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**WHEN PERCEIVED ABSOLUTE POWER CORRUPTS:
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AGENCY RUNNING ROUGHSHOD OVER THE
ADMINISTRATIVE PROCEDURE ACT?**

*By Roy Goldberg*¹

In the transportation sectors, industry participants must either obtain approval from, or avoid the “slings and arrows” launched by, the regulatory bodies that have either received or snagged immense power to control what is allowed in the regulated area. This includes the Federal Aviation Administration (“FAA”), the Transportation Security Administration (“TSA”), the Department of Transportation (“DOT”) and the Surface Transportation Board (“STB”). All too often a bureaucrat drunk with his or her own power, or perhaps just tired of the delay that is inherent in our federal system, opts for a “shortcut” because, as they perceive it, “they know best.” The old saw “You can’t fight City Hall” seems even more intimidating if we substitute City Hall for the entrenched federal agencies that purport to regulate the transportation industry with an iron fist. Unreasonable “expedition” of agency actions may not always result in “sedition”—but it can certainly deprive interested parties of truth, time and treasure.

But all is not lost. We have something called the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* (“APA”), and a large body of case law from the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) and other federal Circuits (and even the U.S. Supreme Court—on occasion) which have supplied the “thin blue line” which protects our transportation clients from an administrative state that is bent on regulation with not merely a heavy hand, but a figurative “back of the hand.”

¹ Clark Hill PLC, Washington, DC. Author’s note: The author served as counsel for petitioners in several, but certainly not all, of the cases cited herein. Specifically, those challenging FAA overflight fees, TSA Aviation and Security Infrastructure Fees (“ASIF”), and TSA’s interference with the advertising program at federal airports.

At the end of the day, it is our job as transportation sector lawyers to challenge at every turn what William Shakespeare aptly coined “the insolence of office.” But we do have tools—most specifically the APA and the jurisprudence that has enforced this critical weapon in our democratic system.

I. THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act, (Pub. L. No. 79–404, ch. 324, 60 Stat. 237, enacted Jun 11, 1946, is the U.S. federal statute that governs the way in which administrative agencies of the federal government of the United States may propose and establish regulations, and it grants U.S. federal courts oversight over all agency actions. It is one of the most important pieces of U.S. administrative law, and serves as a sort of “constitution” for U.S. administrative law.

In addition to setting forth rulemaking procedures, the APA addresses other agency actions such as issuance of policy statements, licenses, and permits. It also provides standards for judicial review if a person has been adversely affected or aggrieved by an agency action.

The APA applies to both the federal executive departments and the independent agencies. It is a “bill of rights” for American entities and persons whose affairs are controlled or regulated by federal government agencies. The text of the APA can be found under Title 5 of the U.S. Code, beginning at Section 500. Section 702 of the APA waives sovereign immunity, allowing persons to sue a federal agency in court for non-monetary relief, such as an injunction or a declaratory judgment, and to have arbitrary and capricious or otherwise unlawful agency actions set aside.

For litigators, the most important section of the APA is 5 U.S.C. § 706, which states:

The reviewing court shall—

compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

A. Key Decisions Applying the APA to Federal Transportation Agencies.

Since the APA was enacted in 1946, the decades since have seen application of the APA to transportation sector agencies in ways that have helped restrict agency decisions that are beyond the pale. In many of these cases, the agency officials opted for shortcuts to get their work done and to

pursue an objective they personally possessed or viewed as the agency’s goal. But, on many occasions, they opted not to allow the system to reach its potential by fairly airing the relevant issues or treating impacted persons and companies with respect. The APA is an important tool to push back against overly aggressive and unfairly considered agency rushes to rulings.

II. THE FEDERAL AVIATION ADMINISTRATION

A. Unlawful ATC Overflight Fees

On three separate occasions, the D.C. Circuit held that air traffic control fees imposed by the FAA on flights that used FAA ATC but did not take off or land in the United States—referred to as “overflight fees”—were unlawful. When the Air Transport Association of Canada (“ATAC”) challenged the FAA’s overflight fee regime in the D.C. Circuit, the litigation became a multi-round rebuke of DOT/FAA decision-making, with the court repeatedly holding the agency’s actions unlawful and arbitrary and remanding—sometimes vacating—the rules.

