

SERVICE DATE – JUNE 18, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 745

STATUS OF AGENCY LIBRARY

Digest:<sup>1</sup> This decision denies a petition for reconsideration of a decision that denied a request for rulemaking and investigation regarding the status of the agency's library.

Decided: June 14, 2018

BACKGROUND

On January 24, 2018, Gordon MacDougall and Thomas McFarland (Petitioners) submitted a petition asking the Board to institute a rulemaking and investigation regarding the status of the agency's library. Petitioners, who are practitioners before the Board, asserted various concerns about the library's holdings and its management. In a decision served on March 30, 2018 (Decision), the Board denied the petition. On April 19, 2018, Petitioners filed a petition for reconsideration. For the reasons stated below, the Board will deny the petition for reconsideration.

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009). Moreover, the claim on reconsideration must be one that, if successful, “would mandate a different result.” See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Or. Int'l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009).

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Petitioners have failed to demonstrate material error, new evidence, or substantially changed circumstances that would mandate a different result. The petition for reconsideration will therefore be denied.

#### I. Alleged Need for a Rulemaking and Investigation

Petitioners contend that the Board must initiate a rulemaking and investigation because “[t]he status of the library is of such major public importance for rail regulation, as to require and permit public participation in the library process . . . .” (Pet. for Recons. 4.)<sup>2</sup> However, the Board has already explained why it declined Petitioners’ request, see Decision, slip op. at 2-5, and Petitioners merely repeat their prior position rather than addressing the Board’s rationale for rejecting that position. As the Decision stated, the General Services Administration has awarded a lease for the Board’s future office space that, in line with current federal policy, reduces the size of the Board’s office space. In anticipation of the reduction in office space, as well as to comply with the government policy to make greater use of digital records, the Board is currently in the process of digitizing many of its library materials. Decision, slip op. at 1-2. As the Decision also made clear, and as discussed further below, materials that the Board is required to provide will continue to be maintained in either hardcopy form or online. And the agency has already expressed its plan to retain documents and books specific to the Interstate Commerce Commission (ICC) or the Board that will not be scanned. Decision, slip op. at 2.<sup>3</sup>

For these reasons, the Petitioners have not demonstrated that the Board’s denial of their request for a rulemaking and investigation was a material error.

#### II. Request for Stay of Disposition Authority

In their petition for rulemaking and investigation, Petitioners also asked the Board to stay a disposition of records described in a Federal Register notice issued by the National Archives and Records Administration (NARA).<sup>4</sup> (Pet. for Rulemaking 3, 6, citing Records Schedules; Availability & Request for Comments, 82 Fed. Reg. 61,336 (Dec. 27, 2017).) The Board denied

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<sup>2</sup> Citing a book published in 1937, Petitioners similarly assert that a rulemaking and investigation are necessary because the Board’s library “has been duly recognized in the ICC’s leading history as of extreme value to agency personnel and the outside public.” (Pet. for Recons. 4-5.) However, this source long predates the availability of agency materials online and in any event is wholly irrelevant to the Board’s obligations under 5 U.S.C. § 552(a)(2). See Decision, slip op. at 4.

<sup>3</sup> In addition, the Board’s investigative authority that the Petitioners invoke does not apply to the Board’s internal processes, but rather to the enforcement of Title 49, Subtitle IV, Parts A, B, and C of the United States Code. See 49 U.S.C. § 11701(a), (b) (referring to “an investigation under this part” and “a violation of this part”); 49 U.S.C. § 14701(a), (b) (same); 49 U.S.C. § 15901(a), (b) (same).

<sup>4</sup> The records at issue are docket files from 1887-1924 that the ICC turned over to NARA decades ago.

this request, observing that the proposed disposition is based on a request by NARA's Office of Research Services—not a request by the Board. Decision, slip op. at 3.

Petitioners now contend that “[i]t is arbitrary and capricious for STB to place the burden on petitioners to seek preservation of its non-print decisions.” (Pet. for Recons. 12.) Petitioners continue to mischaracterize or misapprehend the action they seek to stay. For three decades, the materials in question have been in the physical and legal custody of a different agency—NARA—not the Board. See 44 U.S.C. § 2108(a).

Accordingly, “Petitioners’ request for a stay . . . is not directed to the correct agency.” Decision, slip op. at 3. This agency consented to the disposition, pursuant to 44 U.S.C. § 3303a(e), and the statute establishes a process to obtain input from the public regarding disposition authorities—a process which takes place before NARA, not the Board. See 44 U.S.C. § 3303a(a); Records Schedules, 82 Fed. Reg. 61,336.<sup>5</sup> Thus, by law, and contrary to Petitioners’ assertions, when Petitioners desire the preservation of records that are in NARA’s custody and that NARA proposes to destroy, it is Petitioners’ responsibility to make their views known to NARA. See 44 U.S.C. § 3303a(a). Nothing in the petition for reconsideration provides new evidence or changed circumstances, or demonstrates material error in the Board’s Decision as it relates to NARA’s execution of its statutory responsibilities.

