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SERVICE DATE – MAY 16, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 731

RULES RELATING TO BOARD-INITIATED INVESTIGATIONS

Digest:¹ The Board is proposing rules to establish procedures for investigations conducted on the Board's own initiative pursuant to Section 12 of the Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110, 129 Stat. 2228 (2015).

Decided: May 6, 2016

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Through this Notice of Proposed Rulemaking, the Surface Transportation Board (Board or STB) is proposing rules for investigations conducted on the Board's own initiative pursuant to Section 12 of the Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110, 129 Stat. 2228 (2015) (STB Reauthorization Act) (see 49 U.S.C. § 11701).

DATES: Comments are due by June 15, 2016. Replies are due by July 15, 2016.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: EP 731, 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman at (202) 245-0386. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

¹ 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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

SUPPLEMENTARY INFORMATION: Section 12 of the STB Reauthorization Act authorizes the Board to investigate, on its own initiative, issues that are “of national or regional significance” and are subject to the Board’s jurisdiction under 49 U.S.C. Subtitle IV, Part A. Under the statute, the Board must issue rules implementing this investigative authority not later than one year after the date of enactment of the STB Reauthorization Act (by December 18, 2016).

The Board accordingly proposes regulations, to be set forth at 49 C.F.R. Part 1122, establishing procedures for investigations conducted on the Board’s own initiative pursuant to Section 12 of the STB Reauthorization Act. The proposed regulations would not apply to other types of investigations that the Board may conduct.

Introduction

The STB Reauthorization Act provides a basic framework for conducting investigations on the Board’s own initiative, as follows:

Within 30 days after initiating an investigation, the Board must provide notice to parties under investigation stating the basis for such investigation. The Board may only investigate issues that are of national or regional significance. Parties under investigation have a right to file a written statement describing all or any facts and circumstances concerning a matter under investigation, and the Board has an obligation to separate the investigative and decisionmaking functions of Board staff to the extent practicable.

Investigations must be dismissed if they are not concluded with “administrative finality within one year after commencement.”² In any such investigation, Board staff must make available to the parties under investigation and the Board Members any recommendations made as a result of the investigation and a summary of the findings that support such recommendations. Within 90 days of receiving the recommendations and summary of findings, the Board must either dismiss the investigation if no further action is warranted, or initiate a proceeding to determine whether a provision of 49 U.S.C. Subtitle IV, Part A has been violated. Any remedy that the Board may order as a result of such a proceeding may only be applied prospectively.

² S. Rep. No. 114-52, 12 (2015) (explaining that the one-year deadline for investigations conducted on the Board’s own initiative does not include any Board proceeding conducted subsequent to the investigation).

The STB Reauthorization Act further requires that the rules issued under Section 12 must comply with the requirements of 49 U.S.C. § 11701(d) (as amended by the STB Reauthorization Act), satisfy due process requirements, and take into account ex parte constraints.

Summary of Proposed Rules

To implement this statutory framework for investigations, the Board is proposing a three-stage process, consisting of (1) Preliminary Fact-Finding, (2) Board-Initiated Investigations, and (3) Formal Board Proceedings. Each of these stages is described below and defined in Section 1122.1 of the proposed regulations provided in this Notice of Proposed Rulemaking. Section 1122.2 defines the scope and applicability of the proposed regulations, stating that they would apply only to Board matters subject to Section 12 of the STB Reauthorization Act.

1. Preliminary Fact-Finding

During the Preliminary Fact-Finding stage, Board staff would conduct a nonpublic inquiry regarding an issue to determine if there is a potential violation of 49 U.S.C. Subtitle IV, Part A, of national or regional significance that warrants a Board-Initiated Investigation. Information identifying a potential violation of national or regional significance could come from a variety of sources, including, but not limited to, third party tips, referrals from other agencies or Congress, reports submitted to the Board, or news articles.

The goal of Preliminary Fact-Finding would be for Board staff to decide whether to close its fact-gathering or request authorization to open a Board-Initiated Investigation and determine if a violation has in fact occurred. See Section 1122.3 (describing the Preliminary Fact-Finding process). To assist in making this determination, Board staff may request that parties voluntarily provide testimony, information, or documents. (As an investigation will not have been formally initiated, Board staff would not have authority to issue subpoenas to compel testimony or the production of information or documents during Preliminary Fact-Finding. Cf. Sections 1122.3 & 1122.9.) Under the proposed rules, Board staff would terminate Preliminary Fact-Finding if it becomes evident from information available to Board staff that (1) the potential violation was not of national or regional significance or was not subject to the Board's jurisdiction under 49 U.S.C. Subtitle IV, Part A, or (2) no violation likely occurred. However, if Board staff were to decide that (1) a violation of Part A subject to the Board's jurisdiction may have occurred and (2) that the potential violation may be of national or regional significance warranting the opening of a staff investigation, staff would seek authorization from the Board to pursue a Board-Initiated Investigation.

