

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 738
REGULATORY REFORM TASK FORCE

243990

ENTERED
Office of Proceedings
July 24, 2017
Part of
Public Record

COMMENTS

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

July 24, 2017

Attorney for Samuel J. Nasca

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte No. 738
REGULATORY REFORM TASK FORCE

COMMENTS

Preliminary Statement

Samuel J. Nasca, for and on behalf of SMART/Transportation Division- New York State Legislative Board (SMART/TD-NY), submits these initial comments in response to the Surface Transportation Board (STB) Notice dated and served June 20, 2017. (Notice). 82 Fed. Reg. 28617 (June 23, 2017). Samuel J. Nasca is the New York State Legislative Director for SMART/TD-NY, an elective position he had held for many years. SMART/TD is successor to the former United Transportation Union, which merged with the former Sheet Metal Workers'

International Association, which was implemented August 2014.

The Notice establishes a "listening session" for July 25, 2017, at the STB's headquarters in Washington, DC. The Notice had been preceded by an agency Press Release, No. 17-6, issued April 25, 2017, advising the public that STB Acting Chairman, Ann D. Begeman, has designated a Board employee, Rachel D. Campell, as the STB's Regulatory Reform Officer (RRO), consistent with the "spirit" of President Donald J. Trump's Executive Order 13,777, issued February 24, 2017, on implementing and enforcing regulatory reform, and with ongoing agency regulatory and process review initiatives.

The June 20, 2017 Notice, and an accompanying Press Release, No. 17-7, issued the same day, advised the public that there had been established a Regulatory Reform Task Force (RRTF) to comply with the "spirit of Executive Order 13,777 (EO) issued February 24, 2017." The initial goals of RRTF are stated to (1) improve implementation of regulatory reform initiatives pursuant to the EO; and (2) evaluate existing regulations to identify regulations for repeal, replacement, or

modification, consistent with applicable law.

The Notice also advised that on May 25, 2017 the RRTF had submitted its first status report.(see: EO 13,777,§3(g)). Apparently, the first RRTF meeting was held May 11, 2017. This RRTF 90-day status report stated that following the appointment on April 25, 2017 of the RRO, the RRTF was formed, with five additional named STB staff members.

The June 20, 2017 Notice "Listening Session" to be held July 25, 2017, indicated five potential proposals for the "listening," namely, (1) repeal requirement to file water carrier tariffs; (2) revise environmental rules; (3) replace outdated procedural/filing rules; (4) pending OFA EP-729 rules; and (5) comments in EP-712.

The Board did not publicly reveal activities in response to President Trump's EO 13,777, other than appointment of the RRO (see: EO 13,777,§2(a)), until establishment of the RRTF, and other matters, on June 20, 2017. However, the Board on June 29, 2017, made public the 10-page letter it had received earlier on May 18, 2017 from Association of American Railroads (AAR), listing AAR's items sought to be deregulated.

ARGUMENT

I. THE PRESIDENT'S EO 13,777 IS NOT APPLICABLE TO THE INDEPENDENT STB.

The attempt of the STB's Acting Chairman to justify establishment of its RRTF, along with its RRO, as the "spirit" of the President Trump EO 13,777, amounts to an invalid attempt to carry out the procedural and substantive directives of the EO, without acknowledging formal legal compliance with the EO. However, the agency itself is to enforce and regulate under Congressional laws, not to a different command of the U.S. President.

The STB's actions are governed by specific Constitutional and Congressional standards, whereas the U.S. President is subject to different Constitutional and Congressional standards. Although the President can name the STB head, the actions of that person are subject to the Congress.

EO,13,777, dated February 24 and issued March 1, 2017, attached as Appendix 1, makes reference to and incorporate EO 13,771, dated January 30 and issued February 3, 2017, attached as Appendix 2. The latter EO 13,771 is the only other related EO issued by the

current President Trump, and is perhaps better known as the "one-for-two" proposal, i.e., that for every new regulation issued, at least two prior regulations be identified for elimination.

