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U.S. Court of Appeals

ADMINISTRATIVE LAW
GENERAL POLICY STATEMENT

Interstate Commerce Commission statement of policy on defining contract motor carriers held to be general policy statement and not subject to APA requirement of public comment and thirty day prior notice.

THE REGULAR COMMON CARRIER CONFERENCE, ETC., ET AL. v. UNITED STATES, ET AL., U.S.App.D.C. No. 79-1249, June 30, 1980. *Petition for Review denied* per McGowan, J. (Tamm and Robb, JJ. concur). *Robert C. Bamford* with *Roland Rice, Harry J. Jordan* and *Leonard A. Jaskiewicz* for petitioners. *John P. Fonte* with *Richard A. Allen* and *Robert Lewis Thompson* for respondents. *Paul F. Sullivan* for Intervenor, Heavy-Specialized Carriers Conference. *Harry C. Ames, Jr., E. Stephen Heisley, Dwight L. Koerber, Jr.* and *Lester R. Guttman* for Intervenor, Baywood Transport, Inc., et al.

McGOWAN, J.: This petition for review raises the recurring question of whether agency action purporting to be a "general policy statement" is not something more, and therefore violative of statutory procedural and substantive limitations. In this instance we find the challenge to be unavailing, and we deny the petition.

The Interstate Commerce Act defines a motor *contract* carrier as

> a person, other than a motor common carrier, providing motor vehicle transportation for compensation under continuing agreements with *a person or a limited number of persons*—
>
> (A) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or
>
> (B) designed to meet the distinct needs of each such person.

49 U.S.C. §10102 (12) (emphasis added). A motor *common* carrier, on the other hand, is

> a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both.

49 U.S.C. §10102 (11).

In 1962, the Interstate Commerce Commission warned in *Umthun Trucking Co. Ext.-Phosphatic Feed Supplements*, 91 M.C.C. 691, that

> [t]hose contract carriers whose services do not possess . . . a high degree of specialization . . . are hereby put on notice that their attempts to expand their operations by offering service to more than six or eight separate shippers will be scrutinized with great care to insure that they are not thereby placing themselves in a position to serve more than the limited number of persons

(Cont'd. on p. 1466 - Statement)

U.S. Court of Appeals

UNITED STATES
EMPLOYEES

Performance Rating Act does not prohibit supervisor from responding orally to prospective employers about supervised employee.

BURTON v. LOBDELL, ET AL., U.S.App. D.C. No. 79-1556, June 30, 1980. *Affirmed per curiam* (MacKinnon, Robb and Mikva, JJ. concur). *Harvey M. Katz* for appellant. *Barbara L. Herwig* with *Alice Daniel, Carl S. Rauh* and *Robert E. Kopp* for appellees. Trial Court— Bryant, C.J.

PER CURIAM: This matter is before the court on plaintiff-appellant's appeal from a district court order granting defendant-appellees' motion for summary judgment and to dismiss. For the reasons stated below and in the district court's memorandum opinion, we affirm.

Appellant, Larry R. Burton, brought suit in the district court, alleging that appellees' tortious conduct injured him in his attempts to

(Cont'd. on p. 1464 - Employees)

U.S. Court of Appeals

GOVERNMENT INFORMATION
PRIOR DISCLOSURE

Agency is not required to disclose records under Freedom of Information Act which have been previously furnished applicant by another agency.

CROOKER v. U.S. STATE DEPARTMENT, U.S.App.D.C. No. 79-2441, June 30, 1980. *Affirmed per curiam* (MacKinnon, Robb and Corcoran, JJ. concur). *Michael Alan Crooker, pro se. Charles F. C. Ruff, John A. Terry, Michael W. Farrell, Diane M. Sullivan* and *Barry M. Tapp* for appellees. Trial Court— Joyce Hens Green, J.

PER CURIAM: In January, 1977, appellant Michael Allen Crooker (a federal prisoner proceeding *pro se*) requested from the State Department a copy of all files indexed under his name. Nineteen documents were found. Thirteen of them which had originated with the Federal Bureau of Investigation (FBI) were forwarded to that agency for review and direct response to appellant. The FBI released the thirteen documents to appellant on April 17, 1978. Nevertheless, on August 1, 1978, Crooker wrote the State Department requesting the FBI documents indexed under his name. The State Department responded that the FBI had released the thirteen documents to him on April 17, 1978.

