

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

Ex Parte 745

STATUS OF AGENCY LIBRARY

PETITION FOR RECONSIDERATION



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Practitioners

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Preliminary Statement

Thomas F. McFarland, and Gordon P. MacDougall, submit this petition for reconsideration of the rulemaking decision by the Surface Transportation Board (STB or Board), captioned Status of Agency Library, decided March 29, 2018 (served March 30), which denied their petition asking the Board to institute a rulemaking and investigation regarding the status of the agency's library, and stay disposition of certain records at the National Archives & Records Administration(NARC). 49 CFR 1110.10 (2017ed).

Petitioners have been long-standing practitioners engaged in practice before

the STB.^{1/} The Board in denying their request for rulemaking or formal investigation into the status of the agency's public library, arbitrarily concluded that "nothing" in their petition warranted such a rulemaking or investigation.

(Decision, 1):

Although Petitioners express a number of concerns regarding the Board's management of its library, nothing in their petition provides a justification for a rulemaking or formal investigation.

On the contrary, upon reconsideration, the Board should institute a rulemaking and investigation into the status of the agency's library, and act to retain certain records pending completion of the investigation.

Background

The Board's March 30, 2018 decision does not give an adequate background to recent agency proposals for library revisions. However, the March 30 decision does advance various notions for changes, without proof, but which thus add support for petitioners' request there be rulemaking and investigation. Some of the Board proposals for change have now first been presented by the Board in its March 30 response to our petition filed January 24, 2018. Many of these

^{1/} The rulemaking petition was supported by two other practitioners, Michael Wolly and John Heffner, and by the Western Coal Traffic League. The rulemaking petition was unopposed.

evidentiary notions previously had not been made public to practitioners and, we suspect, likewise also not to other persons making use of the library, or dependent upon sources having access to the library facilities. These new STB proposals, set forth in the STB's March 30 decision in response to our January 24 petition, when considered along with the facts presented in petitioners' January 24, 2018 petition, make compelling there be rulemaking and investigation proceedings. Indeed, the Board recognizes there must be future rule revisions, and notices, for current changes already under internal consideration. (Decision 1 & 2 at para. 3). The status of the library is of such major public importance for rail regulation, as to require and permit public participation in the library process, rather than await agency formulation of the library rules, with resultant subsequent public actions to challenge the agency's unitary library decisions. The continuing two-decade struggle over rail rate evaluation between agency staff and outside practitioners should now caution against unilateral thinking about library organization. The agency's library (which has embraced its indexing function-known as indicies), has been duly recognized in the ICC's leading history as of extreme value to agency personnel and the outside public. See: Sharfman, I.L., The Interstate Commerce Commission Vol. 4, at 86 (1937):

The Commission's library and the section of indices are also under the supervision of the Bureau of Law. The library, containing a useful and substantial collection of books and documents in the field of the Commission's activity, serves outsiders interested in transportation and its regulation as well as the commissioners and the general staff; and the section of indices, which prepares the indices, tables, and digests for the bound volumes of the Commission's reports and maintains complete index-records of the Commission's determinations and those of the courts, also serves the general public as well as the Commission and its staff.....The Commission has always appropriately recognized itself as possessing the status of a public institution.

Of course, the current STB is of smaller scope than the former ICC, but the library remains a specialized institution. The practitioners and others who make use of the library facilities are in a position to offer helpful comments regarding any library reorganization through rulemaking and investigation at this time, rather than awaiting probable and interminable proceedings later on.

I. INADEQUATE AND ERRONEOUS FINDINGS OF THE MARCH 30 DECISION REQUIRE RULE- MAKING AND INVESTIGATION PROCEEDINGS.

1. Professional librarian. It is apparent from the March 30 decision, very likely the agency will not seek a replacement for the professional librarian who died May 14, 2016 . (Pet. 1/24/18, App. 1). The clear inference from the March 30 decision is that the public would continue to receive what has understood to be

interim reliance upon untrained librarian personnel, the STB mentioning its Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC). Visitors seeking library materials somehow would “share” materials through OPAGAC. (Decision 2).^{2/}

2. Other agency libraries. It is assumed the STB’s public library, as a practical matter, would be discontinued, with some unexplained sharing materials though OPAGAC. Primary access to materials would be at other libraries in the Washington DC area, such as the Library of Congress, or the Law Library of Congress. (Decision 4, n.5). The decision opines, without more, that library patrons would view digitalized materials without travel to Washington, DC. (Decision, 2).

