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SERVICE DATE - LATE RELEASE JUNE 17, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33381

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORP. UNDER
49 U.S.C. 24308(a)--SPRINGFIELD TERMINAL RAILWAY COMPANY, BOSTON AND
MAINE CORPORATION, AND PORTLAND TERMINAL COMPANY

Decided: June 17, 1997

On June 5, 1997, Boston and Maine Corporation, Springfield Terminal Railway Company and Portland Terminal Company, all wholly owned subsidiaries of Guilford Transportation Industries, Inc. (collectively referred to as B&M) requested that I recuse myself from all further participation in this proceeding based on a perceived bias of one of my advisors, Mr. Frank N. Wilner. I see no need to recuse myself because: (1) it is I, not any person on my staff, who determines how I will vote on any particular matter before the Board, (2) my votes in this proceeding have not been influenced by any opinions Mr. Wilner may hold regarding any of the parties to this proceeding, and (3) Mr. Wilner has resigned from my staff, effective June 6, 1997.

B&M bases its recusal request on two recent articles¹ and other statements by Mr. Wilner, my former Chief of Staff, which assertedly demonstrate a general negative bias against B&M and a general affirmative bias for the National Railroad Passenger Corporation (Amtrak), the opposing parties in this proceeding. B&M argues that Mr. Wilner is "incapable of giving dispassionate and impartial advice and counsel to" me (B&M Request at 13). B&M further baldly asserts that I have "already been infected with Wilner's bias and partiality" (*id.*), presumably by virtue of my participation in two interlocutory decisions in this case (served May 6 and May 14, 1997).

I cannot speak to any opinions that Mr. Wilner may (or may not) hold towards the parties in this case; nor should I attempt to do so. The recusal request is addressed to me and it is my impartiality that is thereby brought into issue.² B&M wrongly seeks to equate whatever views Mr.

¹ "Guilford's tempestuous past," The Journal of Commerce, June 2, 1997, and "Building rail service on myths," The Journal of Commerce, May 14, 1997.

² Where an advisor's impartiality is subject to doubt, it is the advisor, not the decisionmaker, who should be disqualified from participation in the case. *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1416 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 709 (1996). The two cases cited by B&M for its "tainting" proposition--*Hull v. Celanese Corp.*, 513 F.2d 568, 570 (2d Cir. 1973), and *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 234-35 (2d Cir.

(continued...)

Wilner may have with my own views or actions. I alone am responsible for my votes. I harbor no prejudices either for or against any party to this case; nor do I have any preconceived notions about the merits of this case.

Recusal is necessary in an agency adjudication such as this only if a disinterested observer would conclude that the agency member has in some measure prejudged the facts as well as the law of the particular case in advance of hearing it. *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1158 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). B&M has cited to nothing that would suggest I have prejudged this case in advance of hearing it, or that I do not come to the case with an open mind.

The interlocutory decisions of May 6 and 14 addressed summary judgment and discovery issues that were driven primarily by legal, rather than policy, analysis. I voted to adopt the recommended decisions prepared by the Board's legal staff, after consulting with the legal advisor on my staff (Mr. Dennis J. Starks). As always, however, I made my own determination as to how to cast my vote, after considering staff advice. B&M has not suggested how the attitude towards the parties supposedly held by Mr. Wilner, an economist, might have affected my decision not to reject the consistent recommendation of the agency's lawyers and of my own staff counsel on the legal issues presented.

Finally, there can be no issue of Mr. Wilner improperly influencing future actions in this case, as Mr. Wilner has resigned from my office effective June 6, 1997. Thus, he will no longer be advising me in this or any other case.

In short, I find that my impartiality in judging this case cannot reasonably be questioned. Accordingly, there is no need for me to recuse myself from this case.³

²(...continued)

1977)--are not on point. They concerned disqualification of a law firm as a party's representative, due to divided loyalties or the potential to disclose confidential information. B&M has offered no basis for imputing to a decisionmaker (whether a judge or an agency member) the opinions of a staff advisor.

³ It is up to each Board member to assess his or her own impartiality. *See* 5 CFR 5001.103; *Supplemental Standards of Ethical Conduct for Employees of the ICC*, 9 I.C.C.2d 838, 840 (1993); ICC Termination Act of 1995, §205, P.L. No. 104-88, 109 Stat. 803, 943 (1995) (reference to ICC in federal regulations deemed to refer to Board). In making my determination, I have consulted with the Board's General Counsel and the Board's Designated Agency Ethics Official.

It is ordered:

The request seeking my recusal is denied.

By the Board, Gus A. Owen, Vice Chairman.

Vernon A. Williams
Secretary