In 1996, Congress authorized DOT/FAA to recover costs for air traffic control services provided to such flights, but imposed a key constraint: fees must be “directly related” to the FAA’s costs of providing the ATC service rendered. 49 U.S.C. § 45301 (as originally enacted).

ATAC and foreign carriers argued that the FAA systematically overcharged overflights by allocating costs that those flights did not actually cause. For the FAA, it was critical to collect \$100 million per year (in 1997 dollars) from airlines that flew in U.S.-controlled airspace but did not take off or land in the United States. Rather than take pains to ensure that the fees were truly directly related to agency costs, the FAA opted instead to fudge the math and bill anyway, giving no consideration to the “headwinds” and storm which FAA invited with its imprudent approach.

In *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998), the D.C. Circuit vacated the overflight fee rule, holding that the FAA’s methodology did

not produce fees “directly related” to FAA costs, as required by statute. This was because the agency used a doctrine called “Ramsey pricing” to impose the fees, which caused the fees to not be “directly related” to costs. The D.C. Circuit stated:

We agree with petitioners that, insofar as the FAA allocated fixed and common costs using the Ramsey pricing methodology, its fee structure impermissibly included a component based on value to the user. . . . Ramsey pricing varies the share of total fixed and common costs to a user based on the likely impact of such a cost change on that user’s behavior. This impact is related to a user’s elasticity of demand and to the relationship between the amount to be charged and the user’s total operating costs.

Id. at 401. The court “vacate[d] the fee schedule in its entirety.” *Id.* at 403.

In 2000, the FAA issued a new interim rule, followed by a final rule in 2001, which sought to take advantage of Congress revising the standard from “directly related” to costs to “reasonably related” to costs. The D.C. Circuit was skeptical but initially remanded without *vacatur*, warning the FAA that it needed a real evidentiary basis for its assumptions. *ATAC v. FAA*, 254 F.3d 271 (D.C. Cir. 2001).

The third time was “not a charm” for FAA. In *Air Transport Ass’n of Canada v. FAA*, 323 F.3d 1093 (D.C. Cir. 2003), the D.C. Circuit rejected the overflight fee final rule and set it aside, concluding that the FAA disregarded its statutory mandate, failed to respond meaningfully to record evidence, made assumptions about costs that were unsupported and contradicted by the record, and failed to engage in a product of reasoned decision-making. Judge Stephen Williams wrote:

For the third time, we must review the lawfulness of a Federal Aviation Administration regulation

establishing fees for air traffic control services for overflights—and for the third time, we find that the FAA disregarded its statutory mandate.

Id. at 1094.

Although framed partly as a statutory violation, the D.C. Circuit’s analysis tracks classic arbitrary-and-capricious review by the FAA in the form of: (1) ignoring important aspects of the problem; (2) failing to explain assumptions; and (3) rejection of contrary evidence without reasoned analysis. Writing for the three-judge panel, Judge Stephen Williams stated:

Although consideration of the agency’s specific arguments may seem like flogging a dead horse, we proceed with the exercise so that it may be assured that we have scrutinized its arguments.

Id. at 1096.

Among other things, the D.C. Circuit rejected FAA’s unsubstantiated assumption that the FAA “incurred virtually identical per-mile costs in servicing overflights and non-overflights in the so-called Enroute and Oceanic airspaces.” *Id.* at 1094. It faulted FAA for failing to offer a reasoned basis for rejecting the airlines’ uncontradicted evidence that labor costs incurred in providing air traffic services to overflights were substantially lower than for non-overflights, and that controller duties in the high-altitude sectors are much less intense, and therefore require less controller time. The D.C. Circuit explained:

Each individual controller may service both altitude sectors over the course of the day, but no controller services both types of flights at the same time. Or so say petitioners’ experts, without contradiction. Thus, assuming the truth of petitioners’ other largely uncontradicted claim—that overflights are

overwhelmingly at altitudes above 18,000 feet—the agency need only count the number of shifts devoted to high-altitude flights to calculate the range within which overflights are generating costs.

Id. at 1096.

B. FAA and NEPA

FAA litigation often involves the “hard look” doctrine under the APA and the National Environmental Policy Act (“NEPA”), specifically regarding airport noise and flight paths. In *City of Los Angeles v. FAA* 63 F.4th 835 (9th Cir. 2023), the U.S. Court of Appeals for the Ninth Circuit rejected the FAA’s approval of a new passenger terminal at Burbank Airport. It found the FAA’s Environmental Impact Statement (“EIS”) was arbitrary and capricious because it used flawed data that failed to account for simultaneous equipment operation, which would have pushed noise levels past acceptable thresholds.

