

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 731

RULES RELATING TO BOARD-INITIATED INVESTIGATIONS

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REPLY COMMENTS

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Gordon P. MacDougall
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for Samuel J. Nasca

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Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/
Transportation Division, New York State Legislative
Board (SMART/TD-NY), submits these reply comments with
respect to certain initial comments filed, on or about
July 15, by other parties to the proceeding.^{2/}

^{1/}New York State Legislative Director for SMART/TD, with
offices at 35 Fuller Road, Albany, NY 12205.

^{2/}These other parties are: Association of American
Railroads (AAR), Norfolk Southern Railway Company (NS),
National Industrial Transportation League (NITL),
National Grain and Feed Association (NGFA), and City of
Jersey City, et al.

I. STB HAS ADEQUATE POWERS TO PROSECUTE VIOLATIONS OF KEY TRANSPORTATION LAWS

NGFA and NITL strongly support giving STB's Staff the power to initiate and prosecute, in administrative tribunals, asserted violations of Title 49, Subtitle IV, Part A, subject to certain limitations. NITL 1-2; NGFA-4. The latter points to the 2013/2014 fall rail service deficiencies as highlighting the need for new investigative authority, citing the Senate committee report as supporting need for such STB authority. NGFA-3.^{3/}

It appears NGFA and NITL, along with cited language from the Senate committee report, may have confused the term "investigation" under 49 U.S.C. § 11701(a), to inquire whether various carrier conduct constitutes a violation of the Act so as to be prosecuted by an agency investigation, on the one hand or, instead, an inquiry under 49 U.S.C. § 1321 for the STB to investigate and report on various carrier conduct, on the other hand.

Accordingly, it is incorrect to assume that the STB lacked power to adequately "investigate" the 2013/2014

^{3/} S.Rept. 114-52, at 7.

rail service problems, on the ground that, STB on its own initiative, in its own proceeding, could not prosecute certain violations of Title 49 U.S.C. Subtitle IV, Part A.

It is important to recognize that traditionally the ICC/STB primarily has relied upon the Department of Justice to bring court proceedings, at the request of the agency as required by statute, to enforce or prosecute violations of the Act or the regulations or orders of the agency. 49 U.S.C. § 11703. Moreover, the STB itself may bring a civil action to enjoin an unlawful abandonment/discontinuance, construction or extension of line of railroad, and other provisions of 49 U.S.C. § 10901 through § 10906 ; and to enforce the consolidation provisions of § 11321 through § 11328. See: 49 U.S.C. § 11702.

For example, the former ICC regularly went to court to enjoin unlawful abandonment/discontinuance, rather than institute an administrative proceeding to determine unlawful carrier action. Cf. ICC v. Baltimore and Annapolis Railroad Company, 398 F.Supp. 454 D.Md. 1975); ICC v. Chicago, Rock Island and Pacific Railroad Co.,

501 F.2d 908 (8th Cir. 1974); ICC v. Maine Central RR,
505 F.2d 590 (2d Cir. 1974).

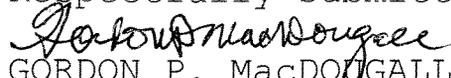
II. THE PROPOSED RULES TO IMPLEMENT STB
ADMINISTRATIVE PROSECUTION ARE DEFICIENT

SMART/TD-NY believes there is considerable merit to the initial comments advanced by the carriers in this rulemaking, particularly those filed and argued by NS.

Moreover, STB is ill-equipped to be entrusted with such serious powers without adequate rules, both procedural and substantive. The agency does not have its own ALJ Staff, and since enactment of ICCTA in 1995, the resulting STB has lost much of its former senior Staff to other agencies or to retirement.

The recent decision in Lucia v. S.E.C., No. 15-1345 USCA-DC Cir. (Aug. 9, 2016), indicates the difficulties associated with conferring prosecutorial power in administrative agencies absent important safeguards, not present or suggested by the STB's proposed rules.

Respectfully submitted,


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

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