### III. Board Expenditures of Funds and Internal Work Distribution

Petitioners continue to suggest that the agency is acting unlawfully by not hiring a professional librarian, and that the library has been staffed by “untrained” personnel. (Pet. for Recons. 4-6.) Petitioners also assert that “[f]urther inquiry is necessary to determine a more exact estimate of space saving through digitalization of microfiche.” (Id. at 7-8.) Petitioners have not stated why these issues provide a basis for reconsideration. As the Board explained, these matters are entirely within the agency’s discretion and therefore are not appropriate for a rulemaking. See Decision, slip op. at 3-4 (citing 5 U.S.C. § 701(a)(2), 49 U.S.C. § 1301(c)(2), and Am. Fed’n of Gov’t Employees v. Donovan, 683 F.2d 511, 515 (D.C. Cir. 1982)).

As noted in the Decision, there is no law to apply in evaluating the Board’s day-to-day activities regarding internal work distribution and expenditures of funds concerning its library. Decision, slip op. at 4 n.5 (citing Int’l Union, UAW v. Donovan, 746 F.2d 855, 862-63 (D.C. Cir. 1984)). Petitioners’ attempts to inject themselves into matters of agency internal management that are clearly reserved to the agency are contrary to statute, precedent, and sound administration of the agency’s mission.<sup>6</sup>

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<sup>5</sup> In this instance, as noted, the request for disposition came from NARA’s Office of Research Services. See Records Schedules, 82 Fed. Reg. 61,337. Accordingly, “the agency” for purposes of 44 U.S.C. § 3303a(a) is NARA.

<sup>6</sup> For the same reasons, Petitioners’ claim that the Decision did not adequately explain why the library is being downsized, (Pet. for Recons. 3), and their suggestion that the Decision is infirm because it provides “notions for changes, without proof” that “previously had not been made public to practitioners,” (id. 3-4), are without merit.

In addition, although they concede that visiting hour information is available on the Board's website, Petitioners claim that "[t]he matter of library [visiting] hours is not answered by the Board . . . ." (Pet. for Recons. 7.) In fact, the Decision did address the library's hours, stating that this issue (among others raised by Petitioners) is committed to the Board's discretion. Decision, slip op. at 3-4.<sup>7</sup> As in their initial petition, Petitioners inaccurately conflate the library and its hours with access to the Board's publicly available records. (See Pet. for Recons. 4 (referring to "agency formulation of the library rules").) Access to public records, however, is distinct from access to the library. As the Decision explained, the regulations at 49 C.F.R. § 1001.1 are not "library rules"—they are the Board's rules governing publicly available records. Decision, slip op. at 2 n.3. Indeed, the regulations do not refer to a "library" at all. The specific agency records identified in these rules are either available online or can be viewed "upon reasonable request" during business hours (Monday through Friday 8:30 a.m. to 5:00 p.m.), without regard to the library. See 49 C.F.R. § 1001.1(a).<sup>8</sup>

#### IV. Availability of Various Materials

In their petition for rulemaking and investigation, Petitioners referred to three specific types of materials, arguing that the Board must provide these items in hard copy form: the Code of Federal Regulations (CFR), Traffic World magazine,<sup>9</sup> and Advance Bulletin supplements that were prepared by ICC staff until 1981. (See Pet. for Rulemaking 4-5.) As the Board explained, under 5 U.S.C. § 552(a)(2), there are certain designated materials, such as final opinions and orders in cases, that agencies affirmatively are required to make available for public inspection through means other than publication in the Federal Register. Decision, slip op. at 4. The Board explained, however, that it is not required to provide the three types of materials referenced by

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<sup>7</sup> Petitioners suggest that the Decision erroneously failed to refer to "the private library maintained by the Board's Office of General Counsel" (which they call the "OGC library"), which Petitioners mention for the first time on reconsideration. They also make the unsupported assumption that, notwithstanding the reduction in the agency's footprint, the "OGC library will be continued and expanded for agency access, but not for public access." (Pet. for Recons. 6.) Again, materials and resources maintained for the agency's internal use are matters entirely within the agency's discretion. As has been noted, the materials that the agency is required to provide to the public by virtue of 5 U.S.C. § 552(a)(2) will continue to be provided.

<sup>8</sup> Members of the public can access these materials most readily using the Board's website. However, if a member of the public wants to inspect physical copies of the materials, he or she may call the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) to arrange access between 8:30 a.m. and 5:00 p.m., Monday through Friday. OPAGAC can be reached at (202) 245-0238. As noted, this method of access applies only to the specific materials identified in § 1001.1.

<sup>9</sup> The petition alludes to Traffic World, a magazine that ceased publishing 11 years ago, but it makes no specific argument about it. Therefore, this decision will not address Traffic World beyond noting that determinations about which materials to keep in the Board's library are committed to agency discretion.