In *City of Phoenix v. Huerta*, 869 F.3d 963 (D.C. Cir. 2017), the FAA implemented “NextGen” flight path changes at Phoenix Sky Harbor without adequate public notice. The D.C. Circuit vacated the changes, ruling the FAA’s decision-making was “arbitrary and capricious” because it failed to consult with the city or properly evaluate the noise impact on historic neighborhoods. The D.C. Circuit stated:

Here the FAA failed to fulfill these obligations because it consulted only low-level employees in the City’s Aviation Department, whom the City had never designated as its representatives. True, the City never informed the FAA that low-level Aviation Department employees were inadequate points of contact, but that is irrelevant. Neither statute nor regulation imposes a duty on local governments to affirmatively inform the agency of their chosen representatives. Just the opposite: the agency must

ask local governments who their authorized representatives are. . . . The FAA never took that step here. And the FAA’s failure to notify and provide documentation to the City of the agency’s finding of no adverse impact violated regulations under the Preservation Act, and denied the City its right to participate in the process and object to the FAA’s findings.

Id. at 971. The D.C. Circuit added that, “by keeping the public in the dark, the agency made it impossible for the public to submit views on the project’s potential effects—views that the FAA is required to consider.” See 36 C.F.R. § 800.5(a); see also *Am. Bird Conservancy v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008) (“Interested persons cannot request an [environmental assessment] for actions they do not know about, much less for actions already completed.”).

III. TRANSPORTATION SECURITY ADMINISTRATION

The TSA is a relatively recent addition to the federal agency world, having been “stood up” shortly after the September 11, 2001 terrorist attacks. But it wasted little time in seeking to avoid the rules and requirements that apply to other agencies, and it also has sought to exploit the national security nature of its focus to avoid judicial scrutiny. The TSA frequently operates under “emergency” or “security program” authorities, which has led to significant litigation over when they must still follow APA notice-and-comment procedures.

A. Arbitrary Refusal to Explain Decisions Which Negatively Impact Companies

In *SecurityPoint Holdings, Inc. v. TSA*, 769 F.3d 1184 (D.C. Cir. 2014), a company that sold advertising at airports petitioned for review of changes that TSA made to a program involving advertisements at airport security screening checkpoints. The D.C. Circuit vacated a letter from the TSA based on the court’s finding of a lack of reasoned decisionmaking on the part of TSA’s then-

Chief Counsel. Petitioner argued that the changes violated the First Amendment because they were in retaliation for SecurityPoint Holdings, Inc.'s ("SecurityPoint") having sued TSA for alleged infringement of a patent. It also argued that TSA's explanation for persisting in the change, in the face of SecurityPoint's arguments that the change was unnecessary and self-defeating for TSA, failed to satisfy the minimum requirements of reasoned decisionmaking. Because the D.C. Circuit agreed with the latter claim, it found it unnecessary to reach the First Amendment issue.

The Petitioner had achieved considerable success selling advertising at airports as part of the TSA's Bin Advertising Program. But after the Petitioner filed a patent infringement suit in the Court of Federal Claims (which ultimately was successful, costing the federal government millions of dollars), TSA modified the Bin Advertising Program, amending the Memorandum of Understanding ("MOU") template to require participating airports to indemnify TSA from all liability for intellectual property claims related to the checkpoint equipment. TSA also changed the template to provide that, on cancellation of an agreement between an airport and a private company, TSA would retain the right to use the checkpoint equipment as well as a license to all intellectual property necessary for such use.

This was another example of a government official retaliating against a company that had merely exercised its rights to pursue judicial relief. SecurityPoint opposed these changes, writing to TSA's Chief Counsel, Francine Kerner, in December 2012, and again in January 2013, requesting that TSA "cease and desist from requiring airports to agree to the new MOU language." 769 F.3d at 1187. SecurityPoint argued that airports would not sign MOUs that subjected them to an obligation to indemnify TSA for intellectual property claims, so that TSA would be killing the goose that laid the golden eggs of reduced costs for checkpoint screening. And the indemnification was unnecessary, as SecurityPoint's contracts gave TSA an implicit license to use the relevant intellectual property at the airports where such agreements were in effect. Ms. Kerner denied the request in a letter dated January 18, 2013. *Id.*

The D.C. Circuit first ruled that the Chief Counsel's letter was a final order, reviewable under 49 U.S.C. § 46110, because the letter marked the consummation of the agency's decisionmaking process, and determined rights or obligations which give rise to legal consequences by confirming that participating airports would be subject to TSA's new mandatory MOU language and thereby would impact SecurityPoint's ability to contract with those airports.