3. General Counsel Library. The March 30 decision makes no reference to the private library maintained by the Board’s Office of General Counsel (OGC).^{3/} It is presumed that the OGC library will be continued and expanded for agency access, but not for public access. In the past, the Law Bureau of the Board’s predecessor agency, Interstate Commerce Commission (ICC) , at times

^{2/}See also: Appendix A, infra.

^{3/} Practitioners over the years have been invited to meetings to discuss matters with agency personnel in the Board’s OGC library.

supervised the public library as well as its own private library.

4 . Visiting Hours. The matter of library visiting hours is not answered by the Board, which claims in its March 30 decision that public records can be viewed “upon reasonable request” during normal business hours (Monday through Friday 8:30 a.m. to 5 p.m.)(Decision 2n.3). The library also serves as the agency’s public docket room, the visiting hours effective November 18, 2015, being 10 a.m. to 3 p.m., with prior appointment encouraged. See: Pet. 7; Appendix A.^{4/}

5. Other Comparable Agencies.The March 30 decision does not make any comparison with public access libraries maintained by sister federal independent regulatory agencies, such as Federal Energy Regulatory Commission (FERC), Federal Maritime Commission (FMC), and Federal Communications Commission (FCC), among others. This is a subject for inquiry in any rulemaking.

6. Digital Substitution. The Board places primary emphasis on the notion that digitalization of agency records can substantially reduce the need for maintaining a library. (Decision 1-2). However, the most significant project is claimed to be the conversion of the agency’s archive of microfiche into a digital format. (Decision 2). Our observation of this process does not indicate any major

^{4/} The actual open hours, 10a.m.-3p.m., can be found by an unlikely route under “items of interest” listed on the agency’s website, requiring a devious search.

space saving. Experience with the Board's microfiche demonstrates serious degeneration of the film over the years. Moreover, the Board claims that books "specific to the Board" will not be scanned, but will be provided access by a library or otherwise sharing through OPAGAC. (Decision 2). Further inquiry is necessary to determine a more exact estimate of space saving through digitalization of microfiche.

II. THE BOARD ERRS IN ELIMINATING VARIOUS MATERIALS WITHOUT ADEQUATE FINDINGS

The Board asserts it has unreviewable discretion, or is not required, to make certain materials available in paper form and, moreover, certain materials need not be provided in any form. ^{5/} The Decision points to Traffic World, Code of Federal Regulations (CFR), and the "Advance Bulletins."

The weekly Traffic World magazine was the journal of record for the former ICC. It began in 1907 after enactment of the Hepburn Act of 1906, and ceased not long after its 100th anniversary, which occurred in 2007.^{6/}

The CFR paperback issues, other than for title 49, have been removed from the

^{5/} The March 30 decision asserts STB's authority as being legally discretionary over library matters at two places--librarian replacement and funds (Decision 3-4, &n.5), and whether to make available various materials. (Decision 4 &n.6).

^{6/} The ICC staff did not favor Traffic World. See: Pet. 8 & App. 2.

library. We suggest other titles may lodge elsewhere in the building, and point to environmental rules administered and/or referenced by the STB are found outside title 49. The Board's March 30 decision errs in not determining whether certain other CFR titles are necessary for retention in the library, particularly for the environmental regulations administered/referenced by the agency outside title 49.

Advance Bulletin and

ICC Acts Annotated

Of critical and substantial importance for practitioners has been elimination of the Advance Bulletin, and its correlated ICCActsAnnotated. The STB decision mentions the Advance Bulletin, three times at page 4 of its decision. The Advance Bulletin, periodically issued to supplement printed volumes of ICC Acts Annotated, was mandated by the U.S. Senate in 1927 through the Hawes Resolution.^{7/} The Advance Bulletin was published in mimograph form, between volumes of ICCActsAnnotated,, with Advance Bulletin contents embraced within subsequently printed copies of ICCActsAnnotated. The key function of ICCActsAnnotated and its Advance Bulletin was to provide the necessary digest of ICC decisions and their indices.

^{7/} S. Resolution No. 17. December 6, 1927. It is reproduced in vol. 1 of ICCActs Annotated.