As a matter of policy, Preliminary Fact-Finding generally would be nonpublic and confidential, subject to the provisions found in Section 1122.6,³ in order to protect the integrity of any subsequent investigation and to protect parties involved from possibly unwarranted reputational or other harm.

2. Board-Initiated Investigation

To commence a Board-Initiated Investigation (which statutorily must conclude with administrative finality within one year), the Board would issue an Order of Investigation and provide a copy of the order to the parties under investigation within 30 days of issuance. See Sections 1122.4 & 1122.5. The Board may commence a Board-Initiated Investigation with or without Board staff having conducted Preliminary Fact-Finding. The Order of Investigation would state the basis for the investigation and identify the Investigating Officer(s) who would be conducting the investigation for the Board. See Section 1122.4.

As with Preliminary Fact-Finding, Board-Initiated Investigations generally would be nonpublic and confidential, except as provided by Section 1122.6, in order to protect the integrity of the process and to protect parties under investigation from possibly unwarranted reputational damage or other harm. Parties who are not the subject of the investigation would not be able to intervene or participate as a matter of right in Board-Initiated Investigations. Section 1122.8.

The goal of the Board-Initiated Investigation would be for the Investigating Officer(s) to decide whether to recommend to the Board that it dismiss the investigation or open a proceeding to determine if a violation of 49 U.S.C. Subtitle IV, Part A occurred. To assist in making this determination, the Investigating Officer(s) would be able to interview or depose witnesses, inspect property and facilities, and request the production of any information, documents, books, papers, correspondence, memoranda, agreements or other records, in any form or media, potentially relevant or material to the basis for the Board-Initiated Investigation, with the power of subpoena to compel the production of documents or testimony of witnesses, if necessary. See Section 1122.9. Any persons or entities producing such information or documents to the Board would be required to follow the procedures set forth at Section 1122.7 in order to preserve any relevant confidentiality claims and to submit the certifications required in Sections 1122.11(a), regarding the diligence of any search, and (b) regarding responsive documents withheld based on claims of privilege. Persons or entities providing testimony or producing information or documents to the Board would be subject to the provisions of Section 1122.11(c) concerning false statements.

³ Section 1122.6 allows the public disclosure of information and documents obtained during Preliminary Fact-Finding or a Board-Initiated Investigation, and the existence of Preliminary Fact-Finding or a Board-Initiated Investigation, under certain circumstances.

Under the proposed regulations, the Investigating Officer(s) would be required to conclude the Board-Initiated Investigation no later than 275 days after issuance of the Order of Investigation and, at that time, submit to the Board and the parties under investigation any recommendations made as a result of the Board-Initiated Investigation and a summary of the findings that support such recommendations. See Section 1122.5(b). The proposed 275-day timeline would provide Board Members the maximum statutory time allotted (i.e., 90 days) to review the Investigating Officer(s)' recommendations and summary of findings and decide whether to dismiss the Board-Initiated Investigation or open a Formal Board Proceeding, while still concluding the Board-Initiated Investigation with administrative finality within one year of its commencement. See Sections 1122.5(b) & (c).

The Board recognizes that potential violations that are “of national or regional significance” could have serious and far-reaching consequences. The Board, therefore, will endeavor to resolve Board-Initiated Investigations as soon as possible. To be clear, 275 days would be the *maximum* amount of time for the Investigating Officer(s) to submit the recommendations and summary of findings to the Board Members and parties under investigation.

Investigating Officer(s), in their discretion and time permitting, would have the option of presenting (orally or in writing) their recommendations and/or summary of findings to parties under investigation *prior to* submitting this information to the Board Members. See Appendix A. In such cases, the Investigating Officer(s) would be required to permit the parties under investigation to submit a written response to their recommendations and/or summary of findings. See Appendix A. The Investigating Officer(s) would then submit their recommendations and summary of findings, as well as any response from the parties under investigation, to the Board members and parties under investigation. See Appendix A.