The D.C. Circuit then went on to hold that the letter was arbitrary and capricious because it failed to address SecurityPoint's assertion that the new indemnification provision would undermine the cost-saving Bin Advertising Program by making it difficult or impossible for airports to participate. SecurityPoint characterized the indemnity provision as "a classic 'poison pill' because airports will not, and indeed cannot, agree to it." The D.C. Circuit stated:

Ms. Kerner's response does not address these contentions. It offers no indication that she or anyone at TSA even considered the potential harms to the Bin Advertising Program, and thus to TSA, from insistence on the new provisions, such as the additional equipment costs that would shift back to the agency as a result.

Id. at 1188.

Instead of addressing SecurityPoint's contentions, Ms. Kerner's letter asserted that TSA modified the MOU in order to "protect itself from legal liability." *Id.* Yet Ms. Kerner never even mentioned SecurityPoint's observation that TSA had "the benefit of an implied license" at the airports where SecurityPoint had an agreement in effect, much less suggests some reason why such a license either would not be in effect or would not meet TSA's concerns. *Id.* "Because Ms. Kerner's letter fail[ed] to provide any 'basis upon which [the Court] could conclude that it was the product of reasoned decisionmaking' on this point, the agency has not fulfilled its statutory duty to

provide a ‘brief statement of the grounds for denial’ under 5 U.S.C. § 555(e).” *Id.* at 1189.

B. Barring Pilot from the United States

In *Olivares v. TSA*, 819 F.3d 454 (D.C. Cir. 2016), the D.C. Circuit criticized TSA for failing to provide contemporaneous support for the agency’s conclusion that an alien pilot from Venezuela should be denied the ability to attend an FAA-certified flight school in France on the basis that he was a risk to aviation and national security. The D.C. Circuit stated:

Although we find that the internal agency materials, as illuminated by the Vara Declaration, satisfy the requirements of [5 U.S.C.] § 555(e), we add a word of caution. In the future, agencies will be well advised to obey the explicit command of § 555(e), rather than counting on being able to salvage their actions later, after the losing party has been forced to seek redress in court. **Persistent scofflaw behavior might cause the courts to insist that the contemporaneous explanation actually be expressed to the complaining party, as the statute requires, on pain of vacatur and remand.** Or the courts might insist on progressively more compelling indications that the reasons offered were in fact the reasons governing the decision when it was made. The offending agency action in this case was mitigated somewhat because the internal materials and the Vara Declaration **were included in the parties’ Joint Appendix, and Petitioner had an opportunity to review these materials before briefing and oral argument. This may not be**

**sufficient in future cases involving agency
defiance of § 555(e).**

Id. at 464-65 (emphasis added).

C. 911 Security Screening Fees

In *Southwest Airlines v. TSA*, 554 F.3d 1065 (D.C. Cir. 2009), the D.C. Circuit faulted the agency for imposing September 11 security fees on airlines that were supposed to be based on the cost of screening, but improperly included the expense of screening not only passengers but also so-called “meeters-and-greeters” which in the days before September 11, had access to the post-security checkpoint areas of the airport. TSA violated the APA by using a cost base developed pre-911 that included meeters-and-greeters in the number of persons screened when, post-911, such population would not be screened and therefore TSA would not bear the expense of screening such a large class of non-existing persons.²

The fee in question was the “Aviation and Security Infrastructure Fee” (ASIF), which pursuant to 49 C.F.R. § 1511.1(b) was imposed directly on airlines. It was meant to plug the gap between the costs of TSA’s civil aviation security services and the sums raised by the separately imposed passenger fee. Petitioners—a group of 22 airlines—claimed that TSA improperly subjected them to approximately \$98 million a year in increased ASIF liabilities.