Section 2(ii) of EO 13,777 directs the RRO to carry out provisions of EO 13563 (Jan. 18, 2011). However, the STB has found EO 13563 does not apply to independent agencies. See: Ex Parte 712, Improving Regulation and Regulatory Review, 2 (served Oct. 12, 2011). Moreover, EO 13,777, §3(iv), is directed to agencies embraced within 31 U.S.C. 901(b)(1). The STB is not mentioned in that section.

It is noteworthy that AAR, in its May 18, 2017 letter to the RRO, suggests that the Board as an independent agency may be outside the specific mandates of EO 13,777.

It is clear to this commenter that the STB is not subject to Trump's EO 13,777. Although the Acting Chairman perhaps may have taken a different view of Presidential executive orders dealing with agency regulations, the transportation industry has been shown better suited in dealing with government agencies

through a separation of powers. Cf. Ex Parte 712, Improving Regulation and Regulatory Review, 7 (served Feb. 18, 2016).

II. THE AAR PROPOSALS ARE MOSTLY INAPPROPRIATE

The May 18, 2017 proposals advanced by AAR in its 10-page letter are for the most part clearly inappropriate for this proceeding. The AAR claims that various pending proceedings being conducted by the agency are inconsistent with the Staggers Act, which the AAR asserts is perhaps the single greatest regulatory reform initiative. (AAR, 2-6). The "listening session" should not embrace AAR's list of pending proceedings, which are predicated upon separate records involving numerous parties, and subject to briefs, appeals, and other on-the-record rules.

Moreover, reference to the Staggers Act is not in point. The Staggers Act was not the basic deregulation act. The key deregulation legislative measure was the 4-R act. The Staggers Act dealt with regulation regarding contract rates. For the most part, railroads were reluctant to employ contract rates absent

legislation. We point to the statement of former UTU General Chairman and Vice President, John D. Fitzgerald, in Ex Parte 658, Oct. 12, 2005. (ID 214903). See also: Stone, Richard D., The Interstate Commerce Commission and the Railroad Industry (Praeger, 1991).

The primary regulatory "reform" item suggested by the AAR is to modify the STB's ex parte communication rule. (AAR, 7-8). Contrary to the AAR, the Board's ex parte communication rule is not self-imposed, but came about by analogy with court rules, and through practitioners at the agency proceedings. The current move to abrogate the ex parte prohibition apparently stems from agency staff personnel and inexperienced agency members-one member in particular.

There is no basis to permit currently inappropriate communications. To do so will lead to corruption, with detriment to the agency. Even where Congress acted to permit ex parte communications in certain STB railroad merger proceedings, the STB nevertheless forbid such conduct. Ex Parte 619, Petition of Fieldston Co., Etc. (Served Jan. 8, 1997). See also: Press Release 97-01 (Jan. 8, 1997).

The AAR's comments about federal preemption (AAR, 9-10) are not really directed to deregulation, but to the exact opposite—for under preemption the STB would seize more regulation at the expense of state and local regulation.

III. THE STB RRTF PROPOSALS LACK ANALYSIS FOR LISTENING SESSION.

The Regulatory Reform Task Force (RRTF) list of five subjects lacks sufficient analysis for a meaningful "listening session." The term "listening session" is generally used as a technique in "audio journalism" and sometimes in agricultural teaching sessions. Although the method may test sincerity, this commenter does not consider it appropriate for fact determination or resolution.

The substitution of less experienced staff to deal with the public, and an RRO to report to the agency head with recommendations, are inadequate alternatives to procedures under the normal agency laws established by the Congress and under rules by the agency itself. It is noteworthy that the Board's June 20, 2017 Notice does not invite written comments by persons attending the

"listening session" prior to July 25, 2017, or that timely post-session filings may be submitted thereafter.

