



Four who journeyed to Eastsound, Washington, to participate in the 24th Annual Workshop on Transportation Law: *left to right*, Robert W. Cunliffe, TRB Counsel for Legal Research; Anthony J. McMahon, Chief Counsel, FHWA; Dowell H. Anders, Deputy Chief Counsel, FHWA; and Watson C. Arnold, Special Assistant Attorney General, Texas, and Chairman of TRB's Group 4—Legal Resources.

24th ANNUAL TRANSPORTATION LAW WORKSHOP

ROBERT W. CUNLIFFE

The 24th Annual Workshop on Transportation Law, which was held in Eastsound, Washington, July 21–25, 1985, and is the oldest continuous workshop sponsored by the Transportation Research Board, had its greatest attendance ever—102 registrants.

Opening Remarks

The opening remarks were delivered by Ken Eikenberry, Attorney General, State of Washington, who welcomed the participants and called attention to the fact that Washington operates the largest ferry fleet in the country with 22

vessels carrying 17 million people and 6.7 million vehicles per year. The attorney general also stated that Washington is defending and attempting to resolve the largest contract construction claim that has ever been defended by any state. The case involves the construction of six ferry vessels.

Taking note of this year's workshop, Eikenberry commented that "the scope and magnitude of the program is amazing." He concluded by observing that Washington is facing up to the torts problem as are most other states in which immunity has been lost. The number of tort cases has increased by 44

Robert W. Cunliffe, formerly Deputy Attorney General and Chief Counsel of the Pennsylvania Department of Transportation, is Counsel for Legal Research, TRB.



A total of 102 registrants—the largest attendance ever—attended the 24th Annual Workshop on Transportation Law, sponsored by TRB and held in July 1985.



percent in 1984 and the payment figure has doubled.

K.B. Johns, TRB Assistant Director for Regular Technical Activities, welcomed the group on behalf of the Transportation Research Board for Executive Director Thomas B. Deen, who was unable to attend. (See excerpts from Johns's remarks in the accompanying box.) Watson C. Arnold, Special Assistant Attorney General of Texas, and currently chairman of TRB's Group 4—Legal Resources, also welcomed the participants.

U.S. DOT Legal Representatives Discuss Recent Developments

Recent developments in transportation law was the topic addressed by the legal representatives of the various modal administrations of the U.S. Department of Transportation. Jeffrey R. Miller, Chief Counsel, National Highway Traffic Safety Administration, discussed highway safety. Miller noted that since the shutdown of the Civil Aeronautics

Board on December 31, 1984, the consumer affairs functions of the CAB had shifted to the U.S. DOT. On the subject of airline route cases, he stated that these cases are first sent to an administrative law judge for a hearing and a decision, and then appeal is made to a DOT career executive officer, a Deputy Assistant Secretary; thus, the decision-making process on airline routes is kept out of the political arena.

Concerning highway safety, Miller addressed the "blood border problem," when two bordering states have different legal drinking age requirements, and the federal law requires that states enforce a minimum drinking age of 21. Commenting that the law is not flexible, he said that there is no discretion and no relief for hardship; if a state does not enforce the law, federal funds must be withheld.

Representatives from U.S. DOT praised the work of TRB on the 55-mile-per-hour study requested by Congress. It was reported that three states have been found to be in noncompliance.

Dowell H. Anders, Deputy Chief Counsel of FHWA, and a longtime member of TRB's Group 4—Legal Resources, introduced Anthony J. McMahon, the new Chief Counsel of FHWA who replaces Donald L. Ivers. Ivers, who recently resigned from FHWA to become General Counsel for

the Veterans Administration, will remain a member of the Group 4 Council.

Anders discussed the disadvantaged business enterprise (DBE) program, which initially caused problems for many states. However, Anders reported, most states met their 1984 goals and it appeared that they would meet their 1985 goals. The major problems with the program relate to certification and decertification. Whereas the states have the authority to certify DBEs, both the states and FHWA have the authority to decertify. According to Anders, this procedure has proven to be less than ideal, and the FHWA is trying to devise a regulation to provide a better system of certification and decertification.

