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Mr. Scott Zimmerman
Acting Director, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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Re: STB Ex Parte No. 739 – Ex Parte Communications in Informal Rulemaking Proceedings

Dear Mr. Zimmerman:

BNSF Railway Company (“BNSF”) writes in response to the Surface Transportation Board’s (“STB” or the “Board”) September 28, 2017 Notice of Proposed Rulemaking (“NPRM”). The NPRM proposes to allow *ex parte* communications in informal rulemaking proceedings subject to disclosure requirements. BNSF fully supports the Board’s long overdue proposal to permit greater communication with stakeholders while still maintaining a transparent and fair process.

Modernizing the Board’s *ex parte* rules to permit an increased flow of information and technical expertise between the Board and its stakeholders during informal rulemaking proceedings will enable the Board to engage in more reasoned policymaking and should produce regulatory policies that are more grounded in the complex operational and market realities currently facing the rail industry. While BNSF joins in the comments being filed by the Association of American Railroads (“AAR”) in this proceeding, we submit this letter to emphasize BNSF’s support for certain aspects of the Board’s proposal.

- **BNSF believes that the Board’s proposal would appropriately align Board rules with current best practices of other agencies.**

The Board’s current regulations at 49 C.F.R. § 1102.2 reflect the outdated and overly restrictive view of the Board’s predecessor agency, the Interstate Commerce Commission, that *ex parte* communications between the Board and stakeholders should generally be prohibited in all instances. This view is out of step with long-held doctrines of administrative law, the *ex parte*

rules generally under the Administrative Procedures Act, and procedures of other federal agencies that have been modernized to reflect evolved precedent governing the propriety of *ex parte* communications regarding informal rulemakings.

As one example, the Federal Communications Commission has amended its rules in recent years to permit greater flexibility to receive *ex parte* communications in its proceedings, including informal rulemakings, and enable the Commission and staff to have greater access to “important, timely information about the complex legal, economic and technical issues the Commission considers.” Federal Communication Commission, FCC 11-11, *Report and Order and Further Notice of Proposed Rulemaking: Amendment of the Commission’s Ex Parte Rules and Other Procedural Rules*, para. 21 (2011). The Federal Energy Regulatory Commission has also revised its *ex parte* rules, which allow *ex parte* communications in informal rulemakings, so as “to improve meaningful dialogue that is necessary to informed and fair decision making.” *Regulations Governing Off-the-Record Communications*, 64 Fed. Reg. 51,222, 51,224 (September 22, 1999).

In addition to aligning the Board’s rules closer to those of the FCC and FERC, the NPRM is consistent with the approach of other agencies welcoming *ex parte* communications, such as the Consumer Product Safety Commission, Consumer Financial Protection Bureau, and Environmental Protection Agency. See 16 C.F.R. §§ 1012.1–1012.7; *Policy on Ex Parte Presentations in Rulemaking Proceedings*, 82 Fed. Reg. 18,687 (April 21, 2017); and Memorandum from Lisa P. Jackson, Administrator, Environmental Protection Agency, to All EPA Employees, *Transparency in EPA’s Operations* (April 23, 2009) (available at https://www.epa.gov/sites/production/files/2014-02/documents/transparency_in_epas_operations.pdf). BNSF believes the Board’s proposal “encourages greater use of *ex parte* communications in informal rulemaking proceedings” consistent with agency best practices recommended by the Administrative Conference of the United States and noted by the Board. NPRM at 2.

- **Increased communications with the Board regarding informal rulemakings will provide value to both the Board and its stakeholders.**

The direct exchange of information between the Board and its stakeholders can give the Board and its staff the benefit of technical and other expertise that the Board cannot otherwise access, which allows the Board to more appropriately tailor its policymaking function to the realities of the rail industry. As noted by the D.C. Circuit in *Sierra Club*, “the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated.” *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981).

The Board has already experienced the benefit of greater information flow with stakeholders in the recent U.S. Rail Service Issues – Performance Data Reporting proceeding (Ex Parte No. 724). Through *ex parte* meetings, the Board and its staff became better informed about highly technical service reporting issues than would otherwise have been possible through a written record alone. Even though the industry generally opposed the service regulations that the Board ultimately adopted in that proceeding, those regulations were more efficiently tailored to the realities of railroad operations than would otherwise have been possible without the *ex parte* process followed by the Board and its staff.

Stakeholders also benefit from direct interaction with the Board. Face-to-face meetings between stakeholders and the Board and its staff can increase stakeholders' understanding of the Board's thoughts and rationale for a rulemaking beyond the supplementary information contained in the pages of an NPRM. Informal contact can allow stakeholders increased understanding and the opportunity to tell the Board how the stakeholder would be affected by a proposed rulemaking. Such an increased two-way flow of information should lead to more informed and efficient Board regulation.

For the reasons set forth above, and those set forth in the AAR's comments, BNSF fully supports the Board's proposal to modernize its *ex parte* rules and increase the opportunities for direct communication with the Board and its staff.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jill K. Mulligan", with a stylized flourish at the end.

Jill K. Mulligan