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Richard Parsons
GCM

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE:

B-175155

DATE: MAR 23 1977

MATTER OF:

Interim Authority of ICC Office of Rail Public Counsel

DIGEST:

1. The Office of Rail Public Counsel to be established under authority of a new section 27 of the Interstate Commerce Act as amended by section 304 of the Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, is independent of the Interstate Commerce Commission although affiliated therewith. Consequently the Commission has no authority to appoint an Interim Director or other employees of such statutory Office.
2. The Interstate Commerce Commission, as part of its statutory authority under the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 715, to make sure that the public interest is properly represented in its proceedings, can create an Office of Public Counsel with significant but not complete independence from the Commission. Creation of the Office of Rail Public Counsel under section 304 of Pub. L. No. 94-210 will preempt from the ICC those functions relating to rail matters granted that independent Office, but such Office is not actually established until the first Director is appointed by the President and confirmed by the Senate.

This decision responds to a request from George M. Stafford, Chairman of the Interstate Commerce Commission (ICC), for advice with respect to whether the Commission may appoint an interim director of the newly authorized Office of Rail Public Counsel pending the Presidential appointment and Senate confirmation of the first permanent director under section 304 of the Railroad Revitalization and Regulatory Reform Act of 1976 (known as the 4R Act), Pub. L. No. 94-210, 90 Stat. 51. Mr. Stafford's request was prompted by a suggestion he received from the Chairman of the Senate Committee on Commerce and the Chairman of the Surface Transportation Subcommittee of the Senate Committee on Commerce that the Commission make such an interim appointment.

Mr. Stafford's letter asks five questions:

- "1. Whether, under the terms of the Railroad Revitalization and Regulatory Reform Act or other applicable law, the Commission is empowered to appoint an interim director of the Office of Rail Public Counsel.
- "2. If so, what powers may be conferred by the Commission as compared with those powers conferred upon the permanent director under the Railroad Revitalization and Regulatory Reform Act.
- "3. Whether an interim director would have power to make future budget requests directly to Congress in the way that the Railroad Revitalization and Regulatory Reform Act appears to confer such power on the permanent director.
- "4. Whether it is lawful for the Commission to allocate budget and staffing resources to an interim office of Rail Public Counsel.
- "5. In the event that you are of the opinion that the Commission could not appoint an interim director of the Office of Rail Public Counsel, whether the Commission could do indirectly what it could not do directly; that is, whether it could designate employees (or a consultant or contractor) temporarily to carry out functions identical or similar to those assigned by statute to the Office of Rail Public Counsel and fund those functions from its present budget resources."

Question 1

In his letter responding to the suggestions from the Chairman, Mr. Stafford expressed the Commission's view that the proposed appointment of an interim Director of the Office of Rail Public Counsel is of doubtful legality. He said:

"In our discussions we have had very much in mind that Congress intended the Director of the Office of Rail Public Counsel to be appointed by the President with the advice and consent of the Senate. PL 94-210 gives the Director such policy and budgetary autonomy that we, after consultation with our General Counsel, have been forced to conclude that we could not name even an Acting Director without thwarting the apparent will of Congress and the

prerogative of the President to select his own nominees. It would also appear that we could not legally use funds allowed under the Act for an Acting Director of our own choosing, nor could we legally divert funds authorized for other Commission functions to such an acting official. It would appear to be legally very doubtful that an Acting Director could use funds appropriated to an office which by law is to be activated by the making of a Presidential appointment. The Acting Director could operate only through the use of Commission personnel detailed to him, thus making the Office primarily a Commission function."

This reasoning is sound. Section 304 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, by amending the Interstate Commerce Act to provide for a redesignated section 27, provides for the establishment of an independent Office of Rail Public Counsel. Section 27(1) describes the Office as "a new independent office affiliated with the Commission * * *." Section 27(2)(a) provides that the Office " * * * shall be administered by a Director * * * appointed by the President, by and with the advice and consent of the Senate." Section 27(2)(b) makes the Director, not the Commission, "responsible for the discharge of the functions and duties of the Office of Rail Public Counsel." The Director also has, under section 27(3), authority to "appoint, fix the compensation, and assign the duties of employees" and to "enter into * * * such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of his functions and duties." Section 27(4) lists a series of independent actions the Office may take to participate in Commission proceedings and contest Commission actions.