If the Investigating Officer(s) were to decide not to use the optional provisions described above, parties subject to investigation would still be allowed to submit written statements to the Board at any time pursuant to 49 U.S.C. § 11701(d)(3). See Section 1122.12.

3. Formal Board Proceeding

Upon receipt of the recommendations and summary of findings from the Investigating Officers, the Board would decide whether to open a public Formal Board Proceeding to determine whether a provision of 49 U.S.C. Subtitle IV, Part A had been violated. If so, the Board would issue a public Order to Show Cause as described in Sections 1122.5(c) and (d). The Order to Show Cause would state the basis for the proceeding and set forth a procedural schedule. See Section 1122.5(d).

4. Other Related Issues

Separation of Investigation and Decisionmaking Functions. In all matters governed by the regulations proposed at 49 C.F.R. Part 1122, the Board would separate the investigative and decisionmaking functions of Board staff, to the extent practicable. See 49 U.S.C. § 11701(d)(5); Section 1122.4.

Ex Parte Communications. Section 12(c)(3) of the STB Reauthorization Act requires the Board, in issuing these rules, to take into account ex parte constraints. Consistent with analogous ex parte constraints in other procedures at the Board, the Board Members, as a matter of policy, would not engage in off-the-record verbal communications concerning the matters under investigation with parties subject to Board-Initiated Investigations. However, as provided in Section 1122.12, parties under investigation would have the right to submit written statements to the Board at any time.

Settlement. During Board-Initiated Investigations, the Investigating Officer(s) would be able to engage in settlement negotiations with parties under investigation. If, at any time during the investigation, the Investigating Officer(s) and parties under investigation reach a tentative settlement agreement, the Investigating Officer(s) would submit the settlement agreement as part of their proposed recommendations to the Board Members for approval or disapproval, along with the summary of findings supporting the proposed agreement. The Board would then decide, in accordance with Section 1122.5, whether to approve the agreement and/or dismiss the investigation or open a Formal Board Proceeding.

Conclusion

The proposed regulations described above and set forth in the Appendix below implement the investigative authority conferred to the Board in the STB Reauthorization Act, in conformance with the requirements of Section 12. The Board invites public comment on the proposed regulations described herein.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities." § 605(b). The impact must be a

direct impact on small entities “whose conduct is circumscribed or mandated” by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

The proposed regulations here only specify procedures related to investigations of matters of regional or national significance conducted on the Board’s own initiative and do not mandate or circumscribe the conduct of small entities. Therefore, the Board certifies under 5 U.S.C. § 605(b) that this rule will not have a significant economic impact on a substantial number of small entities as defined by the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

List of Subjects

49 C.F.R. Part 1122

Investigations

It is ordered:

1. Comments are due by June 15, 2016. Replies are due by July 15, 2016.
2. A copy of this decision will be served upon Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
3. Notice of this decision will be published in the Federal Register.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Appendix

Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, subchapter B, of the Code of Federal Regulations by adding part 1122 to read as follows:

PART 1122 –BOARD-INITIATED INVESTIGATIONS

Sec.

- 1122.1 Definitions.
- 1122.2 Scope and applicability of this part.
- 1122.3 Preliminary Fact-Finding.
- 1122.4 Board-Initiated Investigations.
- 1122.5 Procedural rules.
- 1122.6 Confidentiality.
- 1122.7 Request for confidential treatment.
- 1122.8 Limitation on participation.
- 1122.9 Power of persons conducting Board-Initiated Investigations.
- 1122.10 Transcripts.
- 1122.11 Certifications and false statements.
- 1122.12 Right to submit statements.

Appendix A to Part 1122 – Informal Procedure Relating to Recommendations and Summary of Findings from the Board-Initiated Investigation

Authority: 49 U.S.C. §§ 1321, 11144, 11701.

§ 1122.1 Definitions.

(a) *Board-Initiated Investigation* means an investigation instituted by the Board pursuant to an Order of Investigation and conducted in accordance with Section 12 of the Surface Transportation Board Reauthorization Act of 2015, now incorporated and codified at 49 U.S.C. § 11701.

(b) *Formal Board Proceeding* means a public proceeding instituted by the Board pursuant to an Order to Show Cause after a Board-Initiated Investigation has been conducted.