The operative statutory language provided that the fees in each fiscal year “may not exceed, in the aggregate, the amounts paid in calendar year 2000 by carriers . . . for *screening passengers and property.*” 49 U.S.C. § 44940(a)(2)(B)(i) (emphasis added).³ The D.C. Circuit found that TSA violated the plain language of the provision by basing its calculation of the fees on a U.S. Government Accountability Office estimate which had included the

² Interestingly enough, the same FAA bureaucrat behind the unlawful overflight fees also spearheaded the TSA security fees that the D.C. Circuit a decade later ruled to be unlawful.

³ Airlines not in existence in the United States in 2000 were exempt from the ASIF. This included JetBlue and Virgin America.

costs of screening *non*-passengers, such as “meeters-and-greeters” and sightseers.

The D.C. Circuit rejected TSA’s contention that the reference to “screening passengers” was ambiguous, that the word “screening” may mean something more than the simple evaluation of whether a passenger poses a threat to aviation security. According to TSA, the phrase “screening passengers” could be read to include anything done to protect passengers, which would include exerting control over the access of potentially dangerous non-passengers. But the D.C. Circuit swatted this argument away, emphasizing that “[a]mbiguity is a creature not of definitional possibilities but of statutory context.” *Id.* at 1070. The D.C. Circuit added that in “the context of airport security, the phrase ‘screening passengers’ has a widely understood meaning: it refers to the process of searching airline passengers at an airport security checkpoint, not to the entire set of activities undertaken to promote passenger safety.” *Id.* “In short, TSA violated the plain meaning of the ATSA’s overall limit when it included the costs of screening non-passengers in its estimate of the costs of covered screening in 2000.” *Id.*

D. Refusal to Refund Security Fees

In *United Airlines, Inc. v. TSA*, 20 F.4th 57 (D.C. Cir. 2021), United Airlines, Inc. (“United Airlines”) challenged TSA’s refusal to refund overpayment of aviation security fees it remitted to TSA for tickets associated with passengers involuntarily transferred to one of its flights from another airline, and tickets for which recorded and remitted fee amount deviated from statutorily required fee amount due to currency exchange rate fluctuations. The D.C. Circuit held that TSA’s decision denying the airline’s request for refund associated with involuntarily transfer tickets was arbitrary and capricious.

In the involuntary transfer context, the allocation of legal liability for unremitted security fees is clear. The statute provides that any security fee “shall be collected by the air carrier . . . that sells a ticket for transportation.” 49 U.S.C. § 44940(e)(2). The statute further provides that security fees collected during a given month must then be remitted “by the carrier collecting

the fee” by the last calendar day of the month following imposition. *See id.* § 44940(e)(3); *see also* 49 C.F.R. § 1510.13(a). Because United Airlines played no part in selling the ticket to a passenger involuntarily transferred to one of its flights from another airline, it had no legal obligation to collect and remit the associated security fee and therefore would not be liable in the event that the fee went unremitted to the TSA. 20 F.4th at 62-63.

The case was not about United Airlines’ failure to remit security fees that it was required to collect. Rather, United Airlines sought a refund of security fees it erroneously—and inexplicably—remitted to the TSA despite having no statutory responsibility to do so. The TSA’s authority to issue such refunds is discretionary: “The [TSA] *may* refund any fee paid by mistake or any amount paid in excess of that required.” 49 U.S.C. § 44940(g) (emphasis added). TSA has consistently argued that, in light of its discretion, it reasonably placed the burden on United Airlines to establish that a net overpayment in fact occurred, a position that is not without at least some merit in the informal adjudication context. Accordingly, TSA concluded that United Airlines failed to demonstrate that it had not simply remitted security fees that another airline had collected and then transferred to United Airlines along with the rest of the funds associated with an involuntarily transferred passenger. In this scenario, TSA contends no overpayment of security fees occurred.

Placing the burden on United Airlines, however, did not relieve TSA of its ordinary burden under the APA—i.e., its duty to provide a reasoned explanation for its decision. Even when denying an interested party’s request via informal adjudication, an agency cannot merely state a “conclusion” but rather “must ‘articulate a satisfactory explanation’ for its action.” 20 F.4th at 63-64 (citing *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)); *see also* 5 U.S.C. § 555(e) (providing that an agency’s notice of denial “shall be accompanied by a brief statement of the grounds for denial”). In other words, the agency must always adequately explain “why it chose to do what it did.” *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) (quoting Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 222).

