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SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 572 (Sub-No. 1)

REMOVAL, REVISION, AND REDESIGNATION OF MISCELLANEOUS REGULATIONS

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: The Surface Transportation Board (Board) is revising and updating regulations pertaining to indexing and making documents available, and incorporating them into the Board's regulations on inspection of records. The Board is also removing seven sections from 49 CFR part 1004 that have been incorporated by the Federal Highway Administration (FHWA) into FHWA regulations, and redesignating and updating the remainder of that part.

EFFECTIVE DATE: These rules are effective October 1, 1999.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 565-1600. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: The Board is removing the regulations at 49 CFR part 1000, revising language from that part concerning indexing and making documents publicly available, and incorporating that revised rule into 49 CFR part 1001. We are also removing unnecessary sections of 49 CFR part 1004, and updating the remaining sections in that part.

PARTS 1000 AND 1001 (AVAILABILITY AND INDEXING)

We are removing the regulations at 49 CFR part 1000, but we are also revising and updating the portions of that rule that deal with indexing and the availability of documents, and we are incorporating them into a new 49 CFR 1001.1(b). The Interstate Commerce Commission (ICC) issued the rules now found in part 1000 on June 24, 1967 (32 FR 9020) (Ex Parte No. 37)¹ in response to the passage of the Freedom of Information Act, 5 U.S.C 552 (FOIA). Under the FOIA, government records are divided into three categories: (1) those required to be published in the Federal Register [section 552(a)(1)]; (2) those that must be made publicly available for inspection

¹ The rules were originally codified at 49 CFR 100. The current part 1000 has also been revised and consists of one section, section 1000.10.

and copying and indexed -- the so-called “reading room” documents [section 552(a)(2)]; and (3) all others that are to be furnished upon request unless an exception applies [section 552(a)(3) and 552(b)]. Rule 1000.10 implemented the section 552(a)(2) requirement that the three categories of reading room documents -- final decisions, including concurring and dissenting opinions, made in the adjudication of cases; statements of policy and interpretation adopted by the agency and not published in the Federal Register; and administrative staff manuals and instructions to staff that affect a member of the public [sections 552(a)(2)(A), (B) and (C)] -- be made available and indexed.²

The Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 3049 (1996) (EFOIA), amends the FOIA. Among other things, EFOIA adds a fourth category of reading room documents: records released pursuant to a request under section 552(a)(3) that have become or are likely to become the subject of a subsequent request -- the so-called “subsequent request” documents [section 552(a)(2)(D)]. It also requires agencies to make available to the public a general index of subsequent request documents [section 552(a)(2)(E)] and to make that index available via computer telecommunications by December 31, 1999. In addition, EFOIA requires that all reading room documents created on and after November 1, 1996, be made available, preferably via computer telecommunications, by November 1, 1997. Id.³

² Section 1000.10 also refers to the Interstate Commerce Acts Annotated (the ICAA). The ICAA was published in accordance with a 1928 Senate resolution requesting the ICC to prepare a comprehensive manuscript covering the text of laws administered by and affecting the work of the ICC, suitably annotated with digests and indexes, and to be published as a Senate document. S. Res. 17, 70th Congress, 1st Sess, January 14, 1928. Twenty-two volumes of the ICAA were published between 1930 and 1977.

Effective January 1, 1996, the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), abolished the ICC and created the Board. Section 204(a) of the ICCTA directs the Board to rescind all regulations established by the ICC that are based on provisions of law repealed and not substantively reenacted by the ICCTA. Although the Senate Resolution was not a law, because the ICC has been abolished and the ICCTA 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), and the new rules delete references to the ICAA. We note that today there are many sources of information about the laws the Board implements and how we implement them, and there appears to be no reason for the Board to expend its limited resources to duplicate readily available information.

³The Board maintains an Electronic Reading Room at its Internet website at www.stb.dot.gov, in compliance with the EFOIA requirement that all reading room documents created on and after November 1, 1996, be accessible via computer telecommunications by November 1, 1997. All documents are available for inspection and copying from the site. We are also making available on our website FOIA annual reports. 5 U.S.C. 552(e)(2).

Thus, section 552(a)(2) requires that we make publicly available for inspection and copying at our offices four types of documents: final decisions, policy statements, staff manuals, and subsequent request documents. Our new rule at 49 CFR 1001.1(b) provides for the availability of these documents in paper format, and it requires that those same four types of documents that were created on and after November 1, 1996, be available via computer telecommunications as well.

With respect to indexing, section 552(a)(2) provides that (a) indexes furnishing “identifying information” of the four types of documents be made available for public inspection and copying; (b) indexes be published and distributed quarterly or more frequently, unless such publication is “unnecessary and impracticable”; and (c) a general index of subsequent request documents be made available on the Internet by December 31, 1999:

Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 5, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) [a general index of subsequent request documents] available by computer telecommunications by December 31, 1999.

