

STB EX PARTE NO. 568

MODIFICATIONS TO THE GENERAL PROVISIONS
OF THE BOARD

Decided September 9, 1997

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: The Board revises its regulations to reflect: the elimination of certain functions; the closing of field offices; nomenclature changes resulting from the transfer of functions from the Interstate Commerce Commission to the Surface Transportation Board; and the removal of unnecessary rules.

EFFECTIVE DATE: These rules are effective September 18, 1997.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 565-1600.
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SUPPLEMENTARY INFORMATION: The Surface Transportation Board (Board or STB) is revising parts 1000, 1001, and 1011 of its regulations to reflect changes made by the *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (1995) (*ICCTA*). The *ICCTA* abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Board. Some of the modifications we are making are only nomenclature revisions (changing Interstate Commerce Commission to Surface Transportation Board, for example). Other rules are being changed to reflect substantive revisions of the statute. Some rules are being revised because the statutes upon which they are based have been eliminated. Other regulations are being removed because they are of limited utility or, even if updated, would basically only repeat what is now in the statute.

PART 1000

We are eliminating sections 1000.1 and 1000.5. At this time, we are not making any changes in section 1000.10, concerning the availability of decisions not published in the *Federal Register*. We will issue soon a decision dealing separately with the necessary revisions to section 1000.10.

Section 1000.1 concerns the official seal of the ICC. Former 49 U.S.C. 10301(g) provided that the ICC "shall have a seal that shall be judicially recognized." Former 49 U.S.C. 10303(b) stated in part that "[a] public record * * * certified by the Secretary under the seal of the [ICC] is competent evidence in a proceeding of the Commission and in a judicial proceeding." Under the *ICCTA*, these references to the seal have been deleted: the *ICCTA* eliminated former section 10303; and it revised former section 10301 (which is now codified at 49 U.S.C. 701), deleting any references to the seal.

The Board has its own seal, which is employed as one method of certifying the index of the record and copies of documents in the record. Because it is not statutorily required, however, we do not believe that it is necessary to include the Board's seal in the *Code of Federal Regulations*.¹

Section 1000.5 describes the records and property of carriers and other persons that are subject to inspection and examination by "special agents, accountants, and examiners." It lists the employees who are considered special agents, accountants, and examiners, provides that the Chairman can designate other employees, and contains a facsimile of the ICC's credentials.

The section 1000.5 regulations are based on former section 20(5) of the Interstate Commerce Act, later recodified at former 49 U.S.C. 11144.² The *ICCTA* maintained these provisions in new 49 U.S.C. 11144, 14122, and 15721. Retaining and updating these regulations to reflect the new law is unnecessary,

¹ We are also removing from part 1001.4 the provision that certification of records shall be made under seal, as this is not the only means of certification used by the Board.

² The rules were not revised when the statute was recodified in 1978, even though changes to terminology had been made. For example, under section 20(5) of the Interstate Commerce Act, "any duly authorized special agent, accountant, or examiner" could copy "accounts, books, records, memoranda, correspondence, and other documents." The regulations in section 1000.5 use this language. However, in the recodification of the Interstate Commerce Act at former 49 U.S.C. 11144, for the sake of clarity "an employee designated by the Commission" was substituted for "any duly authorized special agent, accountant, or examiner", and, to comport with 5 U.S.C. 552(a) (the Freedom of Information Act), "records" replaced "accounts, books, records, memoranda, correspondence, and other documents." H. Rep. No. 1395, 95th Cong., 2d Sess. 147 (1978).

because such rules would simply repeat the provisions set forth in the statute. We will amend 49 CFR part 1011.5, however, which covers delegations of authority to the Chairman,³ to provide that the Chairman of the Board shall specify in writing the employees authorized to inspect and copy records and to inspect and examine lands, buildings, and equipment pursuant to 49 U.S.C. 11144, 14122, and 15721.

The ICC credentials shown in section 1000.5 are outdated, and we see no point in codifying a facsimile of the Board's credentials. We do not believe that the public would turn to the *Code of Federal Regulations* to verify a Board employee's credentials. We believe that rules are more appropriately used to provide more meaningful guidance as to Board procedures or Board policy regarding substantive issues.