The D.C. Circuit held that TSA failed to meet that burden. In denying United Airline's request, TSA concluded that United Airlines had failed to demonstrate that any overpayment occurred. More specifically, it determined that United Airlines failed to show that the transferring airline had already remitted the relevant security fee to TSA or that United Airlines had not received from the transferring airline anything less than all of the funds the involuntarily transferred passenger had originally paid to the transferring airline, including the fee amount. But the problem with TSA's rationale was this:

If the transferring airline remains legally obligated to collect and remit the security fees for the tickets it sells, even if the passenger is involuntarily transferred to United [Airlines], there is little reason to suppose that the transferring airline would pass along the security fee to United [Airlines] instead of remitting it to the TSA in proper course. Why would the transferring airline entrust United [Airlines] to satisfy the transferring airline's legal responsibility, thereby risking noncompliance if United [Airlines] failed to do so? The TSA's hypothetical about airlines transferring security fees among themselves therefore appears logically incongruent with the allocation of liability under the statute and the TSA otherwise makes no effort to rely on industry practice or past practice to validate its concern. *See United Airlines*, 859 F.3d at 71 n.11 ("For those overpayments due to involuntary transfers, there is no reason to suspect that the carrier that sold the original ticket did not *also* pay TSA, i.e., it is equally likely that TSA was paid double."). The TSA's reasoning therefore strikes more as a largely unsupported hypothetical than a "satisfactory explanation" rooted in logic or practice. *See Butte*

Cnty., 613 F.3d at 194 (quoting *Tourus Records*, 259 F.3d at 737).

20 F.4th at 64.

E. Screening of Aviation Workers

In *City of Billings v. TSA*, 153 F.4th 46 (D.C. Cir. 2025), the D.C. Circuit vacated the “National Amendment,” a rule requiring major airports to screen aviation workers. The D.C. Circuit held that TSA issued a legislative rule without following the public notice-and-comment process. TSA had argued it was merely amending existing security programs, but the D.C. Circuit found it imposed new, substantive legal obligations.

Soon after adopting the National Amendment, TSA issued a “notice . . . to inform airports and other aviation entities regulated by the Transportation Security Administration” of how the agency would enforce the rule’s requirements upon their taking effect. TSA, *Notice of Informed Compliance: Aviation Worker Screening*, at 1 (Sept. 6, 2023). The agency advised that, while “TSA is not extending or modifying the effective date of the [National Amendment],” it “is providing a 12-month period of ‘informed compliance’ for the requirements in” the rule. *Id.* During that initial period, the agency explained, it “will not pursue civil enforcement action against airports that are making good faith efforts toward implementation of the requirements of the [National Amendment].” *Id.* But after that “informed compliance” period, “failure to comply with all applicable aviation worker screening requirements will be subject to full enforcement action by TSA.” *Id.* at 2.

The D.C. Circuit ruled that the National Amendment had the force and effect of law: it imposes new legal requirements on airport operators across the country and those requirements are subject to civil enforcement by the agency. That is a quintessential legislative rule. Indeed, the very fact that the National Amendment has an effective date bespeaks a legislative rule—there would be little reason to set an effective date if the rule merely interpreted a preexisting obligation as opposed to instituting a new one.” 153 F.4th at 52.

TSA ultimately did not dispute that the National Amendment bears fundamental characteristics of a legislative rule. Instead, TSA contended it could forgo giving notice and an opportunity to comment to the public because of an agency regulation, 49 C.F.R. § 1542.105(c), which contemplates that the agency can “amend” an airport operator’s “security program” by “send[ing] to *the airport operator* a notice . . . of the proposed amendment” and “fixing a period of not less than 30 days within which *the airport operator* may submit written” comment. *Id.* (emphasis added).

The D.C. Circuit retorted that “even assuming TSA correctly understood and complied with its regulation, an agency’s adherence to its own regulations does not somehow enable it to bypass the APA.” *Id.* The APA’s notice-and-comment provisions set out specific exceptions for interpretive rules, rules concerning “military or foreign affairs,” and rules addressing internal agency management. *See* 5 U.S.C. §§ 553(a)(1)–(2), (b)(A). The statute also permits agencies to forgo notice-and-comment procedures if they can establish “good cause” to believe adherence to the procedures would be “impracticable, unnecessary, or contrary to the public interest.” *Id.* § 553(b)(B). TSA did not claim to fit within the good-cause—or any other—exception here. What the APA generally does *not* except from its rulemaking procedures are legislative rules. As to those, an agency cannot simply rulemake its way out of the APA’s requirements for rulemaking.