These publications are explained and evaluated by the former ICC Secretary, H. Neil Garson, Commission Publications, 36 ICC Prac. J. 1977 (1969), set forth in full, infra, at Appedix B. The Secretary stated that ICCActs Annotated is the primary reference source for ICC precedents beginning with the year 1887. 36 ICC Prac. J. at 1978.^{8/}

The March 30 decision makes no findings concerning the adequate indexing or digest of STB decisions, other than to claim the agency is not required to do more than make available the decision itself.(Decision 4.) The STB’s reasons for supporting continued termination of its index and digest functions do not constitute adequate explanations, particularly in light of the long-maintained practice of providing indicies and digests, following Congressional directive. The applicble law on such failure are the “arbitrary/capricious” and “substantial evidence” provisions of the Administrative Procedure Act, as well as the Interstate Commerce Act, and its rail transportation policy.

The task of continuing to prepare digests and indicies today would require a far lesser effort than expressed by ICC Secretary Garson in 1969, who at the time said the agency annually prepared the indices and digests for six printed volumes

^{8/} Precedents are important in agency determinations. See: Pittman, Willim H., Doctrine of Precedents and the Interstate Commerce Commission, 5 Geo. Wash. L. Rev. 543 (1937).

of ICC and MCC reports, whereas subsequently the STB has issued only 7 volumes of printed reports during the entire 12-year period 1996-2007. Thus the STB annually has printed less than 10 percent of printed volumes than did its former ICC annually.^{9/}

III. THE AGENCY HAS RESPONSIBILITY FOR DESTRUCTION OF NON-PRINT ARCHIVES

The March 30 decision asserts petitioners bear responsibility if they seek to preserve certain former ICC materials in the period 1887-1924 noticed for destruction by the National Archives and Records Administration (NARC). (Decision 2-3&n.4). The NARC notice includes formal dockets, other than those covering important or controversial cases containing documentation that supplements the printed decisions. 82 Fed. Reg. 61336, 61337 Dec. 27, 2017). In short, the destruction is directed to non-print ICC decisions, rather than to ICC printed decisions. Yet it is precisely the non-print decisions which are a primary inquiry for petitioner practitioners, for printed decisions are usually available elsewhere from library or other sources. The NARC notice states the records were accessioned to the archive agency; the March 30 decision confirms it was the ICC

^{9/}The STB's assertion that substitution of non-print electronic decisions for printed reports, are more widely available than printed reports(Decision 5), overlooks the digests/indicies for printed reports, absent from STB electronics.

which gave the records to NARC. (Decision 3).

It is arbitrary and capricious for STB to place the burden on petitioners to seek preservation of its non-print decisions. The primary responsibility is on STB. Moreover, precedents are important to the administrative process. The STB should stay destruction of its decisions pending resolution of this library rulemaking and investigation.^{10/}

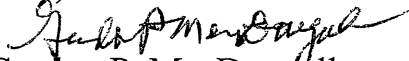
CONCLUSION

The Board should grant reconsideration, and the relief requested in our January 24, 2018 petition, with institution of rulemaking and investigation proceedings.

Respectfully submitted,



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^{10/} The March 30 decision misstates our concern with the handling of materials or information. (Decision 5). We have experienced removal of filed materials by the sponsor from the website, as well as alteration in the text of materials after filing, without transmittal letter.

Items of Interest

► STB Library: New Hours and Procedures

Please be advised that the Surface Transportation Board Library will be open to the public from 10:00 A.M. to 3:00 P.M., Monday through Friday, except when the agency is closed for federal holidays. Although the library will be open on a walk-in basis, patrons are strongly encouraged to call ahead to schedule an appointment during these hours. To make an appointment, please phone Crystal Wortham, at (202) 245-0288, or the Rail Customer and Public Assistance office, at (866) 254-1792. Additionally, library patrons will now be required to sign in and sign out when using the library.

The effective date for the new hours and procedures will be Wednesday, November 18, 2015, continuing until further notice.

APPENDIX A

COMMISSION PUBLICATIONS

H. NEIL GARSON

Secretary, Interstate Commerce Commission

Your president has asked me to talk to you about Commission publications. I am sure that as practitioners most of you are familiar with much of what the Commission issues over and above the daily releases of reports and orders. However, it would be useful to review some of the publications.