Appellant then filed the complaint in this case under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) seeking declaratory and injunctive relief against the State Department. The only documents at issue are the

(Cont'd. on p. 1465 - Disclosure)

U.S. District Court

CIVIL PROCEDURE
STANDING

Employee association lacks standing to challenge government agency's letters to newspapers setting forth position on proposed employee compensation legislation.

NATIONAL TREASURY EMPLOYEES' UNION, ET AL. v. CAMPBELL, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, Dist. Ct., D.C., C.A. No. 79-2673, January 15, 1980. *Opinion* per Flannery, J. *Robert M. Tobias* and *William E. Persina* for the Plaintiff. *David Glass* and *Royce Lamberth* for the Defendant.

FLANNERY, J.: This suit arises from certain lobbying activities by the defendant, the Director of the Office of Personnel Management (OPM), in support of the Federal Employees Compensation Reform Act of 1979 (Compensation Act), which was introduced into both houses of Congress on June 14, 1979. The plaintiff, the National Treasury Employees Union (NTUE), seeks declaratory relief and preliminary and permanent injunctive relief from these activities, alleging violation of two statutes.

The defendant has moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), contending (1) that the plaintiff lacks standing to bring this action, (2) that neither statute at issue creates a private cause of action, (3) that the requirements for preliminary injunctive relief have not been shown, and (4) that regardless of these other points neither statute renders the defendant's activities illegal. The parties having fully addressed all issues in their briefs and at oral argument, the court will treat the defendant's motion as one for summary judgment. Fed.R.Civ.P. 12(b).

The court rules for the defendant, finding that the parties lack standing and that neither statute gives rise to a private cause of action. For these reasons preliminary injunctive relief is inappropriate, and the court need not reach the question of whether either statute applies to the conduct in question.

Background

The activity of which the plaintiff complains

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DISCLOSURE (Cont'd. from p. 1461)

thirteen documents already released to him by the FBI.

The District Court has previously disallowed a second claim by plaintiffs seeking the same documents from a separate agency. *Lynas v. United States Department of State*, Civ.No. 76-1880, slip op. at 2 (D.D.C. No. 30, 1978); *accord, Serbian Eastern Orthodox Diocese v. CIA*, Civ.No. 77-1412, slip op. at 2-3 (D.D.C. July 13, 1978). The Freedom of Information Act does not require that the agency from which documents are requested must release copies of those documents when another agency possessing the same material has already done so. Thus, the State Department is not required to release documents that appellant has already received from the FBI.

Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made. *Ackerly v. Ley*, 420 F.2d 1336, 1340 (D.C. Cir. 1969) (footnote omitted). *See also Misegades & Douglas v. Schuyler*, 456 F.2d 255 (4th Cir. 1972); *Kaye v. Burns*, 411 F.Supp. 897, 901 (S.D.N.Y. 1976).

Additionally, the State Department regulations provide for the automatic referral of requests for records to the agency that originated the record— the "originator." Consequently, the request to the Department is in effect a second request to the FBI, which has already provided appellant with the same documents he requests a second time.

Where the records have already been furnished, it is abusive and a dissipation of agency and court resources to make and process a second claim. The purpose of the Freedom of Information Act is to provide access to governmental materials, with limited exceptions. Here, the request was fully satisfied; the referral to the originating agency was necessary because of the sensitive nature of the materials involved and the familiarity of the originator with the records and their nuances.

Appellant claims attorneys' fees, which are available for parties who have "substantially prevailed" in their suits under the Freedom of Information Act. 5 U.S.C. §522(a)(4)(E). Since appellant has not "prevailed" in this action he is not entitled to attorneys' fees.

We accordingly affirm the summary judgment granted by the District Court in favor of the appellee and denying appellant's motion for summary judgment and attorneys' fees. In doing so we also rely upon the Memorandum Order and Opinion of the District Court.

Judgment accordingly.

STANDING (Cont'd. from p. 1461)

is the use of an undetermined amount of OPM's funds for the preparation and mailing of copies of a certain letter to various publications across the country. The letter, dated June 1, 1979, set forth the views of OPM Director Alan Campbell with respect to the desirability of the Compensation Act, and it requested editorial support for the legislation. These facts were stipulated by the parties.

NTEU is an unincorporated association representing approximately 100,000 employees of several federal agencies. Among its primary functions is lobbying in support of or in opposition to legislation that affects its members. NTEU has publicly opposed the Compensation Act, stating that it would adversely affect federal employees in general and NTEU's members in particular.