TSA suggested that public notice-and-comment requirements would have limited value in these circumstances because the National Amendment principally affects airport operators, not “the public at large,” and because the agency could (and likely would) refuse to disclose information about its regulatory plans regardless. The APA, though, does not contemplate an agency’s forgoing the statute’s notice-and-comment requirements based on the agency’s own assumption that there is a limited need to hear from the public in a given instance. To the contrary, a central object of requiring that the public be afforded notice and an opportunity to comment is to assure that the agency fully understands the potential impact of a proposed rule before finalizing it. Public notice and comment, that is, might alter an agency’s initial assumptions about whether (and how) a proposed rule affects the public at large.

IV. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In *Public Citizen, Inc. v. Federal Motor Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004), public interest grounds petitioned for review of a final rule of the Federal Motor Carrier Safety Administration (“FMCSA”), which revised the hours-of-service regulations limiting hours of driving and work for commercial motor vehicles. The D.C. Circuit held that the final rule was arbitrary and capricious in that the FMCSA neglected to consider the statutorily mandated factor of the rule’s impact on driver health. The court stated that a “statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency’s mission.” *Id.* at 1216. Unfortunately, the “FMCSA point[ed] to nothing in the agency’s extensive deliberations establishing that it considered the statutorily mandated factor of drivers’ health in the slightest.” *Id.* The D.C. Circuit added:

Under the statute, vehicle safety is a distinct factor the agency must consider, so considering the impact of driver health on safety cannot be equal to considering the impact on the physical condition of the operators. . . . It is one thing to consider whether an overworked driver is likely to drive less safely and therefore cause accidents. Whether overwork and sleep deprivation have deleterious effects on the physical health of the driver is quite another.

Id. at 1217. The agency’s failure to consider whether driving for extended periods of time and sleep deprivation cause drivers long-term back problems, or harm drivers’ immune systems, prompted the court to vacate the entire rule as arbitrary and capricious. *Id.*

V. SURFACE TRANSPORTATION BOARD

Decisions involving the STB often focus on the limits of its statutory authority to regulate railroad rates and mergers. In *Union Pacific Railroad Co.*

v. STB, 113 F.4th 823 (8th Cir. 2024), the U.S. Court of Appeals for the Eight Circuit vacated the STB’s “Final Offer Rate Review” (“FORR”) procedure. The STB had tried to simplify rate disputes by choosing between the shipper’s or carrier’s final offer. The court held this violated the APA and the STB’s governing statute because it bypassed the requirement for a “full hearing” and shifted the burden of proof inappropriately. The court concluded that the STB procedure fell short of the statutory requirement that the STB “prescribe the maximum rate.” *Id.* at 834 (quoting 49 U.S.C. § 10704(a)(1)). According to the decision, “FORR effectively prevents the Board from giving ‘due consideration’ to the statutory factors that the Board is required to consider in assessing a rate’s reasonableness . . . by limited the Board to the two final offers the parties propose in prescribing the maximum reasonable rate.” *Id.* at 838. It cannot be that the parties, rather than the Board, prescribe the maximum rate. *Id.* at 839.⁴

VI. CONCLUSION

The above discussion of case law in the last three decades showcases how our federal officials often are in a hurry to achieve results that they either deem to be important for personal reasons or for institutional motives, but reflect improper and indeed arbitrary and capricious shortcuts and a fundamental lack of fairness. The job of transportation attorneys is to continually push back against such conduct, so that our clients are able to achieve the results to which they are entitled and should expect in a democratic, capitalist and efficient economy.

⁴ By contrast, in *Seven County Infrastructure Coalition v. Eagle County*, 601 U.S. 168 (2025), the Supreme Court reversed a D.C. Circuit ruling that had required the STB to consider “upstream” oil drilling effects and “downstream” impacts, before approving construction of a new rail line in Utah. The Court held that under the APA’s deferential standard, the STB is not required to study environmental impacts beyond the “proximate effects” of the action it actually has the authority to authorize.