Beyond the statutory requirement that the index “provide[] identifying information to the public as to any matter issued . . . and required by this paragraph to be made available or published,” there is little authority as to what constitutes an appropriate index. “Congress has imposed some very limited record-creating obligations with regard to indexing under the FOIA.” Kissinger v. Reporters Committee, 445 U.S. 136, 152, n.17 (1980) (citation omitted). See also Irons & Sears v. Dann, 606 F.2d 1215, 1223 (D.C. Cir. 1979), indicating only that an agency is to “provide[] a reasonable index. . . .”

The Board issues every business day the “Surface Transportation Board Daily Releases” (Daily Releases). Each Daily Releases lists all the decisional documents issued by the Board (including documents required to be published in the Federal Register pursuant to section 552(a)(1)) as of 10:30 a.m. on that day.⁴ These documents are categorized by the decisional body that issues them (such as the entire Board, Director of the Office of Proceedings, Chief of the Section of Environmental Analysis, Secretary). Within each of these categories, the documents are further indexed in alpha-numeric order, by an alphabetical docket prefix (such as AB for abandonment-

⁴ The Board sometimes issues “late releases,” which are decisional documents served after 10:30 a.m. These documents are listed in the Daily Release for the following day.

related matters, and FD for finance matters) and docket number. The title of the case, the date the matter was decided, and the document type (decision, notice, or environmental review, for example) are also provided. Finally, a brief summary of the content of the document is given. The Daily Releases also indicate how copies of the documents can be purchased. The Board's Electronic Reading Room provides the same indexing information as contained in the Daily Releases for all decisional documents in that database.

We believe that the Daily Releases, individually and collectively, in paper and electronic format, meet the section 552(a)(2) indexing requirements for decisional documents. These issuances, which represent the bulk of the Board's section 552(a)(2) documents, contain sufficient information about all (not just final) Board decisions (including policy statements in decisional format) to permit the public to identify the underlying document. Additionally, they are available for inspection and copying at the Board's office and via the Board's Electronic Reading Room. All other reading room documents (such as staff manuals that affect the public, subsequent request documents, and any policy statement that might not be issued as a decisional document) will be available for inspection and copying at the Board's offices and via the Board's Electronic Reading Room, indexed by the date of issuance and document title.

The FOIA, 5 U.S.C. 552(a)(2), requires agencies to "publish and distribute" the indexes on at least a quarterly basis, unless an agency finds such publication to be "impracticable and unnecessary." Although we do not place the indexes in bound volumes for distribution, we believe that our practice of making all indexes conveniently available for inspection and copying and purchase satisfies the publication and distribution requirement. In the event that the publication requirement is construed to refer to bound volumes, we hereby find it unnecessary and impracticable to publish and distribute the indexes.

PART 1004

The ICCTA abolished the ICC and transferred certain of the ICC's functions and proceedings to either the Board or the Department of Transportation. Certain motor carrier functions formerly under the jurisdiction of the ICC were transferred to the Secretary of Transportation, who subsequently delegated those functions to the Federal Highway Administration (FHWA). Then, in final rules issued by the Board and FHWA, many of the regulations pertaining to these functions found in 49 CFR chapter X were transferred to and redesignated in 49 CFR chapter III. Motor Carrier Transportation; Redesignation of Regulations from the Surface Transportation Board Pursuant to the ICC Termination Act of 1995 (61 FR 54706, Oct. 21, 1996) (Redesignation).

In Redesignation, the Board and FHWA also noted, *inter alia*, that 49 CFR part 1004 embraced matters that fell within the jurisdiction of both agencies, and that the transfer of such dual jurisdiction regulations would be effected in a separate action. Subsequently, the regulations in seven sections of part 1004 (49 CFR 1004.10 and 1004.20 to 1004.25) involving motor carrier routing and the interpretation of motor carrier operating rights were incorporated with appropriate

technical changes into 49 CFR part 356 by FHWA. 62 FR 32040 (June 12, 1997). These regulations, however, were not removed from 49 CFR Chapter X. Also, the remaining two sections of 49 CFR part 1004 were not incorporated into 49 CFR Chapter III: 49 CFR 1004.10, pertaining to gifts and donations by carriers, and 49 CFR 1004.26, concerning the adjustment of claims for misrouting.

We are removing the regulations at 49 CFR 1004.2, 1004.20, 1004.21, 1004.22, 1004.23, 1004.24, and 1004.25 that have been incorporated in substance into 49 CFR part 356. These rules pertain to matters that are within the exclusive jurisdiction of FHWA .

The two remaining sections of part 1004 -- 49 CFR 1004.10 and 49 CFR 1004.26 -- concern functions that are still within the Board's jurisdiction.⁵ The gifts and donations regulations at 49 CFR 1004.10 were originally issued on July 24, 1969 (34 FR 12221). They were revised without substantive change in Non-Rail Interpretations and Routing Regulations, Ex Parte No. 55 (Sub-No. 67) (served and published in the Federal Register on November 22, 1988, 53 FR 47219) (Ex Parte No. 55).⁶ We are redesignating this section as 49 CFR 1004.1 but otherwise leaving the rule unchanged.

The misrouting regulations at 49 CFR 1004.26 were originally issued in Adjustment for Claims for Damages - Misrouting, 319 I.C.C. 462 (1963). They were also revised without substantive change in Ex Parte No. 55. We are updating the regulations without making substantive changes, but we are deleting the statutory references to the statutes of limitations, and we are redesignating this section as 49 CFR part 1004.2. Finally, we are updating the authority citation while removing obsolete and unnecessary authority references.

