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UP-4/NS-4

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
—CONTROL—
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY

**MOTION TO PERMIT STAKEHOLDER COMMUNICATIONS IN ACCORDANCE
WITH 49 U.S.C. § 11324(f)**

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Pursuant to 49 U.S.C. § 11324(f)(2), ex parte communications are explicitly permitted in consolidation proceedings involving at least one Class I carrier, subject to disclosure requirements. Yet nearly 30 years ago, the Board issued a decision in *Fieldston* banning such communications.¹ Because the justifications underlying *Fieldston* are no longer valid, and because the Board’s decision-making in this proceeding would benefit from communications with parties subject to appropriate disclosure requirements, Applicants² respectfully ask the Board to waive the prohibition on ex parte communications established in *Fieldston* for this proceeding.³

I. The Justifications In *Fieldston* for Banning Ex Parte Communications Are No Longer Valid.

Congress provided “express authorization” in the ICC Termination Act to allow the Board to entertain ex parte communications, subject to disclosure requirements.⁴ Yet despite this express authorization, the Board imposed a blanket prohibition on such communications in *Fieldston*. Applicants respectfully submit that the concerns underlying this nearly 30-year-old decision are no longer valid.

¹ See *Pet. of Fieldston Co., Inc. To Establish Procs. Regarding Ex Parte Commc’ns In R.R. Merger Procs.*, Docket No. EP 619 (STB served Jan 8, 1997).

² As set forth in Applicants’ Notice of Intent (UP-1/NS-1), “Applicants” are Union Pacific Corporation (“UPC”) and Union Pacific Railroad Company (“UP”) (collectively, “Union Pacific”) and Norfolk Southern Corporation (“NSC”), Norfolk Southern Railway Company (“NS”) (collectively “Norfolk Southern”).

³ The Association of American Railroads has requested that the Board institute a proceeding to make various modifications to the Board’s ex parte communication rules in 49 C.F.R. part 1102, including abandoning *Fieldston* and codifying Congress’s intent in § 11324(f)(1) in Board regulations. *Pet. for Rulemaking—Amendments to Reguls. Governing Ex Parte Commc’ns*, Docket No. EP 782 (filed May 16, 2025).

⁴ H.R. Rep. No. 104-422, at 191 (1995) (Conf. Rep.) (describing the “principal procedure change” to § 11324 in the ICC Termination Act of 1995); 49 U.S.C. § 11324(f)(4).

First, the Board expressed concern that entertaining ex parte communications would “burden” the agency with “reducing any oral communication to writing and placing it in the public docket.”⁵ But this concern was remedied over seven years ago when the Board relaxed its ex parte communication rules in informal rulemakings and required participating stakeholders to draft and submit memoranda summarizing the date, time, attendees, data, and arguments presented and discussed during the ex parte communication,⁶ which the Board then reviews and posts in the public docket.⁷ This process has worked well: it minimizes the use of agency resources and is consistent with approaches employed by other agencies.⁸ If the Board grants Applicants’ request for a waiver of *Fieldston* in this proceeding, Applicants suggest that the Board employ this same process.

Second, the Board in *Fieldston* was concerned that entertaining ex parte communications would impede the Board’s ability to “issue decisions promptly” by adhering to a “strict timetable” and procedural schedule.⁹ But the Board has unnecessarily tied its own hands by prohibiting a congressionally authorized tool that actually could further the agency’s ability to reach an efficient and timely decision. The Board retains the discretion to set parameters around

⁵ *Fieldston*, slip op. at 2.

⁶ 49 C.F.R. § 1102.2(g)(4)(i); *Ex Parte Commc’ns In Informal Rulemaking Procs.*, Docket No. EP 739 (STB served Feb. 28, 2018).

⁷ 49 C.F.R. § 1102.2(g)(4)(ii), (vi).

⁸ *See, e.g.*, 18 C.F.R. § 385.2201(g)(1) (FERC regulations require submission to the agency of any “document, or a summary of the substance of any oral communication,” for filing in the public docket).

⁹ *Fieldston*, slip op. at 2.

such communications to ensure their usefulness without jeopardizing the procedural schedule. Indeed, Congress codified agency discretion on how to deploy this tool into practice.¹⁰

Third, the Board in *Fieldston* articulated the concern that, if ex parte communications were allowed, the public would be “left to wonder whether the record in a proceeding truly includes all facts and arguments on which a decision is based” if ex parte communications were permitted under any circumstances.¹¹ But again, since *Fieldston*, the Board and other agencies have developed procedures that implement “safeguards . . . sufficient to preserve fairness and transparency.”¹² Those safeguards include the requirements that all ex parte communications be publicly disclosed and that parties have an opportunity to respond to the substance of those communications.¹³ These safeguards can be employed effectively in this proceeding to ensure a fair and orderly process.