1. Water carrier tariff filing. (RRTF, 1). This subject involves the non-contiguous domestic trades (movements between U.S. mainland points and Alaska, Hawaii, or U.S. territories such as Puerto Rico, Guam, etc.). The Board inherited rate jurisdiction held by the Federal Maritime Commission (FMC) as part of ICCTA legislation effective in 1996. There is an absence of meaningful legislative history concerning the basis for this transfer from FMC to STB. The filing and maintenance of tariffs may be important to the shipping industry and to shippers located in distant territories, at ports as well as inland points. The Board should broaden notice and enlist the views and assistance of other federal agencies. Perhaps an alternative course to reduce the STB's burden might be transfer of noncontiguous commerce back to FMC regulation. (RRTF-2)

2. Environmental rules. (RRTF-2) The environmental proposal is too inexact to provide an intelligent listening session.

3. Procedural/Filing rules. (RRTF-2) The proposal

for elimination of paper filings, either by permitting all filings to be made through the Board's website, or repealing the requirement that paper copies be filed, would be most unwise. The STB's website is capable of manipulation, and in fact revision of filings is an everyday occurrence. Initial paper filings, as well as paper copies are essential, even though the website may be retained for viewing of documents without personal visit to the agency docket room.

4. OFA Rulemaking Ex Parte 729.(RRTF-2) This a pending proceeding, which is understood to have been concluded in major respects by decision served June 29, 2017, subsequent to the May 25, 2017 RRTF report.

5. Comments on Ex Parte 712.(RRTF-2). This is a pending proceeding, and inappropriate for listening session. This commenter filed an extensive pleading five years ago in Ex Parte 712.

Respectfully submitted,



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

July 24, 2017

Attorney for Samuel J. Nasca

Presidential Documents

Title 3—

Executive Order 13777 of February 24, 2017

The President

Enforcing the Regulatory Reform Agenda

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to lower regulatory burdens on the American people by implementing and enforcing regulatory reform, it is hereby ordered as follows:

Section 1. Policy. It is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.

Sec. 2. Regulatory Reform Officers. (a) Within 60 days of the date of this order, the head of each agency, except the heads of agencies receiving waivers under section 5 of this order, shall designate an agency official as its Regulatory Reform Officer (RRO). Each RRO shall oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. These initiatives and policies include:

(i) Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), regarding offsetting the number and cost of new regulations;

(ii) Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), as amended, regarding regulatory planning and review;

(iii) section 6 of Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), regarding retrospective review; and

(iv) the termination, consistent with applicable law, of programs and activities that derive from or implement Executive Orders, guidance documents, policy memoranda, rule interpretations, and similar documents, or relevant portions thereof, that have been rescinded.

(b) Each agency RRO shall periodically report to the agency head and regularly consult with agency leadership.

Sec. 3. Regulatory Reform Task Forces. (a) Each agency shall establish a Regulatory Reform Task Force composed of:

(i) the agency RRO;

(ii) the agency Regulatory Policy Officer designated under section 6(a)(2) of Executive Order 12866;

(iii) a representative from the agency's central policy office or equivalent central office; and

(iv) for agencies listed in section 901(b)(1) of title 31, United States Code, at least three additional senior agency officials as determined by the agency head.

(b) Unless otherwise designated by the agency head, the agency RRO shall chair the agency's Regulatory Reform Task Force.

(c) Each entity staffed by officials of multiple agencies, such as the Chief Acquisition Officers Council, shall form a joint Regulatory Reform Task Force composed of at least one official described in subsection (a) of this section from each constituent agency's Regulatory Reform Task Force. Joint Regulatory Reform Task Forces shall implement this order in coordination with the Regulatory Reform Task Forces of their members' respective agencies.

(d) Each Regulatory Reform Task Force shall evaluate existing regulations (as defined in section 4 of Executive Order 13771) and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law. At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that:

- (i) eliminate jobs, or inhibit job creation;
- (ii) are outdated, unnecessary, or ineffective;
- (iii) impose costs that exceed benefits;
- (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

(e) In performing the evaluation described in subsection (d) of this section, each Regulatory Reform Task Force shall seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations.

(f) When implementing the regulatory offsets required by Executive Order 13771, each agency head should prioritize, to the extent permitted by law, those regulations that the agency's Regulatory Reform Task Force has identified as being outdated, unnecessary, or ineffective pursuant to subsection (d)(ii) of this section.