PART 1001

Part 1001 deals with two separate matters: the availability and certification of records (sections 1001.1 to 1001.4); and Freedom of Information Act (FOIA) issues (sections 1001.5 and 1001.6). The FOIA sections were not substantively affected by the *ICCTA* and, therefore, we are simply changing ICC references to STB references and making other minor changes in those sections. We are also changing the ICC references in the records sections and updating retained statutory references.

The *ICCTA* made other changes that require modifying the rules. Section 1001.1(a) is being amended to reflect the new tariff and contract summary filing requirements and to recognize that government quotations are no longer filed at the Board. We are removing section 1001.1(c) (concerning reports, maps, and profiles), which is based on repealed 49 U.S.C. 10783. The language of section 1001.1(d) is being simplified and obsolete references are being deleted. We are removing sections 1001.2 and 1001.3, because the field offices formerly maintained by the ICC have been closed and because the Board does not have jurisdiction over international joint ocean-motor through-rate movements.

Because these changes to the regulations are technical, and do not involve substantive revisions of our rules, notice and comment are not needed. Under 5 U.S.C. 553(b)(A), the Administrative Procedure Act's requirements of notice

³ We note that part 1011, concerning delegations of authority, contains a number of obsolete provisions. We will soon be issuing a decision that updates the remainder of part 1011.

and comment are not applicable to "rules of agency organization, procedure, or practice."⁴ The rules we are revising fall within these categories.

Small Entities

The Board certifies that these rule changes will not have a significant economic effect on a substantial number of small entities. The changes being made largely pertain to agency management, personnel, and procedure, and should have no impact on small entities.

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 1011

Administrative practice and procedure, Authority delegation (Government agencies), Organization and functions (Government agencies).

By the Board, Chairman Morgan and Vice Chairman Owen.

⁴ When the ICC issued the section 1000.5 regulations [May 15, 1959 (24 Fed Reg. 3957)], it stated that, because the rules were a clarification of regulations concerning agency personnel, a rulemaking proceeding pursuant to the Administrative Procedure Act was unnecessary.

APPENDIX

For the reasons set forth in the preamble, parts 1000, 1001, and 1011 of title 49, chapter X, of the Code of Federal Regulations are amended as follows:

PART 1000 — THE BOARD

1. The authority citation for part 1000 is revised to read as follows:

Authority: 5 U.S.C. 552

2. The heading of part 1000 is revised to read as set forth above.
3. The heading of "Subpart A - General" and sections 1000.1 and 1000.5 are removed.
4. Part 1001 is revised to read as follows:

PART 1001 — INSPECTION OF RECORDS

Sec.

- 1001.1 Records available at the Board's office.
- 1001.2 Certified copies of records.
- 1001.3 Requests to inspect other records not considered public under 5 U.S.C. 552.
- 1001.4 Predisclosure notification procedures for confidential commercial information.

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

§ 1001.1 Records available at the Board's office.

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 5:00 p.m., Monday through Friday):

- (a) Copies of tariffs and railroad transportation contract summaries filed with the Board pursuant to 49 U.S.C. 13702(b) and 10709(d), respectively.
- (b) Annual and other periodic reports filed with the Board pursuant to 49 U.S.C. 11145.
- (c) All docket files, which include documents of record in a proceeding.
- (d) File and index of instruments or documents recorded pursuant to 49 U.S.C. 11301.
- (e) STB Administrative Issuances.

§ 1001.2 Certified copies of records.

Copies of and extracts from public records will be certified by the Secretary. Persons requesting the Board to prepare such copies should clearly state the material to be copied, and

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whether it shall be certified. Charges will be made for certification and for the preparation of copies as provided in part 1002 of this chapter.

§ 1001.3 Requests to inspect other records not considered public under 5 U.S.C. 552.

Requests to inspect records other than those now deemed to be of a public nature shall be in writing and addressed to the Freedom of Information Officer (Officer). The Officer shall determine within 10 days of receipt of a request (excepting Saturdays, Sundays, and legal public holidays) whether a requested record will be made available. If the Officer determines that a request cannot be honored, the Officer must inform the requesting party in writing of this decision and such letter shall contain a detailed explanation of why the requested material cannot be made available and explain the requesting party's right of appeal. If the Officer rules that such records cannot be made available because they are exempt under the provisions of 5 U.S.C. 552(b), an appeal from such ruling may be addressed to the Chairman. The Chairman's decision shall be administratively final and state the specific exemption(s) contained in 5 U.S.C. 552(b) relied upon for denial. Such an appeal must be filed within 30 days of the date of the Freedom of Information Officer's letter. The Chairman shall act in writing on such appeals within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of any appeal. In unusual circumstances, as set forth in 5 U.S.C. 552(a)(6)(B), the time limit may be extended, by written notice to the person making the particular request, setting forth the reasons for such extension, for no more than 10 working days. If the appeal is denied, the Chairman's order shall notify the requesting party of his or her right to judicial review. Charges shall be made as provided for in § 1002.1(f) of this chapter.