(c) *Investigating officer(s)* means the individual(s) designated by the Board in an Order of Investigation to conduct a Board-Initiated Investigation.

(d) *Preliminary fact-finding* means an inquiry conducted by Board staff prior to the opening of a Board-Initiated Investigation.

§ 1122.2 Scope and applicability of this part.

This part applies only to matters subject to Section 12 of the Surface Transportation Board Reauthorization Act of 2015, 49 U.S.C. § 11701.

§ 1122.3 Preliminary Fact-Finding.

The Board staff may, in its discretion, conduct nonpublic Preliminary Fact-Finding, subject to the provisions of § 1122.6, to determine if an alleged violation could be of national or regional significance and subject to the Board's jurisdiction under 49 U.S.C. Subtitle IV, Part A, and warrants a Board-Initiated Investigation. Where it appears from Preliminary Fact-Finding that a Board-Initiated Investigation is appropriate, staff shall so recommend to the Board. Where it appears from the Preliminary Fact-Finding that a Board-Initiated Investigation is not appropriate, staff shall conclude its Preliminary Fact-Finding and notify any parties involved that the process has been terminated.

§ 1122.4 Board-Initiated Investigations.

The Board may, in its discretion, commence a nonpublic Board-Initiated Investigation of any matter of national or regional significance that is subject to the jurisdiction of the Board under 49 U.S.C. Subtitle IV, Part A, subject to the provisions of § 1122.6, by issuing an Order of Investigation. Orders of Investigation shall state the basis for the Board-Initiated Investigation and identify the Investigating Officer(s). The Board may add or remove Investigating Officer(s) during the course of a Board-Initiated Investigation. To the extent practicable, an Investigating Officer shall not participate in any decisionmaking functions in any Formal Board Proceeding(s) opened as a result of any Board-Initiated Investigation(s) that he or she conducted.

§ 1122.5 Procedural rules.

(a) Not later than 30 days after commencing a Board-Initiated Investigation, the Investigating Officer(s) shall provide the parties under investigation a copy of the Order of Investigation. If the Board adds or removes Investigating Officer(s) during the course of the Board-Initiated Investigation, it shall provide written notification to the parties under investigation.

(b) Not later than 275 days after issuance of the Order of Investigation, the Investigating Officer(s) shall submit to the Board and the parties under investigation:

(1) Any recommendations made as a result of the Board-Initiated Investigation;
and

(2) A summary of the findings that support such recommendations.

(c) Not later than 90 days after receiving the recommendations and summary of findings, the Board shall decide whether to dismiss the Board-Initiated Investigation if no further action is warranted or initiate a Formal Board Proceeding to determine whether any provision of 49 U.S.C. Subtitle IV, Part A, has been violated in accordance with Section 12 of the Surface Transportation Board Reauthorization Act of 2015. The Board shall dismiss any Board-Initiated Investigation that is not concluded with administrative finality within one year after the date on which it was commenced.

(d) A Formal Board Proceeding commences upon issuance of a public Order to Show Cause. The Order to Show Cause shall state the basis for the Formal Board Proceeding and set forth a procedural schedule.

§ 1122.6 Confidentiality.

(a) All information and documents obtained under § 1122.3 or § 1122.4, whether or not obtained pursuant to a Board request or subpoena, and all activities conducted by the Board under this part prior to the opening of a Formal Board Proceeding, shall be treated as nonpublic by the Board and its staff except to the extent that:

(1) The Board directs or authorizes the public disclosure of activities conducted under this part prior to the opening of a Formal Board Proceeding;

(2) The information or documents are made a matter of public record during the course of an administrative proceeding; or

(3) Disclosure is required by the Freedom of Information Act, 5 U.S.C. § 552 or other relevant provision of law.

(b) Procedures by which persons submitting information to the Board pursuant to this part of title 49, chapter X, subchapter B, of the Code of Federal Regulations may specifically seek confidential treatment of information for purposes of the Freedom of Information Act disclosure are set forth in § 1122.7. A request for confidential treatment of information for purposes of Freedom of Information Act disclosure shall not, however, prevent disclosure for law enforcement purposes or when disclosure is otherwise found appropriate in the public interest and permitted by law.

§ 1122.7 Request for confidential treatment.

