

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 755

FINAL OFFER RATE REVIEW

Digest:¹ To permit informal discussions with stakeholders, the Board waives the general prohibition on ex parte communications between June 1, 2020, and July 15, 2020.

Decided: May 14, 2020

On September 12, 2019, the Board issued a notice of proposed rulemaking (NPRM) in Docket No. EP 755 seeking public comment on its proposal of a new procedure for challenging the reasonableness of railroad rates in smaller cases.² Under this proposed procedure, known as Final Offer Rate Review (FORR), the Board would decide a case by selecting either the complainant's or the defendant's final offer, subject to an expedited procedural schedule that adheres to firm deadlines. The Board received 25 opening comments and eight reply comments and conducted two ex parte meetings, summaries of which have been placed in the docket.

The procedural schedule set forth in the NPRM concluded with the expiration of the reply comment period on January 10, 2020. The Board finds that it would benefit from additional stakeholder input on the proposal specifically and on how best to continue its efforts to establish a new methodology generally, and will therefore exercise its discretion to waive its general prohibition on ex parte communications to permit post-comment period ex parte discussions with stakeholders.

Pursuant to the Board's regulations, "ex parte communications with Board Members in informal rulemaking proceedings are permitted after the issuance of a notice of proposed rulemaking and until 20 days before the deadline for reply comments set forth in the notice of proposed rulemaking, *unless otherwise specified by the Board in procedural orders governing the proceeding.*" 49 C.F.R. § 1102.2(g)(1) (emphasis added). As it explained in adopting these regulations, the Board may permit ex parte discussions following the submission of written

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language in Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In conjunction with the NPRM in Docket No. EP 755, the Board also sought additional comments on Docket No. EP 665 (Sub-No. 2), Expanding Access to Rate Relief.

comments if that would be more beneficial in a particular rulemaking. Ex Parte Commc'ns in Informal Rulemaking Proceedings, EP 739, slip op. at 19 (STB served Feb. 28, 2018).

Here, the comments delved deeply into the mechanics of the proposed FORR procedure—for example, posing hypothetical litigation scenarios and asking the Board to be “more explicit” about principles and evidence it may find relevant in a FORR proceeding. (See, e.g., Ass'n of Am. RRs. Comments 15-16; U.S. Dep't of Agric. Comments 4.) Additional ex parte discussions are warranted to ensure the Board understands these and other issues introduced or addressed in the comments.

In addition, the Board appreciates that at least one carrier, Canadian National Railway (CN), has indicated an interest in using the Board's voluntary arbitration program to resolve small rate disputes and has suggested certain modifications to the Board's arbitration program. (See Canadian Nat'l Ry. Comments 25-27.) To date, the Board's arbitration program—first established in 1997³ and modified in 2013⁴ and again in 2016⁵—has gone unused. The Board wishes to explore the issues raised in CN's comments and is interested in discussing whether, and if so, how, its arbitration program, see 49 C.F.R. part 1108, could be further modified so as to provide a practical and useful alternative dispute resolution mechanism, particularly for stakeholders with smaller rate disputes. Questions related to this concept include, for example, whether other railroads and rail shippers may similarly be willing to use the Board's voluntary arbitration program to resolve smaller rate disputes; whether other commenters share CN's preference for revising the Board's arbitration regulations to provide that arbitration decisions are confidential to the extent permissible by law⁶; and whether railroads would be willing to opt in to the arbitration program on terms that would be acceptable to shippers. The Board intends to

³ Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transp. Board, EP 560 (STB served Sept. 2, 1997).

⁴ Assessment of Mediation & Arbitration Procedures, EP 699 (STB served May 13, 2013) (establishing a new arbitration program, under which carriers and shippers may agree voluntarily in advance to arbitrate certain types of disputes that come before the Board, and clarifying and simplifying its existing arbitration rules).

⁵ Revisions to Arbitration Procedures, EP 730 (STB served Oct. 11, 2016) (implementing directives in the Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228).

⁶ See 49 C.F.R. § 1108.9(g); Assessment of Mediation & Arbitration Procedures, EP 699, slip op. at 15-16 (based on comments from both railroad and shipper interests, redacted versions of arbitration decisions would be submitted to the Board for publication on the Board's website).

use the ex parte discussions to preliminarily explore these and other issues involving the potential use of voluntary arbitration to resolve smaller rate disputes.⁷

Accordingly, to permit informal discussions with stakeholders, the Board will waive the general prohibition on ex parte communications. Subject to the procedures established below, parties may discuss matters related to this proceeding⁸ with the Board and Board staff.⁹

The Board establishes the following procedures pursuant to the regulations adopted in Ex Parte Communications in Informal Rulemaking Proceedings, Docket No. EP 739. Meetings will take place by telephone or online conference between June 1, 2020, and July 15, 2020. Depending on parties' interest, the Board may extend this period.

Parties wishing to make visual presentations or provide other written or electronic materials should email their materials to rcpa@stb.gov, with the subject line "EP 755 Ex Parte Meeting Materials," no later than two business days before their first meeting is scheduled to occur. Any party engaged in ex parte communications in this proceeding shall submit to the Board member office with whom the meeting was held a memorandum pursuant to the provisions of 49 C.F.R. § 1102.2(g)(4). Any presentations or other materials submitted in advance of the meeting must also be attached to the memorandum. Parties must submit their memoranda no later than two business days after the ex parte communication; the Board will post the memoranda (including any attachments) on its website within five business days of submission. Parties will be allowed 20 business days from the close of the ex parte communication period to submit written comments in response to the memoranda and other submitted materials. To schedule meetings, parties should contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at 202-245-0238.

It is ordered:

1. To permit informal discussions with stakeholders, the Board waives the general prohibition on ex parte communications as discussed above.

⁷ Any future changes to the Board's arbitration regulations, if necessary, would be the subject of a separate rulemaking proceeding.

⁸ The Board previously waived the prohibition on ex parte communications in Docket No. EP 665 (Sub-No. 2). See Expanding Access to Rate Relief, EP 665 (Sub-No. 2) (STB served Mar. 28, 2018) (stating that "[t]he waiver will remain in effect until further order of the Board."). To the extent parties wish to discuss both Docket No. EP 755 and Docket No. EP 665 (Sub-No. 2) in the same meeting, the procedures established in today's decision will apply.

⁹ Consistent with Ex Parte Communications in Informal Rulemaking Proceedings, EP 739, slip op. at 20, meetings will be held under the auspices of the Board members' offices and may include Board staff as determined by each Board member.

2. Parties may schedule meetings with Board members between June 1, 2020, and July 15, 2020.

3. Comments in response to the memoranda are due by August 12, 2020.

4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.