Petitioners. See id.<sup>10</sup> Nonetheless, the Board noted that it does keep hard copies of the portions of CFR Title 49 that contain the agency’s regulations dating back to 1938 and currently intends to retain these copies. Id.

In their reconsideration petition, Petitioners argue that “[t]he Board’s March 30 decision errs in not determining whether certain other CFR titles are necessary for retention in the library.” (Pet. for Recons. 9.) However, the Decision did make this determination. As the Decision pointed out, the Board is not required to provide any copies of CFR volumes, in Title 49 or otherwise. Decision, slip op. at 4. Also, the Decision noted that Petitioners can access the complete CFR from multiple sources other than the Board. Id., slip op. at 4 n.6.

In regard to the Advance Bulletins, Petitioners cite a 1969 article by a former ICC Secretary stating that the Interstate Commerce Acts Annotated (ICAA), to which the Advance Bulletins were a supplement, were “the primary reference source for ICC precedents beginning with the year 1887.” (Pet. for Recons. 9-10.)<sup>11</sup> While the ICAA and Advance Bulletins may have been frequently used as reference sources through the middle of the 20<sup>th</sup> century, Petitioners themselves have acknowledged that the ICC stopped publishing Advance Bulletins in 1981. (See Pet. for Rulemaking 5.) Transportation practitioners have been able to use other techniques and resources to conduct their research since then.

Petitioners claim that “[t]he 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 [indices] and digests, following Congressional directive.” (Pet. for Recons. 10.) In fact, the Board has not terminated its index function. Contrary to Petitioners’ assertion, the Board maintains and makes publicly available on its website indexes of its adjudications, rulemakings, and other decisions, which are electronically sortable and searchable, with related information such as docket number and service date displayed. And the Board has expressly determined that no “Congressional directive” currently requires it to issue digests of its decisions. See Removal, Revision, & Redesignation of Miscellaneous Regulations, EP 572 (Sub-No. 1), slip op. at 2 n.2 (STB served Aug. 31, 1999) (“because the ICC has been abolished and the [ICC Termination Act] contains no mention of an annotated compendium of laws administered by the Board, we are under no legal obligation to resurrect the ICAA (which, as noted, was last published in 1977)”), reconsideration denied EP 572 (Sub-No. 1), slip op. at 3 (STB served June 22, 2000). Nevertheless, decisions of the entire Board do contain digests, contrary to Petitioners’ unsupported claim (Pet. for Recons. 10-11). See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

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<sup>10</sup> According to Petitioners, the Decision erroneously failed to “make any comparison with public access libraries maintained by sister federal independent regulatory agencies . . . .” (Pet. for Recons. 7.) Because the Board is complying with its statutory obligations, its procedures need not be identical to those of other agencies. Petitioners cite no legal requirement to the contrary.

<sup>11</sup> Although it is not clear, their position seems to be that the Board is under some obligation to resume publication of the ICAA and the Advance Bulletins (the latter of which have not been maintained in the library for many years).

Similarly, Petitioners argue that “[t]he STB’s assertion that substitution of non-print electronic decisions for printed reports, are more widely available than printed reports [], overlooks the digests/[indices] for printed reports, absent from STB electronics.” (Pet. for Recons. 11 n.9.) As discussed above, indexes are not “absent”; as with the Board’s decisions themselves, the indexes provided on the Board’s website are more widely available than they were when the agency incurred the cost of binding some of its decisions in printed volumes, which were offered for purchase. See Decision, slip op. at 5. And as noted, although the Board is not legally required to provide digests, it does include digests in decisions of the entire Board, the availability of which is also improved through online distribution.

#### V. Allegations That Paper Copies Have Been Concealed

According to Petitioners, “[t]he March 30 decision [misstates] our concern with the handling of materials or information. 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.” (Pet. for Recons. 12 n.10 (citation omitted).) Again, Petitioners’ accusations are unsupported and unfounded. See Decision, slip op. at 5. In addition, Petitioners’ suggestion of a misstatement in the Decision is perplexing, as their petition included no mention of these issues.<sup>12</sup> Accordingly, Petitioners have not demonstrated that the Decision misstates the contents of the initial petition.

#### VI. Conclusion

For the reasons stated above, Petitioners fail to demonstrate material error, new evidence, or substantially changed circumstances that would lead the Board to materially alter its prior action. Accordingly, the petition for reconsideration will be denied.

#### It is ordered:

1. The petition for reconsideration is denied.
2. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.

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<sup>12</sup> Instead, the petition for rulemaking and investigation claimed that Board staff “will on occasion remove public materials from the library” and implied that such actions may be taken as a “tendency” for agency personnel to “withhold public information” or conceal “staff actions” from Board Members or the press. (See Pet. for Rulemaking 7-8.) That concern was addressed by the Board and is different from the issue now raised by Petitioners on reconsideration. (Decision, slip op. at 5.)