⁵ In Revision of Authority Citations, STB Ex Parte No. 571 (STB served Sept. 26, 1997) at 2, we "question[ed] whether the portions of part 1004 that are not obsolete are still necessary," and we indicated that we would "seek comment in a separate proceeding as to whether this rule should be maintained." We now believe that the two remaining sections of part 1004 do have relevance, although parties may petition the Board if they wish to have any portion of part 1004 removed.

⁶ The Ex Parte No. 55 decision also consolidated the interpretations and routing regulations then found at 49 CFR 1041 and 1042 with the gifts and donations regulations and the misrouting regulations found in former part 1004. The final rules we are issuing will be similar to the pre-Ex Parte No. 55 part 1004, pertaining only to gifts and donations and misrouting.

Because these changes to Parts 1000, 1001, and 1004 either remove obsolete regulations, make revisions that are not substantive, or update rules to reflect current agency practice, we find good cause to dispense with notice and comment. 5 U.S.C. 553(b)(3)(A) and (B).

Small Entities

The Board certifies that this rule will not have a significant economic effect on a substantial number of small entities, because obsolete rules are being removed, and the changes to the remaining rules are either not substantive or reflect current agency practice.

Environment

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects

49 CFR Part 1000

Administrative practice and procedure, Conflict of interests, Seals and insignia.

49 CFR Part 1001

Confidential business information, Freedom of information.

49 CFR Part 1004

Administrative practice and procedure.

Decided: August 23, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

For the reasons set forth in the preamble, title 49, chapter X, of the Code of Federal Regulations is amended as follows:

Part 1000 [REMOVED]

1. Under the Authority of 49 U.S.C. 721, Part 1000 is removed.

Part 1001

2. The authority citation for Part 1001 Inspection of Records continues to read as follows:

Authority: 5 U.S.C. 552, 49 U.S.C. 702, and 49 U.S.C. 721.

3. Section 1001.1 is revised to read as follows:

§1001.1. Records available from the Board.

(a) The following specific files and records in the custody of the Secretary of the Surface Transportation Board are available to the public and may be inspected at the Board's office upon reasonable request during business hours (between 8:30 a.m. and 5 p.m., Monday through Friday):

(1) Copies of tariffs and railroad transportation contract summaries filed with the Board pursuant to 49 U.S.C. 13702(b) and 10709(d), respectively.

(2) Annual and other periodic reports filed with the Board pursuant to 49 U.S.C. 11145.

(3) All docket files, which include documents of record in a proceeding.

(4) File and index of instruments or documents recorded pursuant to 49 U.S.C. 11301.

(5) Surface Transportation Board Administrative Issuances.

(b) The following records, so-called 'reading room' documents, are available for inspection and copying at the Board's office:

(1) final decisions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(2) those statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register;

(3) administrative staff manuals and instructions to staff that affect a member of the public;
and

(4) copies of all records, regardless of form or format, that have been released to any person under 5 U.S.C. 552(a)(3) and that, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

(c) The Board maintains, and makes available for inspection and copying, indexes of the documents described in paragraph (b) of this section. Final decisions are indexed in the "Surface Transportation Board Daily Releases", which is issued by the Board every working day. This document also explains how copies of decisions can be purchased. The remaining documents are indexed as they are made available.

(d) Documents described in paragraph (b) of this section that were created on and after November 1, 1996, are indexed by service date or date of issuance and are available for viewing and downloading from the Board's Electronic Reading Room at www.stb.dot.gov, the Board's website. Final decisions are maintained in a database that is full text searchable.

4. Part 1004 is revised to read as follows:

PART 1004 - INTERPRETATIONS AND ROUTING REGULATIONS

Sec.

1004.1 Gifts, donations, and hospitality by carriers.

1004.2 Misrouting, adjustment of claims.

Authority: 49 U.S.C. 721.

§1004.1 Gifts, donations, and hospitality by carriers.

It is unlawful for any common carrier engaged in interstate or foreign commerce to offer, make, or cause any undue or unreasonable preference or advantage to any person. Gifts or services or anything of substantial value to particular shippers or their representatives are considered violations of the law. Expenditures for such gifts may not support requests to increase carrier rates. The Board shall take appropriate enforcement action to redress such unlawful expenditures.

§1004.2 Misrouting, adjustment of claims.

Carriers should adjust claims for damages resulting from misrouting. Where a carrier admits responsibility for billing, forwarding, or diverting a shipment over a higher rated route than that directed by the shipper or otherwise available, the misrouting carrier should refund the difference to the shipper (or reimburse the delivering carrier, as the case may be). Where the misrouting carrier alleges justification for using the higher rated route, the Board may, at its discretion and upon appropriate petition, determine or express an advisory opinion on the lawfulness of such routing. This interpretation must not be used to evade or defeat tariff rates or to meet the rate of a competing carrier or route, nor to relieve a shipper from responsibility for routing instruction. Damages caused by misrouting are not overcharges.