Anders's discussion then turned to the issue of bid rigging. He expressed amazement that contractors did not learn the bid-rigging lessons of the early 1980s and some are being indicted today for 1983 and 1984 offenses. In the past year there have been 31 debarments. Of these, 11 debarred contractors appealed to the administrative law judge and DOT prevailed in all cases. On the issue of money recovered by the states from debarred contractors, it was reported that the federal government had prevailed in its suit against the State of Tennessee.

Problems related to the movement of

TRB AND THE ENVIRONMENT OF CHANGE

Editor's note: The following remarks are excerpts from an address by K. B. Johns, TRB Assistant Director for Regular Technical Activities, at the 24th Annual Workshop on Transportation Law, on July 22, 1985.

hazardous materials on the highways and through urban areas were reviewed by George W. Tenley, Jr., Acting Chief Counsel, Research and Special Programs Administration, U.S. DOT. He made it clear that where a state has permit and fee provisions for such shipments, when setting the fee the state cannot discriminate against the shipment of hazardous materials.

The subject of truck-weight problems was covered by David C. Oliver, Attorney, FHWA, who gave a slide presentation on truck weight and pavement-life problems. Oliver made the point that running overweight can be very profitable to truckers and correspondingly damaging to the highway. "If you are going to use the fine and penalty structure to control the overweight trucks, the fines and penalties must be very stiff so as to not just be a license fee for a way to do business," he said. At the same time, he stated, the penalties should not be so large that courts will ignore them and reduce charges.

Motor Vehicle Laws Addressed

"Key Issues in Motor Vehicle Law" was a joint presentation by Andrew R. Hricko, General Counsel for the Insurance Institute for Highway Safety, and Victor J. Perini, Jr., General Counsel, Highway Users Federation for Safety and Mobility. Three areas of concern were discussed: the mandatory seat-belt law, child restraints, and teenage driving. Perini emphasized that although 14 states now have a mandatory seat-belt law, 8,000 additional lives would have been saved if all of the states had such a law since the first law was passed by a state in 1983. By means of a film, Hricko showed that a crash at 35 mph requires both a seat belt and an air bag for safety.

It is a pleasure for me to meet with you again at this outstanding, annual gathering of transportation legal specialists. My message this morning concerns change. Transportation is changing in a variety of ways. Commercial aviation in a deregulated, freely competitive environment may look the same to infrequent travelers, but is noticeably different in many ways. The heat of competition is producing winners and losers—and mergers. Often, where service is no longer required by regulation, costs are higher, service is less frequent or is provided only by commuter airlines, and in some cases service has been discontinued.

Trucking appears to be headed to a whole new ballgame, also producing some big winners and many small losers. True competition is possible for the first time, perhaps, since the beginnings of goods movement by truck. The competition between trucks and railroads continues, with many voices telling us today about the importance of both, but especially of the role predicted for trucks and highway transportation in the nation's future.

There is a greater awareness of the continuing dominance of the automobile in personal transportation. There is less talk of shifting large numbers of personal trips to mass transportation, a recognition of the limitations of the capabilities of any known and affordable transit technology. Automobiles are also changing—they are

smaller and lighter and give good gasoline mileage.

At TRB there are changes too, changes to come for which Tom Deen, TRB's Executive Director, is daily challenging the entire TRB staff to prepare. We are looking into areas that deal not only with technical questions, but also with public-policy issues. The 55-mile-per-hour national maximum speed limit study is a typical example, as are on-going studies by TRB on double-bottom trucks and the design standards for 3-R highway-improvement projects. Probable topics for future studies include safety and mobility of older persons; state motor-vehicle safety inspection programs; and airport landside capacity constraints as related to noise and other community concerns.