Any person that produces documents to the Board pursuant to § 1122.3 or § 1122.4 may claim that some or all of the information contained in a particular document or documents is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, is information referred to in 18 U.S.C. § 1905, or is otherwise exempt by law from public disclosure. In such case, the person making such a claim shall, at the time the person produces the document to the Board, indicate on the document that a request for confidential treatment is being made for some or all of the information in the document. In such case, the person making such a claim also shall file a brief statement specifying the specific statutory justification for non-disclosure of the information in the document for which confidential treatment is claimed. If the person states that the information comes within the exception in 5 U.S.C. § 552(b)(4) for trade secrets and commercial or financial information, and the information is responsive to a subsequent FOIA request to the Board, 49 C.F.R. § 1001.4 shall apply.

§ 1122.8 Limitation on participation.

No party who is not the subject of a Board-Initiated Investigation may intervene or participate as a matter of right in any such Board-Initiated Investigation under this part.

§ 1122.9 Power of persons conducting Board-Initiated Investigations.

(a) The Investigating Officer(s), in connection with any Board-Initiated Investigation, may interview or depose witnesses, inspect property and facilities, and request and require the production of any information, documents, books, papers, correspondence, memoranda, agreements, or other records, in any form or media, potentially relevant or material to the issues related to the Board-Initiated Investigation. The Investigating Officer(s), in connection with a Board-Initiated Investigation, also may issue subpoenas, in accordance with 49 U.S.C. § 1321, to compel the attendance of witnesses, the production of any of the records and other documentary evidence listed above, and access to property and facilities.

(b) With regard for due process, the Board may for good cause exclude a particular attorney from further participation in any Board-Initiated Investigation in which the attorney is obstructing the Board-Initiated Investigation.

§ 1122.10 Transcripts.

Transcripts, if any, of investigative testimony shall be recorded solely by the official reporter or other person or by means authorized by the Board or by the Investigating Officer(s).

§ 1122.11 Certifications and false statements.

(a) When producing documents under this part, the producing party shall submit a statement certifying that such person has made a diligent search for the responsive documents and is producing all the documents called for by the Investigating Officer(s). If any responsive document(s) are not produced for any reason, the producing party shall state the reason therefor.

(b) If any responsive documents are withheld because of a claim of the attorney-client privilege, work product privilege, or other applicable privilege, the producing party shall submit a list of such documents which shall, for each document, identify the attorney involved, the client involved, the date of the document, the person(s) shown on the document to have prepared and/or sent the document, and the person(s) shown on the document to have received copies of the document.

(c) Under this part, any person making false statements under oath is subject to criminal penalties for perjury under 18 U.S.C. § 1621. Any person who knowingly and willfully makes false or fraudulent statements, whether under oath or otherwise, or who falsifies, conceals, or covers up a material fact, or submits any false writing or document, knowing it to contain false, fictitious, or fraudulent information is subject to the criminal penalties set forth in 18 U.S.C. § 1001.

§ 1122.12 Right to submit statements.

Any party subject to a Board-Initiated Investigation may, at any time during the course of a Board-Initiated Investigation, submit to the Board written statements of facts or circumstances, with any relevant supporting evidence, concerning the subject of that investigation.

Appendix A to Part 1122 – Informal Procedure Relating to Recommendations and Summary of Findings from the Board-Initiated Investigation

(a) After conducting sufficient investigation and prior to submitting recommendations and a summary of findings to the Board, the Investigating Officer, in his or her discretion, may inform the parties under investigation (orally or in writing) of the proposed recommendations and summary of findings that may be submitted to the Board. If the Investigating Officer so chooses, he or she shall also advise the parties under investigation that they may submit a written statement, as explained below, to the Investigating Officer prior to the consideration by the Board of the recommendations and summary of findings. This optional process is in addition to, and does not limit in any way, the rights of parties under investigation otherwise provided for in this part.

(b) Unless otherwise provided for by the Investigating Officer, parties under investigation may submit written statement(s) described above within 14 days after of being informed by the Investigating Officer of the proposed recommendation(s) and summary of findings, and such statements shall be no more than 15 pages, double spaced on 8 ½ by 11 inch paper, setting forth the views of the parties under investigation of factual or legal matters relevant to the commencement of a Formal Board Proceeding. Any statement of fact included in the submission must be sworn to by a person with personal knowledge of such fact.

(c) Such written statements, if the parties under investigation choose to submit, shall be submitted to the Investigating Officer. The Investigating Officer shall provide any written statement(s) from the parties under investigation to the Board at the same time that he or she submits his or her recommendations and summary of findings to the Board.