Section 27 in no way suggests that the Office of Rail Public Counsel is a part of the Interstate Commerce Commission, under its direction or control, or in any way subordinate to it. The only organizational connection between the Office and the ICC suggested in the statute is the word "affiliated" in section 27(1). The ordinary meaning of "affiliated" is that of a loose but formal relationship between persons or groups. The word does not necessarily suggest control or dependence. In the context in which the phrase appears, and considering the remaining subsections of section 27, the word "affiliated" cannot be said to give the ICC any independent control or authority over the Office of Rail Public Counsel. Moreover, the Conference Report, H.R. Report No. 94-781, 94th Cong., 2d Sess. 162-164 (1976) clearly indicates the exercise of a conscious choice to take the selection of the Director out of the hands of the Commission. In view of the foregoing, we find that the Interstate Commerce Commission has no power to appoint an interim director of

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this Office of Rail Public Counsel, nor may it appoint other employees of the Office, such responsibility being placed solely in the Director.

Questions 2, 3 and 4

Our decision with respect to question 1 renders moot questions 2, 3 and 4 of the Chairman's request which are conditional on an affirmative answer to question number 1.

Question 3

The Chairman's question 3 consists of two principal issues; the first is the extent to which the Commission possesses authority to establish an Office of Public Counsel independent of the 4R Act of 1976, and the second is the extent to which section 304 of the 4R Act has preempted any express or implied authority of the Commission to perform Public Counsel functions.

Authority Prior to the 4R Act

In October 1975, the Interstate Commerce Commission announced the establishment of the Office of Public Counsel. This Office was developed out of the experience of the Commission in a special Office of Public Counsel which was established to carry out some of the responsibilities of the Rail Services Planning Office pursuant to section 205 of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, January 2, 1974, 87 Stat. 993, 45 U.S.C. § 715(d)(2) (Supp. IV, 1974). In October 1975, the responsibility of the Public Counsel was expanded to cover all matters subject to ICC consideration.

An October 31, 1975, ICC press release described the Office in the following terms:

"The Public Counsel shall be appointed by the Chairman, subject to the approval of a majority of the Commission. He shall be qualified by training and experience in matters of transportation regulation and be compensated at a GS-18 level of pay in the classified service. He shall be removed only for cause by an absolute majority of the entire Commission membership.

"The Public Counsel shall be subject to the administrative supervision of the Chairman but in all other respects shall not be accountable to the Chairman or the Commission, and shall have the right to make independent budget recommendations to the Office of Management and Budget and the Congress.

"The Public Counsel within the budgetary and personnel allocations and pursuant to such procedural requirements as the Commission shall have established, shall employ or contract for such permanent or temporary personnel and services as may be necessary for the proper discharge of his functions and duties, including the employment of attorneys, engineers, accountants, and economists, as may be required for the preparation, offering, and analysis of testimony and exhibits. In addition, he shall coordinate the activities of the Office of Public Counsel with other Bureaus and Offices of the Commission and may request, and upon approval of the Chairman shall receive the assistance and services of such other Bureaus and Offices, having due regard for their existing workloads.

"The Counsel shall have discretion to participate as a party in proceedings, adjudicative or rulemaking, before the Commission in which he deems his participation may be of assistance to the Commission in determining the public interest, and the Commission, on its own initiative, may direct his participation as a party. The proceedings normally will be, but are not necessarily limited to, those in which issues of national transportation importance are involved, in which hearings are ordered, and/or in which the representatives of the parties are not likely to develop all of the facts or arguments that the Commission should have in rendering its decision. He will in any proceeding be responsible for assisting in the development of the record in the Commission's effort to determine the public interest with regard to the Interstate Commerce Act and related statutes, recognizing that such legislation provides the frame of reference within which the Commission operates, and that the policies expressed therein must be the basic determinants of its action.

"The Public Counsel, as any other party, may intervene in, and may petition for the institution of proceedings before the Commission at such times and in such manner as is appropriate under the Commission's rules, and he shall as a party be afforded all of the rights, and be bound by all of the obligations applicable to other parties and their counsel."