But the major change is currently resulting from AASHTO's pre-implementation phase of the Strategic Highway Research Program (SHRP) that grew out of TRB's Strategic Transportation Research Study (STRS): Highways released last year. As currently envisioned, SHRP—scheduled to begin in the fall of 1986—will comprise six major research areas, and will funnel \$150 million into these areas for 5 years, provided that the U.S. Congress concurs. Such a program is larger than the current FHWA program, and is four to five times larger than the states' National Cooperative Highway Research Program at TRB. Its sheer size and complexity, coupled with a desire to move as rapidly as possible into high pay-off research, will require new institutional frameworks for control and management. It will also require great care to ensure against damaging other useful research institutions, such as those just mentioned, as well as the HPR programs in the states.

Environmental Cases

A panel led by Edward V.A. Kussy, Assistant Chief Counsel of FHWA, updated the law and cases concerning environmental issues and the payment of attorney fees under the Equal Access to Justice Act. Jose R. Allen, Chief of the General Litigation Section of the Land and Natural Resources Division, U.S.

Department of Justice, advised that in the defense against an environmental challenge to a highway project, every effort should be made to limit the case to what is in the administrative record. "Try to convince the court that no testimony is needed," Allen said. However, he stated, if the court insists on taking testimony, the judge should be encouraged to limit the testimony to what is

wrong or deficient in the administrative record. Panel leader Kussy pointed out that in most areas of the country, environmental cases are now being limited to the issue of whether the administrative record justifies agency action. Maria A. Lizuka, an attorney in the Appellate Section of the Lands and Natural Resources Division, U.S. Department of Justice, covered the issue of attorney fees under the Equal Access to Justice Act.

The challenge to route H-3 in Hawaii was the subject of a slide presentation by Randall Y.K. Young of the Hawaii State Department of the Attorney General, who advised that the middle section of the highway is being challenged while both ends have been constructed.

Major Issues Facing the U.S. Congress

A presentation on the major issues facing Congress in passing the 1986 Federal Aid Highway Bill was given by Ruth R. Johnson, Deputy Assistant Chief Counsel, General Law Division, FHWA. According to Johnson, there are five major issues that Congress must face and resolve in order to pass the bill: demonstration projects, the formula for apportionments, minimum allocations, "buy American," and the Interstate cost estimate (ICE).

Demonstration projects are special projects constructed with 100 percent federal funds with no obligation limit. However, as Johnson pointed out, the Byrd Amendment requires that the apportionment to the state be reduced if the money obligated in any 1 year exceeds the income into the Trust Fund for any 2 years. She also advised that the 4-R formula may be changed in the 1986 Act. The issue that is involved in minimum allocations concerns the amount of money received by donor states or those states that pay in more to the Trust Fund than they receive in return. Donor states are supposed to receive 85 percent of the monies paid in. The problem is that all allocations, such as demonstration projects and emergency projects, do not count toward the 85 percent.

According to Johnson, Congress must resolve this issue.

The Surface Transportation Assistance Act of 1982 included a "Buy American" provision that covered cement as well as steel. Johnson informed the group that the 1984 Act deleted the provision on cement so that "Buy American" is now limited to steel products.

In reviewing the ICE issue, Johnson noted that the cost estimate for completion of the Interstate system must be provided before Interstate funds can be released.

Johnson briefly touched on several other issues facing Congress in considering the 1986 bill. The beautification program will be reviewed, as will the disadvantaged business enterprise program that will end in 1986 unless it is extended. She commented that the 55 mph speed limit issue is also likely to be reviewed as well as the toll-road policy because there is a trend to use tolls as a new revenue source in some states.

Finally, Johnson observed that there is likely to be an effort in Congress to extend the Interstate completion date of 1990. After a thorough yet concise

review by Johnson of the major highway issues facing Congress, the workshop participants had a better understanding of those issues.

