

TRB's 26th Annual Workshop on Transportation Law was held this year in Portland, Oregon, July 19-23. David B. Frohnmayer, Oregon Attorney General welcomed participants to the meeting. In his opening remarks, Frohnmayer, who was first elected attorney general in 1980, recounted that upon assuming office he transferred all of the lawyers assigned to the various departments in the state government into the Department of Justice to ensure the application of legal principles rather than bending the law to implement policies. Frohnmayer subsequently developed a team concept by which the attorneys worked closely with other departments at an early stage in any legal matter to minimize litigation or to limit damages.

Lowell B. Jackson, Executive Director, Colorado Department of Highways, and Chairman of the Transportation Research Board for 1987, greeted workshop participants on behalf of the Board. Jackson noted that two workshop sessions were appropriately devoted to contract claims, a timely topic because "the number of claims getting into the legal system and out of the administrative system is growing at an alarming and costly rate."

Welcoming attendees on behalf of TRB's Group 4 Council was Watson C. Arnold, Special Assistant Attorney General of Texas, and Chairman of TRB's Legal Resources Group.

Some of the highlights of the 26th Annual Workshop on Transportation Law are presented below. All formal papers presented at the workshop have been distributed to the participants and also to all state chief counsels not in attendance to ensure that each state department has access to this information.

FHWA Chief Counsel Addresses Recent Developments in Transportation

In his discussion on Recent Developments in Transportation Law, Anthony J. McMahon, Chief Counsel of the Federal Highway Administration, stated that under a significant provision of the 1987

Surface Transportation and Uniform Relocation Assistance Act (STURAA), Congress ensured the completion of the Interstate Highway System. He also advised that 35 states had raised the speed limit to 65 mph on rural Interstate highways as of July 2, 1987.

Commenting on the motor vehicle safety provisions of the act, McMahon called attention to three requirements: minimum standards are to be established for testing drivers of commercial vehicles; a commercial vehicle driver's information system must be estab-

lished for additional agents to investigate the tax-collection system.

Federal Aid and Toll Facilities

The issue of Federal Aid and Toll Facilities was addressed by Arthur P. Berg, an attorney with the Port Authority of New York and New Jersey. Berg called attention to a provision of the 1987 STURAA that incorporated major changes in federal law relating to toll facilities by providing for several demonstration projects with federal partic-

Highlights of the 26th Annual Workshop on Transportation Law

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lished; and commercial drivers are restricted to a single operator's license.

McMahon has assumed the lead in collecting excise taxes on gasoline and diesel fuel that are owed to the federal government. Large truck-stop operators have sold millions of gallons of fuel without paying taxes, and the government is trying to move the point of collection to a point in the refinery distribution ladder to facilitate collection. In addition, the FHWA is asking for the right to enter into an agreement to reimburse the Internal Revenue Ser-

vice. This resulted from a conclusion by the Congressional Budget Office that a modification in the antitoll policy was warranted to meet capacity needs.

Thomas R. Viall, Assistant Attorney General for Vermont's Agency of Transportation, pointed out that the United States Supreme Court overturned 70 years of precedent when it struck down Pennsylvania's flat-fee truck tax as unconstitutional.

Robert W. Cunliffe is Counsel for Legal Research, TRB.



Oregon Attorney General David Frohnmayer welcomes Transportation Law Workshop participants to the 26th Annual Workshop held in Oregon.



Watson Arnold, Special Assistant Attorney General, Texas, and Chairman of TRB's Legal Resources Group, greets workshop attendees.



Anthony McMahon, FHWA Chief Counsel, speaks on Recent Developments in Transportation. Seated, Jack Sollis, Chief Counsel, Oregon DOT.



Session on Litigation at the Law Workshop drew a large audience.

Contract Claims

The issue of contract claims was the focus of two workshop sessions. In a half-day session entitled "Featured State Session: Oregon," a panel discussed the State's Perspective on Defending Contractor Claims. The panel members—an attorney, an engineer who is contract claims coordinator for Oregon DOT and an investigator for Oregon DOT—discussed the team concept and taking an

aggressive attitude toward claims.

