

ORIGINAL

Before the  
SURFACE TRANSPORTATION BOARD



Ex Parte No. 731

RULES RELATING TO BOARD-INITIATED INVESTIGATIONS

\_\_\_\_\_

241120

COMMENTS

\_\_\_\_\_

ENTERED  
Office of Proceedings  
July 15, 2016  
Part of  
Public Record

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

Attorney for Samuel J. Nasca

July 15, 2016

Before the  
SURFACE TRANSPORTATION BOARD

---



Ex Parte No. 731

RULES RELATING TO BOARD-INITIATED INVESTIGATIONS

---

COMMENTS

---

Preliminary Statement

Samuel J. Nasca, 1/for and on behalf of SMART/  
Transportation Division, New York State Legislative  
Board (SMART/TD-NY), submits these comments in response  
to the Surface Transportation Board (STB or Board),  
Notice of Proposed Rulemaking (NPRM), dated May 6, 2016  
(served May 16). 81 Fed. Reg. 30510-14. (May 17, 2016).

The NPRM is issued responsive to Section 12 of  
Surface Transportation Board Reauthorization Act of  
2015, P.L. 114-110, 129 Stat. 2228, 2234-35 (Dec. 18,

---

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

2015), STB Reauthorization Act, codified and amending 49 United States Code, (U.S.C.), §11701(a).

The STB's NPRM would establish a new Part 1122 to the Code of Federal Regulations (CFR), captioned, Board-Initiated Investigations, 49 CFR 1122, with 12 subsections thereto followed by an Appendix A. (NPRM, 8-13, 49 CFR 1122.1-1122.12 & App. A). 81 Fed. Reg. at 30512-14).

The Board in the preface to its proposed regulations said Section 12 of STB Reauthorization Act is to authorize STB to investigate, on its own initiative, issues "of national or regional significance," which are subject to the Board's jurisdiction under 49 U.S.C. Subtitle IV, Part A. The NPRM proposes procedures for such investigations conducted on the Board's own initiative under Section 12, but these would not apply to other types of investigations the Board may conduct. (NPRM, 2). 81 Fed. Reg. at 30510.

The NPRM contains an extensive "Summary of Proposed Rules" (NPRM, 3-6), which is as lengthy as the proposed rules themselves. (NPRM, 8-13). In essence, the Board's

rules, without specifying the subjects proposed for investigation (other than saying they would only apply to matters subject to Section 12 of STB Reauthorizing Act, on the Board's own initiative, and would not apply to other types of investigation the Board may conduct), are directed to violations of 49 U.S.C. Subtitle IV, Part A, without further specification.<sup>2/</sup> The subjects would be restricted further to issues "of national or regional significance." The NPRM does not apply to, affect, or restrict STB investigations instituted upon complaint about a violation of this Part, brought to the Board upon complaint by a person or Governmental authority.<sup>3/</sup> The NPRM proposes to set-up a three stage process for eligible Section 12 investigations, consisting of (1) Preliminary Fact-Finding, (2) Board-Initiated Investigation, and (3) Formal Board Proceedings. In the Preliminary Fact-Finding stage, the Board staff would conduct a private (nonpublic) inquiry

---

<sup>2/</sup>This is the entire statutory provision for Rail Interstate Transportation. Subtitle IV, Part A, embraces chapters 101, 105, 107, 109, 111, 113, 115, 117, and 119.

<sup>3/</sup>These complaints by persons and Govt. authorities are addressed in 49 U.S.C. 11701(b). Cf. 49 U.S.C. 11701(a).

to determine if there is a potential violation of 49 U.S.C. Subtitle IV, Part A, of national or regional significance, which warrants a Board-Initiated Investigation.

If the Board Staff in its Preliminary Investigation decides that a violation of Part A may have occurred, and may be of national or regional significance, the staff would seek Board authorization to pursue a Board-Initiated Investigation. However, the Board may omit the Staff Preliminary Investigation, and proceed directly to stage 2--a Board-Initiated Investigation.

The goal of the Board-Initiated Investigation would be for certain Staff members, designated "Investigating Officer(s)" to decide whether to recommend that the Board dismiss the Investigation or to open a proceeding to determine if a violation of 49 U.S.C. Subtitle IV, Part A occurred. The Investigating Officer(s) would make this initial determination in a nonpublic and confidential manner. Parties not the subject of the investigation would not be able to intervene or to participate as of right.

The final phase would have the Board, after receipt

of the recommendations and summary of findings from the Investigating Officer(s), 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.

I. THE STB SHOULD NOT ADOPT THE NPRM;  
MOST PROVISIONS ARE NOT NECESSARY.

The proposed extensive prosecution rules are almost totally unnecessary, and go beyond the asserted Congressional purpose. The STB and its predecessor ICC have long-maintained effective practices and procedures for dealing with violations of the Interstate Commerce Commission Act, as amended. These practices should be renewed or continued, rather than scrapped for what would amount to an entirely new and inappropriate employee prosecution group within the STB.