Design Defects and Tort Liability

A presentation was given by James J. Stapleton, Assistant Chief Counsel, FHWA, on "Design Defects and Tort Liability," a major issue—and a financial problem—facing many states that have recently lost sovereign immunity. One of the major problems facing the states, Stapleton said, is that 90 percent of the roads in use in the United States today were built before 1950, which was about the time standard specifications began to appear. In virtually every case, the plaintiff's attorney is bound to raise the issue of failure to update design unless that particular state has a design defect immunity statute or case law that gives design immunity.

Stapleton gave a slide presentation to depict some common design defects, including drain grates running longitudinally; end beams that were open and exposed to oncoming traffic; an attenua-



George W. Tenley, Jr., Acting Chief Counsel, Research and Special Programs Administration, U.S. DOT, discusses legal problems related to the movement of hazardous materials on the highways and through urban areas. Seated, Theodore O. Torve, Chief Counsel, Washington State Department of Transportation.



Addressing the workshop on the disadvantaged business enterprise program and the issue of bid rigging is Dowell H. Anders, Deputy Chief Counsel, FHWA. Seated, Jeffrey R. Miller, Chief Counsel, NHTSA, who discussed highway safety.



Victor J. Perini, Jr., General Counsel, Highway Users Federation for Safety and Mobility, and Andrew R. Hricko (seated, center), General Counsel, Insurance Institute for Highway Safety, and chairman of the TRB Committee on Motor Vehicle and Traffic Law, made a joint presentation on "Key Issues in Motor Vehicle Law." Seated, left: Theodore O. Torve, Chief Counsel, Washington State Department of Transportation.

tion filled with concrete; liquid asphalt used to fill cracks in the road surface, which changes the skid coefficient and could cause skidding accidents; vegetation obstructing traffic-control devices; cluster signing resulting in confusion and accidents; and misleading pavement marking in construction work zones.

After viewing the slides and hearing Stapleton's presentation, it was evident to the workshop participants that an educational program covering tort liability and risk management is important not only for attorneys but also for state DOT engineers and administrators. The Legal Resources Group of TRB has established a Tort Task Force under the chairmanship of Spencer A. Manthorpe, Chief Counsel, Pennsylvania Department of Transportation. One of the objectives of the task force is to set up an educational program.

Right-of-Way Settlements

"Control of Right-of-Way Settlements" was the topic of Irwin Schroeder's talk. Schroeder, a former trial attorney in the Lands and Natural Resources Division, U.S. Department of Justice, tried many of the early environmental cases.

Schroeder joined FHWA as Assistant Chief Counsel for Right of Way and Environmental Law and now serves as FHWA's Regional Counsel in San Francisco. He discussed FHWA's acquisition review process and in particular the procedure that must be followed for federal projects. He pointed out that the selection process must be competitive if there is nothing special, peculiar, or unusual about the property to be acquired. In such a case, Schroeder said, "you must acquire by asking for proposals with price included." However, if the property is special, peculiar, or unusual, the services of an appraiser can be engaged under the sole source procedure.

Other Topics Discussed

Gordon S. Baca, Deputy Chief Counsel of Caltrans, and Robert H. Raymond, Jr., Assistant Chief Counsel of PennDOT, joined forces to address the topic of "Defense and Indemnity of State Employees in Tort and Constitutional Issue Cases." The thrust of the discussion was that all states should have a law that indemnifies state employees and provides for their defense by an

attorney, either state or private, when an employee is sued as an individual.

The final panel was comprised of attorneys from the Attorney General Division of the Washington State Department of Transportation, who described the settling of large contract claims involving construction of ferry boats.

Other workshop speakers included Walter A. McFarlane, Deputy Attorney General of Virginia, who discussed cable television permits; and Richard Kennedy Jacobsen of the Baltimore Department of Law, who addressed the issue of relocation benefits.

One of the traditional highlights of the Law Workshop is the "Roll Call of the States" in which a representative of each state is given the opportunity to report on recent court decisions of interest or to ask for help on a particular problem.

Next year the Annual Workshop on Transportation Law will be held the week of July 20, 1986, in Williamsburg, Virginia. Engineers and administrators are welcome and encouraged to attend.