency or political expediency, it risks doing itself and the cause of administrative justice a serious disservice.