A. Legislative Background and Needs. The Congress did not intend to establish a detailed new procedure in the process of increasing STB power so as to prosecute alleged violations of 49 U.S.C. Subtitle IV, Part A, restricted to Board-Initiative investigations, where

issues of national or regional significance are involved. The NPRM goes far beyond the procedures outlined in Section 12. Concerning legislative need, the sole reference in the Committee report is a need for STB authority to investigate rail issues on its own initiative, rather than changing STB procedures in a major way. Sen. Rept. 114-52, at 7:

Congressional oversight, including extensive communication with STB leadership and the Committee hearings in September 2014 and January 2015, has identified several areas for improvement. Some inefficiencies result from insufficient authority. For example, the STB currently does not have authority to proactively investigate rail issues on its own initiative.

The Committee report, in specifically describing Section 12 of S. 808, headed "Investigative authority," pointed to current law as only permitting investigations on complaint, whereas Section 12 would now allow investigations on the STB's own motion. Sen. Rept. 114-52, at 12:

This section would allow STB to initiate investigations on its own initiative and set restrictions on those investigations. Current law only allows investigations upon complaint.

Section 12 in dealing with Board-Initiated investigations, would not accord the same powers the

agency has, upon complaint, to investigate possible violations of 49 U.S.C. Subtitle IV, Part A. For example, Section 12 sets forth time constraints within the investigation process, provides for de novo judicial review, and limits Board-ordered remedies as being prospective-only. Sen. Rept. 114-52, at 12-13.

B. Traditional Agency Handling Appropriate. The former ICC established the Division of Prosecutions in 1907 following the Hepburn Act (1906). The duties became the Division of Inquiry in 1911, and then Bureau of Inquiry in 1917. Subsequently, the Bureau of Inquiry and Compliance came about in 1953, followed by the Bureau of Investigations and Enforcement, and ultimately the Office of Consumer Protection.<sup>4/</sup>

It appears that the Board and its predecessor had not established special rules to govern investigations instituted by the agency concerning violation of the provisions of the Interstate Commerce Act, or the agency's rules. The customary procedure for hearings was

---

<sup>4/</sup>See: Turney, John R., Development of Internal Organization of the Interstate Commerce Commission, 30 ICCPJ 727 (1963); In the Matter of John M. Nader, 364 I.C.C. 83 (1980).

to assign the matter to a hearing examiner or Administrative Law Judge associated with the agency.

There appears to be no special reason for establishing special procedures, in addition to those specified by statute, for the administration of Section 12 investigations. Accordingly, it is suggested the Board may merely note in its regulations that specific rules for section 12 investigations will be issued as the occasion may require.

## II. SOME OF THE NPRM PROVISIONS WOULD LIKELY BE VERY HARMFUL.

The former ICC went through the process of having its investigative power restricted to dealing with complaints, as was the case in the original Act. The Mann-Elkins Act (1910) resolved the matter of investigations on the agency's own initiative, by extending the ICC's authority to investigate on its own motion. See: Sharfman, I.L., The Interstate Commerce Commission, Vol. 1, p. 53 n.53 (1931); Aitchison, Clyde B., The Evolution of the Interstate Commerce Act 1887-1937, 5 Geo. Wash. L. Rev. 338-39 (1937).

The power of the I.C.C. to decide complaints and to

also investigate on its own motion continued until ICC Termination Act of 1995, where the resulting STB was restricted to instituting an investigation only on complaint. 49 U.S.C. 11701 (1995 ed). This 1995 version of the Board's power to institute an investigation only on complaint, has now been reversed, with restoration of the ICC's 1910 form, permitting investigation on the Board's own motion, but now restricted to issues of national or regional significance, and with certain limitations, as set forth in Section 12 of STB Reauthorization Act.

The NPRM would unnecessarily add to the conditions specified in Section 12, and should not be adopted by the Board. There is not a need for specific rules. The former ICC did not appear to require specific CFR regulations. However, in the event the Board now decides to memorialize Section 12 procedures by advance CFR designations, the following revisions should be considered.

A. STB Staff Participation. All mention of participation by Board "Staff" should be eliminated from the proposed regulations. Reference should be in the

name of the "Board."

B. Investigating Officer. The term "Investigating Officer" is inappropriate. A member of the Board should be assigned to handle the inquiry. Of course, the Board Member can supervise employees in the various details.

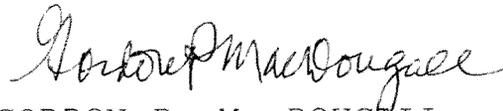
C. Preliminary Fact-Finding. The entire "Preliminary Fact-Finding" should be deleted, as there is always "preliminary" work before any official "preliminary" and such is unnecessary.

D. Nonpublic investigation. The automatic "nonpublic" process should be deleted; the nonpublic determination should be left open until sought to be invoked.

E. Intervention/Participation. The entire "Limitation on participation" should be deleted; the requests should be handled as they arise, and not predetermined by regulation.

F. Confidentiality. The proposed rules for confidentiality and requests for confidential treatment should be deleted, and handled individually as situations may arise.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gordon P. MacDougall".

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

Attorney for Samuel J. Nasca

July 15, 2016