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SERVICE DATE - FEBRUARY 9, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 568

MODIFICATIONS TO THE GENERAL PROVISIONS OF THE BOARD

Decided: February 3, 1998

By decision served and published in the Federal Register on September 18, 1997 (62 FR 48953) (corrected decision served September 23, 1997, and published in the Federal Register on September 25, 1997, 62 FR 50257), the Board adopted final rules revising parts 1000, 1001, and 1011 of the Code of Federal Regulations largely to reflect changes made by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA).¹ Additionally, the Board made nonsubstantive nomenclature changes to the rules and also removed references that were unnecessary or redundant. For example, the Board removed rules in parts 1000 and 1001 concerning the official seal, employee credentials, and field offices.

On October 8, 1997, Joseph C. Szabo, for and on behalf of United Transportation Union-Illinois Legislative Board (UTU-IL), filed a petition for reconsideration of the decision. UTU-IL contends that changing former section 1001.1(d) constitutes material error. That rule listed the records available at the former Interstate Commerce Commission's (ICC) Washington office as:

All docket files, including pleadings, depositions, exhibits, transcripts of testimony, recommended and proposed reports, exceptions, briefs, and reports and decisions of the Commission in any proceeding and carrier operating authorities granted in such proceedings. This does not apply to matters arising under 49 U.S.C. 10928, Temporary Authority for Motor and Water Carriers, which are filed in a Regional Office until a petition for reconsideration is ripe for decision.

The Board modified this regulation by adding a new rule 49 CFR 1001.1(c) stating that former section 1001.1(d) "is being simplified and obsolete references are being deleted."

¹ The September 23 decision specified that the amendments "reflect 10 changes made by [the ICCTA]." The reference "10" should be deleted.

Decision at 2. Section 1001.1(c) now lists the following documents as being available at the Board's office:

All docket files, which include documents of record in a proceeding. The Board noted that notice and comment were not needed to amend the rules, because "these changes to the regulations are technical, and do not involve substantive revision of our rules" Id. at 3.

UTU-IL argues that the first sentence of former section 1001.1(d) should be retained. It notes that the new section substitutes "documents of record" and "in a proceeding" for case information such as transcripts and pleadings. It contends that the ICCTA provides no justification for the modification, and that the alleged change in agency practice concerning the availability of pleadings, transcripts, and other items is arbitrary and capricious and has not been adequately explained or justified.

In Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1, 1996 and Nov. 15, 1996) (STB Ex Parte No. 527), UTU-IL had similarly alleged that the Board had changed its policy regarding the availability of pleadings and transcripts. However, in United Transp. Union - III, Legis. Bd. v. Surface Transp. Bd., No. 97-1027 (D.C. Cir. Jan. 6, 1998) (UTU-IL v. STB), the court found that the Board had not changed its longstanding policy. Here, UTU-IL argues that the changed regulation "could be read to uphold the Secretary's current practice of denying access, and denying copying of transcripts, when received by the agency prior to receipt of suggested corrections." UTU-IL submits that such a policy is inconsistent with former section 1001.1(d) and that the documents in former section 1001.1(d) were available even if they were not formally docketed. Moreover, UTU-IL states that uncorrected transcripts have been cited by the agency in its decisions.

We reject UTU-IL's contentions. First, it has mischaracterized our policy. We do not deny access to the raw, uncorrected transcript. As noted in STB Ex Parte No. 527 (November 15, 1996 decision at 4), the raw transcript is generally available 3 or 4 days after a hearing and can be inspected at the Board. It cannot be copied, however, until the corrected transcript is returned by the court reporter to the Board.

Secondly, we have not changed the policy of the Board reflected in former section 1001.1(d). Individuals may continue to inspect uncorrected transcripts at the office of the

Board.² As we noted in our September decision, in issuing new rule 1001.1(c), we merely have removed outdated references and simplified the language in former section 1001.1(d). Substantively, there has been no change. As before, “[a]ll docket files”, which include transcripts, may be inspected.

Finally, we note that this unchanged policy is not new.³ On June 24, 1967, the ICC published in the Federal Register the rules for inspection of records now codified at part 1001 (32 FR 9020). These rules have been basically unchanged in substance,⁴ last being revised in 1981 to reflect the recodification of the Interstate Commerce Act. Revision of Rules - Recordation of Doc. - 49 U.S.C. 11303, 365 I.C.C. 353 (1981). Moreover, on July 3, 1964, the ICC published a policy statement in the Federal Register noting the lack of bidders for contracts for reporting services due to a decrease in sales of transcripts by the official reporter. The ICC stated that the decrease was due to the recopying of transcripts from sources other than the official reporter. The ICC was able to negotiate a new contract “only after the contractor was assured that the Commission would take affirmative measures to discourage the practice of recopying transcripts of hearings by unofficial sources.” 29 FR 8418, 8419.⁵

In sum, there has been no change in Board policy regarding the inspection or copying of pleadings and transcripts. The UTU-IL petition for reconsideration is denied.

² As we noted in STB Ex Parte No. 527, “[s]ection 1001.1(d) pertains to inspection of transcripts, but not copying.”

³ In UTU-IL v. STB, the court refused to reach the merits of the criticisms of the Board’s policy; the court ruled that “[b]ecause the new rule did not alter the STB’s rules or practices governing public access to transcripts, pleadings, or correspondence, the UTU’s challenge to those policies is untimely under the Hobbs Act, 28 U.S.C. §2344.” Slip op. at 10. (The Hobbs Act provides a 60-day period after the entry of a final order of an agency for a party to file an appeal with the court of appeals.)

⁴ The ICC did publish in the Federal Register on January 18, 1980 (45 FR 3580), a revision to section 1001.1(d) that provided that certain documents filed in the Commission’s regional offices were not available in Washington, D.C.

⁵ We note that the current rule at 49 CFR 1113.17(d), prohibiting the agency from giving free copies of transcripts, dates from 1942. 7 FR 6395, 6404 (August 14, 1942).

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

It is ordered:

1. UTU-IL's petition for reconsideration is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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