(g) Within 90 days of the date of this order, and on a schedule determined by the agency head thereafter, each Regulatory Reform Task Force shall provide a report to the agency head detailing the agency's progress toward the following goals:

- (i) improving implementation of regulatory reform initiatives and policies pursuant to section 2 of this order; and
- (ii) identifying regulations for repeal, replacement, or modification.

Sec. 4. Accountability. Consistent with the policy set forth in section 1 of this order, each agency should measure its progress in performing the tasks outlined in section 3 of this order.

(a) Agencies listed in section 901(b)(1) of title 31, United States Code, shall incorporate in their annual performance plans (required under the Government Performance and Results Act, as amended (see 31 U.S.C. 1115(b))), performance indicators that measure progress toward the two goals listed in section 3(g) of this order. Within 60 days of the date of this order, the Director of the Office of Management and Budget (Director) shall issue guidance regarding the implementation of this subsection. Such guidance may also address how agencies not otherwise covered under this subsection should be held accountable for compliance with this order.

(b) The head of each agency shall consider the progress toward the two goals listed in section 3(g) of this order in assessing the performance of the Regulatory Reform Task Force and, to the extent permitted by law, those individuals responsible for developing and issuing agency regulations.

Sec. 5. Waiver. Upon the request of an agency head, the Director may waive compliance with this order if the Director determines that the agency generally issues very few or no regulations (as defined in section 4 of Executive Order 13771). The Director may revoke a waiver at any time. The Director shall publish, at least once every 3 months, a list of agencies with current waivers.

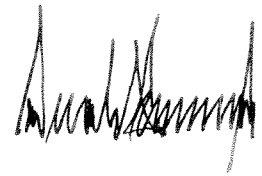
Sec. 6. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
February 24, 2017.

[FR Doc. 2017-04107
Filed 2-28-17; 11:15 am]
Billing code 3295-F7-P

Presidential Documents

Executive Order 13771 of January 30, 2017

Reducing Regulation and Controlling Regulatory Costs

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101 *et seq.*), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. Purpose. It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.

Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.

(b) For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).

(c) In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.

(d) The Director shall provide the heads of agencies with guidance on the implementation of this section. Such guidance shall address, among other things, processes for standardizing the measurement and estimation of regulatory costs; standards for determining what qualifies as new and offsetting regulations; standards for determining the costs of existing regulations that are considered for elimination; processes for accounting for costs in different fiscal years; methods to oversee the issuance of rules with costs offset by savings at different times or different agencies; and emergencies and other circumstances that might justify individual waivers of the requirements of this section. The Director shall consider phasing in and updating these requirements.

Sec. 3. Annual Regulatory Cost Submissions to the Office of Management and Budget. (a) Beginning with the Regulatory Plans (required under Executive Order 12866 of September 30, 1993, as amended, or any successor order) for fiscal year 2018, and for each fiscal year thereafter, the head of each agency shall identify, for each regulation that increases incremental cost, the offsetting regulations described in section 2(c) of this order, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation.

(b) Each regulation approved by the Director during the Presidential budget process shall be included in the Unified Regulatory Agenda required under Executive Order 12866, as amended, or any successor order.

(c) Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.

(d) During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.

(e) The Director shall provide the heads of agencies with guidance on the implementation of the requirements in this section.

Sec. 4. Definition. For purposes of this order the term "regulation" or "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency, but does not include:

(a) regulations issued with respect to a military, national security, or foreign affairs function of the United States;

(b) regulations related to agency organization, management, or personnel; or

(c) any other category of regulations exempted by the Director.

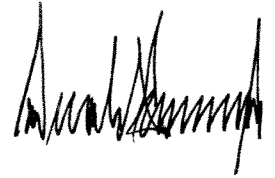
Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to be "Donald Trump", located in the upper right quadrant of the page.

THE WHITE HOUSE,
January 30, 2017.

[FR Doc. 2017-02451
Filed 2-2-17; 11:15 am]
Billing code 3295-F7-P