The development of resources was stressed in the preparation of expert witnesses, an in-house specialist, and other state agency specialists, and the importance of graphics for presentation of evidence was noted. Also discussed was the use of computers and software to aid in setting up a claim defense. Rich Roberts, the investigation panel member, emphasized that the key to the successful defense of contract claims is

education of field personnel. Field personnel must be trained to recognize when a claim may arise or when the contractor is acting contrary to law, regulations, or specifications, and the necessary steps to take.

At the session dealing with federal perspective on handling contract claims, coordination between legal and engineering at an early stage in the claims process was stressed. Bernard L. King, Contract Administrator, Central Direct Funded Division, Federal Highway Administration, Denver, said that as claims coordinator he tries to prevent claim litigation through claim prevention and claim resolution by getting involved in contract disputes as they occur in the field rather than after decisions have been made that invariably lead to litigation. King also stressed education at the operational level by training field personnel to recognize claims and, most important, to document everything involving a potential claim. Emphasizing that claims are not exclusively a construction problem, he noted that a claim can arise in design or in decisionmaking regarding construction materials. King recommended that departments encourage settlement at the project level as there appears to be a direct relationship between the amount of claim and how high up in the highway organization the claim is settled.

At the same session John Rippley, Deputy Regional Counsel, FHWA, Denver, noted that the 1987 STURAA will change contract responsibilities and risk in a number of states by transferring risk from the contractor to the states. He admonished contract lawyers to look at disclaimer clauses because they may no longer be effective. The act requires the USDOT to issue regulations requiring contract clauses that equitably address site conditions, suspension of work, and material changes in the scope of the work.

Formal Papers

Walter A. McFarlane, Deputy Attorney General of Virginia, reviewed the continuing problem of bid rigging and antitrust matters. He emphasized that

states must continue to monitor bid rigging, which has not been prevented by indictments and convictions.

Environmental issues were the subject of an address by Edward V. A Kussy, Assistant Chief Counsel for Environment and Right of Way, FHWA. With respect to the Clean Air Attainment Standards, he noted that the FHWA is trying to coordinate the mitigation issues in non-attainment areas between the American Association of State Highway and Transportation Officials and other federal agencies.

Gregory C. Santoro, Assistant Chief Counsel, Pennsylvania Department of Transportation, delivered a formal paper on "Use of Turnkey Procedures in Highway Construction—Legal Issues and Problems." Santoro outlined the modified turnkey procedure adopted by the Pennsylvania Department of Transportation whereby the department retained responsibility for environmental matters, right-of-way acquisition, and utility relocation, whereas design and construction were subject to turnkey.

Orrin F. Finch, former Assistant Chief Counsel for the California Department of Transportation, delivered an affirmative action update regarding decisions of the United States Supreme Court. Finch is the author of "Minority and Disadvantaged Business Enterprise Requirements in Public Contracting" (*Research Results Digest 146*, November 1985), a publication of TRB's National Cooperative Highway Research Program.

Panel Discussion on Alcohol and Drug Abuse

The TRB Committee on Motor Vehicle and Traffic Law sponsored a panel discussion on Alcohol and Drug Abuse in Transportation, planned by Committee Chairman Andrew R. Hricko, General Counsel of the Insurance Institute. Moderator of the panel discussion was Keith McGuire, Chief of the Seattle Office, National Transportation Safety Board. K. A. Thompson, Vice President, Safety, Yellow Freight System; Tom Johnson, Assistant Chief Pilot, Seattle, Alaska Airlines; and Victor Perini,



Gregory Santoro, PennDOT Assistant Chief Counsel, delivers paper on Use of Turnkey Procedures in Highway Construction—Legal Issues and Problems.

Environmental issues are addressed by Edward Kussy, Assistant Chief Counsel for Environment and Right of Way, FHWA.



Orrin Finch, former Assistant Chief Counsel, Caltrans, presents an affirmative action update on decisions of the United States Supreme Court.



General Counsel of the Highway Users' Federation, discussed the problems of random (no notice) versus mandatory testing, due process, and rehabilitation programs. Johnson pointed out that after a member of the airline cockpit crew successfully completes rehabilitation, he is under surveillance for an additional 1½ years. Thompson stated that drug abuse has cost all industries \$60 billion to \$100 billion. He said the American Trucking Associations supports drug testing during physical examination required for hiring, random testing based on suspicion of probable use, and mandatory testing after a serious or fatal accident. Perini, filling in for R. W. Taggart, Vice President, Public Affairs, Southern Pacific, said that the most frequently abused drug in railroad incidents is marijuana. He pointed out that

Southern Pacific rules prohibit an employee from reporting to work with either alcohol or illicit drugs in his system.