There are, at the present time, forty publications prepared and issued by the Commission. Probably one of the most important is the Annual Report of the Commission. Not only does the Annual Report contain an accounting of the Commission's stewardship for the past year, but it also contains a listing of Commission publications issued during the year. These are found in Appendix E at pages 131 to 134.

The appendix sets forth the title, a brief description of the contents, and, in addition, the frequency of publication of each is given along with the price, if on sale at GPO, or the fact it can be obtained *free* from ICC's Section of Administrative Services.

The publications listed are grouped under the general subjects: *Financial and Traffic Statistics; Accounting and Costs; Transport Economics; and Railroad Carload Waybill Sample Publications*. The latter group has been discontinued because of budget considerations following release of all statements for 1966. Hopefully, the Department of Transportation will pick up the waybill sampling program which was begun in 1946. Some of the publications which are of prime significance are as follows—Transport Statistics in the United States; Freight Commodity Statistics, Class I Railroads; Motor Carrier Freight Commodity Statistics, Class I Common and Contract Carriers of Property; Quarterly Reports of the Operating Revenues and Expenses of Carriers; Monthly Reports on Wage Statistics; and a variety of cost statements.

The listed publications are of particular interest to economists and accountants; however, general practitioners also find these publications most useful.

There are four publications which are prepared by the Office of the Secretary, which form the primary research tools of the practitioner. Probably the best known of these publications is the Interstate Commerce Acts Annotated. The others are the index digests printed in the back of the bound report volumes, the Commission's Rules of Practice, and the last is the Library Bulletin.

Remarks before the 40th Annual Meeting, Association of Interstate Commerce Commission Practitioners, Houston, Texas June 27, 1969.

The Interstate Commerce Acts Annotated at the present time consists of twenty volumes and it is the primary reference source for ICC precedents beginning with the year 1887.

It may be of interest to note that this major research tool in interstate commerce law resulted from a resolution of the U.S. Senate. Senate Resolution No. 17, December 6, 1927 expressed the sense of the Senate by requesting the Commission to prepare a manuscript covering the laws "which (1) are administered by the Commission, (2) affect the Commission's work, powers, or duty, and (3) the Commission decides should be included so as to make available a comprehensive publication of the Federal laws relating to the regulation of carriers subject to the Interstate Commerce Act, suitably annotated as the Commission deems to be of public interest and value with digests, following each section or paragraph, of pertinent decisions of the Federal courts and the Commission, together with an index, the text of general rules and regulations, or appropriate reference thereto, . . . and such tables as may be necessary. . . ."

At the time of the Senate Resolution, the Commission was "only" forty years old and it had already filled 122 volumes of reports. Despite the obvious magnitude of the task, the planning, direction, and preparation of this major undertaking was placed in the tender and loving care of Commissioner Clyde B. Aitchison, who, undaunted, submitted the manuscript as required by the Senate Resolution two years later on December 31, 1929.

A brief reference to Commissioner Aitchison's memorandum to the Commission about his labor of love will describe the immense amount of work which culminated in this magnificent research tool. He said that "The work has required an examination, page by page, of 280 volumes of decisions of the Supreme Court, 334 volumes of the Federal Reporter, 160 volumes of the Commission's reports and of forty-two volumes of its annual reports more than 800 volumes—besides a search of decisions of other tribunals, such as the Court of Claims. The examination developed approximately 200,000 points reduced by further examination to about 100,000 citation points. . . . More than 16,000 opinions of the courts and of the Commission are cited."

This monumental work was initially published in five volumes. As I pointed out before, it now consists of twenty volumes. Volume 20 consists of a cumulative order. Prior to this volume, each and every volume of annotations had to be reviewed to ascertain the development of a specific note. Now, Volume 20 does away with such a chore. Instead you need only to consult one index to find material in all nineteen volumes.

The Interstate Commerce Acts Annotated are supplemented by Advanced Bulletins which are issued twelve times a year. There is also a cumulative index in each of the Advanced Bulletins which facilitates research. In order to ensure currency of the Annotated Act, the Advanced Bulletins are designed to be combined with a minimum of editorial work into bound volumes every two years. Volume 21 is presently

being put together. At this time, I cannot predict when it will be available.