We have held in cases concerning the Federal Trade Commission (FTC), B-139703, 1972, and Nuclear Regulatory Commission (NRC), B-92288, 1976, that each of these regulatory agencies (as well as others discussed therein, including the ICC) possesses authority to pay the expenses of indigent intervenors from its appropriated funds and take certain other

administrative actions to facilitate participation in the proceedings by such intervenors when the agency determines that such participation is essential to enable it to carry out its functions and the assistance provided is necessary to secure the participation of the intervenors in question. We noted some important limitations, however. With respect to the authority to provide a Public Counsel we stated in our decision in the NRC case, B-92288, supra:

"Certainly, however, no authority exists for NRC to supply funds for an independent Public Counsel outside of the regulatory agency * * *.

* * * * *

"* * * Although we believe the Commission's authority to administer the Atomic Energy regulatory scheme is sufficient to allow provision of some form of assistance to participants, it does not have authority to use its appropriation to finance independent entities not within the jurisdiction and control of the agency where the purpose of those entities is to assist adversary participants in NRC's proceedings."

The limitations suggested by these comments do not pertain to the ICE Office of Public Counsel that was formed in early 1974 as part of the Rail Services Planning Office to carry out the explicit mandate of section 205 of the Regional Rail Reorganization of 1973, 45 U.S.C. § 715. In expanding the Office of Public Counsel, the ICC's press release of October 31, 1975 (quoted supra) indicates that it was reorganized to give it more independence but nonetheless is still based upon a delegation of authority from the Commission. While substantially insulating the Office from day to day control of the rest of the Commission, the Office as described in the October 31 press release is not "an independent Public Counsel outside the regulatory agency * * *" which we cautioned against in our NRC decision. Id. The Public Counsel who heads the Office is assigned the responsibility by the Commission of assisting it "in developing the record in the Commission's effort to determine the public interest." The Commission is to hire the Public Counsel and can remove him for cause. The Counsel is to employ personnel under "budgetary and personnel allocations pursuant to such procedural requirements as the Commission shall have established * * *" And despite the statement that the Public Counsel "shall not be accountable to the Chairman or the Commission," the Commission retains authority to reorganize this Office so as to regain any authority it has delegated. Further, the Commission has not, nor could it, relieve itself of its ultimate

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accountability for an Office that remains within its organizational framework. Compare this form of independence with the independence created by the Office of Rail Public Counsel discussed under Question 1.

Accordingly, we find that the ICC had the authority to create an office such as that described in the October 31, 1975, press release under its general statutory and regulatory authority and that it continues to possess such authority, subject to any presumption resulting from section 304 of the 4R Act.

Presumption

While there is no specific language in section 304 of the 4R Act preempting the authority of the ICC to exercise authority it possessed prior to its passage, there is a clear indication in the way section 304 is written and its legislative history that the Office of Rail Public Counsel was intended to replace that portion of the ICC Office of Public Counsel functions that dealt with matters involving common carriers by railroad, subject to Part I of the Interstate Commerce Act, 49 U.S.C. § 1, et seq.

The Senate Committee on Commerce reviewed the development of ICC's present Office of Public Counsel with approval. In its report on S. 2718, the Committee said:

"Another impediment to regulation in the public interest has been the limited opportunity for the development of a public interest record before the Commission. While the provisions of the Interstate Commerce Act require public notice of proposed actions, an opportunity for interested persons to submit their views, and public hearings in some cases, public participation and more importantly the development of a public interest record, has been limited.

"Acknowledging this problem, the Regional Rail Reorganization Act of 1973 gave an even more explicit mandate to the Commission's Rail Services Planning Office created by that Act, to assure that the views of the public were adequately represented in the hearings and evaluations conducted by the Office. Section 205(d)(2) of that Act directed the Office to employ the services of attorneys and other personnel to protect the interests of communities and users of rail service which, for whatever reason, such as their size or location, might not

otherwise be adequately represented in the course of the hearings and evaluations conducted under the Act.

"In response to this Congressional mandate, the Director of the Rail Services Planning Office appointed a Public Counsel whose functions is to provide legal representation and assistance to the public throughout the restructuring process set in motion by the Act. The Office conducted hearings on the preliminary system proposed by the USRA and at each hearing location one or two attorneys from the Office of Public Counsel were assigned to assist the public. These attorneys meet continuously and extensively with the public in the weeks prior to the hearings and during the hearings themselves. The Office of the Public Counsel was independent of the administrative control of the Director in developing for the record any information or view deemed pertinent.