Trial Preparation

For the first time, this year's workshop featured an all-day breakout session on trial preparation, jury selection, and negotiating a settlement. The session was aimed at the less-experienced lawyers, but the number of participants indicated that many of the experienced ones wanted a refresher course. The session, sponsored by TRB's Committee on Eminent Domain Law, ended with a 1-hour program on Legal Ethics, presented by Delmer Cain, Assistant Attorney General, Texas, and Donald L. Corlew, Deputy Attorney General, Tennessee.



At podium, William Boland, Washington State Assistant Attorney General; seated, from left, Donald Corlew, Tennessee Deputy Attorney General; Thomas Hines, PennDOT Assistant Counsel; Arnold K. Shimelman, Connecticut Assistant Attorney General.

Roll Call of the States

A continuing highlight of the Annual Workshop on Transportation Law is the half-day session entitled "Roll Call of the States." This session gives the participants the opportunity to report on important court decisions, unusual pending cases, acts or bills of their respective legislatures, or to ask for advice and help. Some of the cases reported

this year, representing a wide range of practice in state DOTs, are briefly described below.

Colorado reported a malpractice case, the basis of which was the collapse of a structure on I-75 leading to the closing of the highway; the Department of Highways is suing the design engineer.

The Missouri Highway Commission lost a sex discrimination suit brought by a woman who was denied a maintenance position. The Missouri Supreme Court ruled that the discrimination was statewide, not just in the district in which the woman applied for the position. Two million dollars in damages and one-half million dollars in attorney fees were awarded, and the department was ordered to hire 37 percent to 40 percent women.

The New York City DOT reported two cases. The first involved the 1982 Surface Transportation Assistance Act (STAA) and the issue of double-bottom, oversized trucks. With limited access to the city via four Interstates, truckers brought suit to gain access to all Interstates and prevailed in the Federal District Court. The case is now on appeal. The second case involved one-way double tolls on the Verrazano Narrows Bridge. Petitioners alleged an adverse environmental effect and prevailed. The city is now developing an environmental impact statement.

Among the cases reported by Florida was a product liability case against a highway paver in which it was alleged that the pavement was a product in order to gain application of strict liability. The Florida Supreme Court ruled that a public road is not a product. Also reported was a contract claim case in which a plan change resulted in extra work amounting to \$840,000. The contractor performed the extra work without a written order as required by the contract. The court dismissed the complaint for failure to obtain the written order.

Louisiana reported an important case involving geometric standards of highways. The lower court and the intermediate appellate court held that the department was liable because it failed to improve a road with 1.5-ft shoulders by reconstruction to present-day standards of 6-ft shoulders. The department presented an economic defense and prevailed, with the state supreme court holding that it would be financially impossible to bring all of the state's roads up to modern standards.

In Iowa a meat packer agreed, after being cited for approximately 1,500 weight violations, to install weigh-in-motion scales at its plants; to install a device to lock carcasses in position in trucks to keep weight properly distributed on the axles; and to supply weight-ticket information to the state. The court left the case pending for one year to ensure compliance.

The STURAA of 1987 added a new section to Title 23, which prohibits the information gained from the studies provided for in sections 130 (railway-highway crossings), 144 (highway bridge replacement and rehabilitation program), and 152 (hazard elimination program) from being admissible in any state or federal court for the purpose of proving damages. The ink was barely dry on the new law when a plaintiff's lawyer tried to circumvent it by using the Federal Freedom of Information Act. Grady Click, Assistant Attorney General of Texas, reported that the Federal Court in Texas has now barred that avenue of approach.

1988 Workshop on Transportation Law

The 27th Annual Workshop on Transportation Law will be held at the Sheraton Inn, Stamford, Connecticut, July 24-28, 1988. Mark your calendars and inform the city and authority attorneys in your state of the dates and location of the workshop.

Transportation right-of-way personnel and engineers are always welcome. Individuals who would like to make a presentation or to suggest a topic to be addressed should contact Robert Cunliffe, Transportation Research Board, 2101 Constitution Avenue, N.W., Washington, D.C. 20418 (telephone 202-334-3205).