Because the Interstate Commerce Acts Annotated gathers together statutory provisions, court reports, ICC reports and regulations, it must be selective. It has been compiled on a selective basis since its inception. But nevertheless, since it covers 1887 to date it contains more material than any other single publication.

At the present time, there are 327 bound volumes of ICC reports and 101 volumes of motor carrier reports. It should be apparent that without a key to this vast amount of printed opinions, the work of the practitioners and the Commission would be insuperable. The Annotated Act represents the key, a key which has been held up as the model for other agencies which issue written opinions.

Today, the Annotated Act can be purchased from the Government Printing Office for less than \$5.00 per volume. Advanced Bulletins may be obtained by writing to the Office of the Secretary.

The index digests appear in the back of each volume of printed reports and unlike the Annotated Act, the digests cover only the reports printed in the volume. The digests consist of short lines rather than paragraphs taken from the reports. Therefore, they can be much more detailed in covering points of practice, procedure, evidence, and in separating and grouping Commission statements of principles of law and important conclusions of fact.

A major shortcoming of the index digests is the fact that each and every volume of reports must be consulted in order to find points of law and precedents. For a short time, we were able to publish a paperback volume of cumulative index digests which covered several volumes of reports. However, lack of funds prevented the continuance of this project. This is a major loss because we are currently publishing about six volumes of reports a year. At this rate, the lack of a cumulative volume of index digests substantially increases the burden of the practitioner researching ICC opinions. Hopefully, should there be an increase in the Commission's appropriations, I shall ask the Commission to allocate funds for the preparation of a cumulative index which would cover ten to twenty printed volumes.

Recently, I have received critical comments about the brevity of the index digests in the recent printed volumes. I am also concerned about this matter, though it may seem to be a hackneyed excuse, the limited funds available for this purpose required a reduction in the size of the index digests. Of course, it is recognized that reduction also affects the quality since the number of points of law indexed is also materially reduced. However, the present index is better than none at all—recognizing that an index is required by the Freedom of Information Act—nevertheless, within the available allocation of funds, we shall put forth our best efforts to improve the index digests. In this respect, you may be aware of the provisions of Public Law 90-23, the Freedom of Information Act which provides in Section 3(b) that:

Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof.

Incidentally, in order to provide the complete coverage required by the Information Act, we also set up a file of all available no-print reports. These are indexed on cards by title and docket number and are filed under general headings such as "public convenience and necessity." They are available for examination by you or other members of the public in Room 3380. Cost of publication would be prohibitive.

Another and important working tool of the practitioner is, of course the General Rules of Practice. Our September 1, 1968 edition contains a number of substantial changes in format, some of which were the result of recommendations from the practitioners. To begin with, the 1968 edition is in a larger size with larger type and, therefore, more legible to the reader. More importantly, the publication is in loose-leaf form, making it possible to insert amendments or substitute pages without the need of having to make periodic republication of the entire set of rules. The index and the table of contents have been improved and as a quick reference feature, we have added at the end a guide to the number of copies required to be filed of the various pleadings. Not only does the list include pleadings mentioned in the rules, but there is also included some of the major documents filed with the Commission and the number of copies required. The many comments received praising the new edition of the rules of practice has made the many hours which went into its construction well spent.

Last but not least, we publish a Library Bulletin every two months. In this bulletin, we list the speeches of the Commissioners since the last bulletin; articles in periodicals (law or general) which we think relevant, and we also list recent publications on law and allied subjects acquired by the library since the last bulletin.

As most of you know, you can write, call, or come to the Section of Reference Services and receive assistance in locating precedential or other material. In addition to the publications I have described, our staff has compiled various indices and files which are too voluminous to publish, but which prove useful in unusual instances or for research in depth. Our reference staff will be glad to assist you in using any of these materials.

Thank you for giving me the opportunity to talk to you about the tools of our trade. As in any other field, no tool is perfect. With each modification or change a better more useful tool is produced. This is what we at the Commission are trying to accomplish.

Speaking about research tools, I am reminded of the remarks of Commissioner Aitchison when he spoke to you at your annual convention in October 1930 on the Hawes Resolution.

The toolmaker is essential. He has a lowly task, but we remember the proud boast of the Armourer in Robin Hood:

The sword is a weapon to conquer fields;
I honor the man who shakes it;
But nought is the lad who the broadsword wields
Compared to the lad who makes it.