"In its oversight of the regional Rail Reorganization Act, this Committee found the workings of the Office of Public Counsel contributed greatly to the reorganization process by both keeping those who might be affected by the Act informed of the reorganization process and by representing them in the various proceedings called for under the Reorganization Act. This work both increased public confidence in the outcome of the reorganization process and increased the quality of that process by insuring that the voice of all concerned was heard by the planning officials.

"The success of this limited experiment has led the ICC and this Committee to conclude that the public would benefit by the creation of a permanent Office of Public Counsel affiliated with the Commission to help the Commission to develop the record on issues affecting the public interest. The Commission moved in October to create such an Office and this legislation would provide a legislative sanction for this action. Of course if the Congress eventually creates an independent Agency for Consumer Advocacy, the Committee would expect that a specialized Office of Public Counsel concerned solely with surface transportation matters could be integrated into that agency." (Emphasis added.)
Report of Senate Committee on Commerce on S. 2718, S. Report No. 94-499, 94th Cong., 1st Sess. 15-16 (November 26, 1975).

As can be seen from this report, Congress was aware of the scope of the ICC delegation to its Office of Public Counsel in October 1975. The version of the bill, S. 2716, that the Committee had before it at that time was described by the Committee as providing legislative sanction for the existing ICC office. Id. However, as indicated by the underlined portions of the report, supra, it anticipated a fully independent specialized Office of Public Counsel "eventually" which would replace the existing office.

The House passed version of this Act, H.R. 10979, created a similar Office to the one created by the ICC in October 1975. However, due to a jurisdictional objection by the House Committee on Public Works and Transportation, its proposed Office was restricted to rail matters and was to be called the Office of Rail Public Counsel. The Conference Committee adopted, in most respects, the Senate's proposal for this Office but restricted its jurisdiction to rail matters. Report of the Committee on Conference on S. 2716, H.R. Report No. 94-781, 94th Cong., 2d Sess. 163-164 (January 23, 1976).

From the above it is our view that while the Congress, for reasons of Committee jurisdiction, dealt only with rail matters, it supports, at least in principle, the more general Office of Public Counsel established by the Commission. Since neither the Act nor its legislative history evidences an intent to limit the Commission's authority to continue its Office of Public Counsel and in view of the general approval given to that Office, it is our opinion that the enactment of section 304 was not in any way intended to affect the Commission's authority to continue those operations of its Office of Public Counsel which were not preempted by and given to the Office of Rail Public Counsel.

We next consider when section 304 of the 4R Act takes effect to limit the operations of the existing Office of Public Counsel. As noted before, the legislative history of section 304 indicates congressional approval of the past efforts of the ICC to develop an office specifically responsible for considering the public interest. It is reasonable to assume that Congress did not intend to affect the Commission's efforts and authority until the Office of Rail Public Counsel actually comes into existence. Despite the language of section 304 which speaks of the Office of Rail Public Counsel as being established within 60 days of enactment of the 4R Act, under the terms of section 304, there can be no functionally existent office until a Director of the Office of Rail Public Counsel is appointed and confirmed in conformance with new section 27(2) of the Interstate Commerce Act. Accordingly, we find no preemption of ICC authority to establish and carry out the functions of an Office of Public Counsel with respect to rail matters until such time as a duly appointed and confirmed Director of the Office of Rail Public Counsel takes office.

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Finally, we note that of the authority granted the Office of Rail Public Counsel under section 304 of the 4R Act, at least the authority to seek judicial review and the authority to evaluate and represent the public interest "before other Federal agencies when their policies and activities significantly affect rail transportation matters subject to the jurisdiction of the Commission" exceed that given the Office of Public Counsel under the internal arrangements of the ICC. See Commission press release, quoted above. These are activities which require specific legislative authorization and would not be sustained as being within ICC's general statutory authority.

We therefore conclude, in answer to question 5, that the ICC retains the authority to establish an Office of Public Counsel similar to that described in its October 31, 1975, press release and that the jurisdiction of that Office to deal with rail matters will not be affected until the Office of Rail Public Counsel established by section 304 of the 4R Act becomes operational. However, the Commission's authority is not sufficiently extensive to give the Office of Public Counsel the same authority granted the Office of Rail Public Counsel to seek judicial review or appear before other agencies as representatives of the public interest.

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