§ 1001.4 Predisclosure notification procedures for confidential commercial information.

(a) *In general.* Confidential commercial information provided to the Interstate Commerce Commission or the Board shall not be disclosed pursuant to a Freedom of Information Act (FOIA) request except in accordance with this section. For such purposes, the following definitions apply:

(1) *Confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to, corporations, state governments, and foreign governments.

(b) *Notice to submitters.* Except as provided in paragraph (g) of this section, the Board, to the extent permitted by law, shall provide a submitter with prompt written notice, in accordance with paragraph (c) of this section, of receipt of an FOIA request encompassing its submissions. This notice shall either describe the exact nature of the information requested or provide copies of the records themselves.

(c) *When notice is required.* Notice shall be given to a submitter whenever:

(1) The Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(2) The information has been designated, in good faith by the submitter, as confidential commercial information at the time of submission or within a reasonable time thereafter. Whenever possible, the submitter's claim of confidentiality shall be supported by a statement or certification by an officer or authorized representative of the company that the information in question is in fact confidential commercial information and has not been disclosed to the public.

(d) *Opportunity to object to disclosure.* (1) Through the notice described in paragraph (b) of this section, the Board shall afford a submitter a reasonable period of time in which to provide it with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding the requested information.

(2) When notice is given to a submitter under this section, the Board also shall notify the requester that it has been provided.

(e) *Notice of intent to disclose.* (1) The Board shall consider carefully a submitter's objections and specific grounds for nondisclosure prior to its determination whether or not to disclose the requested information. Whenever the Board decides to disclose the information over a submitter's objection, it shall provide the submitter with written notice containing the following:

- (i) A description or copy of the information to be disclosed;
- (ii) The reasons why the submitter's disclosure objections were not sustained; and
- (iii) A specific disclosure date, which shall be a reasonable number of days after the notice of intent to disclose has been mailed to the submitter.

(2) At the same time that notice of intent to disclose is given to a submitter, the Board shall notify the requester accordingly.

(f) *Notice of lawsuit.* (1) Whenever an FOIA requester brings legal action seeking to compel disclosure of confidential commercial information, the Board shall promptly notify the submitter.

(2) Whenever a submitter brings legal action seeking to prevent disclosure of confidential commercial information, the Board shall promptly notify the requester.

(g) *Exception to notice requirement.* The notice requirements of this section shall not apply if:

- (1) The Board determines that the information requested should not be disclosed; or
- (2) The information already has been published or otherwise officially made available to the public; or
- (3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or
- (4) Disclosure is required by a Board rule that:
 - (i) was adopted pursuant to notice and public comment;
 - (ii) specifies narrow classes of records submitted to the Board that are to be released; and
 - (iii) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or within a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

or

(5) The information requested was not designated by the submitter as exempt from disclosure, when the submitter had an opportunity to do so at the time of submission or within a reasonable time thereafter, unless the Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(6) The designation made by the submitter in accordance with these regulations appears obviously frivolous; in such case, the Board must provide the submitter only with written notice of any administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

PART 1011 - BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

5. The authority citation for part 1104 is revised to read as follows:

Authority: 5 U.S.C. 553, 31 U.S.C. 9701, and 49 U.S.C. 701, 721, 11144, 14122, and 15721.

6. The heading for part 1011 is revised to read as set forth above.

§ 1011.5 [amended]

7. Section 1011.5 is amended by revising the heading and by adding a new paragraph (a)(9) to read as follows:

§ 1011.5 Delegations to individual Board Members.

(a) * * *

(9) Designation in writing of employees authorized to inspect and copy records and to inspect and examine lands, buildings, and equipment pursuant to 49 U.S.C. 11144, 14122, and 15721.

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