NTEU argues that Campbell's use of public funds to support the Compensation Act not only directly injures itself and its members but also violates two statutes, both of which, according to NTEU, give rise to private rights of action. The first of these statutes, section 607(a) of the Treasury, Postal Service and General Appropriations Act of 1979, P.L. 95-429, 92 Stat. 1001, provides,

> No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress.

The second statute, 18 U.S.C.A. §1913 (1970), provides,

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation. . . .

Standing

The basic requirement of standing is injury in fact. In addition, a plaintiff must show some causative link between the injury allegedly suffered and the action under protest. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

In this case the plaintiff has failed to show either that it has suffered any injury of a legally cognizable nature or that any adverse developments have occurred with respect to the Compensation Act that are causally related to the defendant's conduct. Even if NTEU could demonstrate that Campbell's letter had directly influenced newspaper editors in their positions regarding the Compensation Act, it would still have to show some harm resulting from the adoption of those positions. This it has not done. The link between Campbell's letter and the fate of the proposed legislation is too attenuated for the plaintiff to prevail. The court is aware that "economic injury (or its prospect)" can suffice to confer standing, L. Tribe, *American Constitutional Law* 82 (1978), and it is safe to say that Campbell hoped the ultimate impact of his letter would be on the Compensation Act rather than solely on the minds of various editors. Nevertheless, in asking this court to discern sufficient injury arising from that letter to give rise to a justiciable case or controversy, the plaintiff asks too much.

Private Rights of Action

At the outset the court notes the interrelationship of the issues of standing and the existence of private rights of action under given statutes. Professor Tribe has commented on this congruence of issues, stating, "In effect, someone is 'injured in fact' by an action for purposes of article III if the person has a statutory right to complain of the action in a federal court. . . ." L. Tribe, *supra* at 80. In other words, if someone has an implicit right of action under the statute, *i.e.*, a statutory right to complain, then he also has standing to bring the action. In this case the plaintiff has no statutory right to complain.

The case law in this area is sparse. No cases have been decided under section 607, and only two cases have addressed section 1913. *American Conservative Union* v. *Carter*, No. 79-2495, slip op. at 4-5 (December 14, 1979); *National Association for Community Development v. Hodgson*, 356 F.Supp. 1399 (D.D.C. 1973). In *American Conservative Union* Judge Robinson of this district court ruled that no private right of action was available under section 1913. As he observed, that section does not explicitly create a private right, and the sparse legislative history offers no support for inferring such a right. He commented, moreover, that the logic of the statute— it provides for ordinary criminal penalties and also the removal from office of officials found to have violated its terms, but it omits reference to private rights of action— suggests that no private right was intended by Congress.

In *Hodgson*, this court denied the defendant's motion to dismiss for lack of a private right of action under section 1913. Despite the similarities of *Hodgson* to the case at hand, that case cannot be deemed controlling. Since that ruling the Supreme Court issued an opinion in *Cort v. Ash*, 95 S.Ct. 2080 (1975), that appears to establish a more rigorous standard for inferring a private right of action than did the opinion in *Wyandotte Transportation Co. v. United States*, 88 S.Ct. 379 (1967), on which the court relied in *Hodgson*.

The *Cort* opinion states,

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted, ". . .that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

95 S.Ct. 2088. Applying this four-pronged test, the Court found that a cause of action should not be inferred in favor of a corporate shareholder against corporate directors under a criminal statute, 18 U.S.C. §610, which prohibits corporations from making contributions in connection with certain elections. *See also Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S.Ct. 242 (1979); *Cannon v. University of Chicago*, 99 S.Ct. 1946 (1979); *Touche Ross & Co. v. Redington*, 99 S.Ct. 2479, 2489 (1979) ("The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."). Looking to the legislative intent underlying this statute, as well as the other factors set forth in *Cort*, this court cannot say that a private right of action exists under section 1913. To the extent that *Hodgson* is inconsistent with this position it is overruled.

With respect to section 607(a), NTEU's position has no more basis in the legislative history or the language or logic of the statute than with respect to section 1913. There is simply no reasonable ground for ruling that Congress intended by this purely prohibitive statute to authorize civil suits against government officials. The court shares the plaintiff's concern for private interest groups struggling to be heard over the voices of advocates supported by public funds. Nevertheless, the decision to provide such groups with private causes of action can be made only by