Finally, the Board asserted in *Fieldston* that “judicial review of agency railroad merger decisions . . . would be greatly complicated by our exercising our discretion so as to permit ex parte communications” in rail licensing proceedings under § 11324.¹⁴ The *Fieldston* decision cited no legal or factual support for this assumption, and the same concern would impact the informal rulemaking context, where the Board permits ex parte communications subject to

¹⁰ See 49 U.S.C. § 11324(f)(4) (“Nothing in this subsection shall be construed to require the Board or any of its members or employees to engage in any ex parte communication with any person.”).

¹¹ *Fieldston*, slip op. at 3.

¹² *Ex Parte Commc’ns In Informal Rulemaking Procs.*, Docket No. EP 739, at 17; see also *Reguls. Governing Off-the-Record Commc’ns*, 63 Fed. Reg. 51,312, 51,319 (Sept. 25, 1998) (FERC concluding that public disclosure of the substance of ex parte communications is “consistent” with “due process principles” relating to “the actual and apparent integrity of administrative processes”).

¹³ See *Reguls. Governing Off-the-Record Commc’ns*, 63 Fed. Reg. at 51,319; 49 C.F.R. § 1102.2(g)(4).

¹⁴ *Fieldston*, slip op. at 3.

disclosure requirements. In any event, other agencies have concluded that public disclosure of the substance of ex parte communications is “consistent” with “the creation of an agency decision-making record capable of judicial review.”¹⁵

II. Ex Parte Communications In This Proceeding Would Assist The Board’s Decision-Making.

The Board should grant a waiver of the *Fieldston* ban because ex parte communications in this proceeding will facilitate more efficient and thorough decision-making. Congress’s rationale for permitting ex parte communications in railroad merger proceedings under § 11324(f)(4) is instructive on this point. Congress enacted this “express authorization” for communications between the decision makers and parties to the proceeding in response to “complaints that the former ICC process did not allow sufficient procedural flexibility to allow informal consultation to identify areas of concern at an early stage of the approval process.”¹⁶

Consistent with Congress’ direction, Applicants propose that the period for ex parte meetings would begin when the Board grants this Motion, and would conclude on Day 150 of Applicants’ proposed schedule—thus allowing parties ample time to respond to the disclosed communications in their written submissions due after that date. *Cf.* 49 C.F.R. § 1102.2(g)(1). The ex parte period proposed is sufficient to provide parties and the Board with time and flexibility to hold meetings. Should the Board wish to hold additional ex parte meetings later in the procedural schedule, it would retain the discretion to deploy this tool quickly by virtue of having waived *Fieldston* early in the proceeding. Ex parte communications should be limited to parties to the proceeding, consistent with 49 C.F.R. § 1101.2(d). And parties should be required

¹⁵ *Reguls. Governing Off-the-Record Commc’ns*, 63 Fed. Reg. at 51,319.

¹⁶ H.R. Rep. No. 104-422, at 191 (1995) (Conf. Rep.) (describing the “principal procedure change” to § 11324 in the ICC Termination Act of 1995).

to comply with the procedural requirements for written disclosure that are found in the existing regulations at 49 C.F.R. § 1102.2(g).

Applicants appreciate the Board’s designation of a Board staff liaison for this proceeding. However, the liaison’s role is limited to providing “informal opinions and interpretations, which are not binding on the Board, regarding the format of or information to be included in the application.”¹⁷ A waiver of *Fieldston* will allow all interested parties to discuss substantive issues with Board Members and staff, and would allow such discussions after the Application and comments have been filed. Such ex parte communications are consistent with Congress’s purpose in § 11324(f)(4), and will aid the Board in its consideration of this transformative transaction.

CONCLUSION

The Board should grant Applicants’ motion for waiver of *Fieldston* and permit ex parte communications in this proceeding subject to written disclosure requirements.

¹⁷ Decision No. 3, slip op. at 2; 49 C.F.R. § 1180.4(c)(6)(iii).

Respectfully submitted,

/s/ Raymond A. Atkins

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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of August 2025, the foregoing Motion to Permit Stakeholder Communications in Accordance with 49 U.S.C. § 11324(f) was served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/ Michael L. Rosenthal