

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 739

EX PARTE COMMUNICATIONS IN
INFORMAL RULEMAKING PROCEEDINGS

COMMENTS OF THE ASSOCIATION
OF AMERICAN RAILROADS

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The Association of American Railroads (“AAR”) submits these comments as a party of record in accordance with the Notice of Proposed Rulemaking (“NPRM”) served on September 28, 2017 in the above-captioned proceeding by the Surface Transportation Board (“STB” or “Board”). The AAR and its freight member railroads have a strong interest in ensuring that the Board’s rules regarding ex parte communications in informal rulemaking proceedings lead to reasoned decision-making, as well as that the final rules issued by the agency reflect the operating and business practices of the railroad industry. The AAR supports the NPRM proposal because the rule changes will facilitate the rulemaking process while maintaining transparency.

As made clear in AAR filings in other proceedings, the Board’s application of its current regulations unnecessarily prohibits most informal communications with the Board and its staff in the informal rulemaking context.¹ The Board’s predecessor agency, the Interstate Commerce Commission (“ICC”), included informal rulemaking proceedings in a general

¹ See AAR letter, EP 738, *Regulatory Reform Task Force* (filed June 29, 2017); AAR Reply, EP 724 (Sub-No. 4), *U.S. Rail Service Issues – Performance Data Reporting* (filed Dec. 21, 2015).

prohibition on ex parte communications, even though the Administrative Procedure Act (“APA”) only includes a prohibition on ex parte communications in formal rulemaking under 5 U.S.C. § 556-57.² The NPRM accurately establishes the legal framework around ex parte communications in informal rulemaking proceedings, noting that the Interstate Commerce Act, as amended, does not contain any restrictions on ex parte communications in informal rulemakings.³ The case law governing the propriety of such communications in informal rulemakings has evolved since the ICC considered the issue and it is now clear that agencies have flexibility to engage in communications during informal rulemaking proceedings.⁴ Moreover, the Administrative Conference of the United States (ACUS), which reflects agency best practices, has recently encouraged greater use of ex parte communications in informal rulemaking proceedings, subject to appropriate safeguards.⁵

As explained below, the AAR supports the NPRM proposals because they will facilitate the flow of information in rulemaking proceedings and will lead to better informed decision-making by the agency. The NPRM proposal is also consistent with other agency practice. Finally, the AAR offers suggestions for minor modifications to improve and clarify the rules.

² See *Revised Rules of Practice*, 358 I.C.C. 323, 345 (1977) (“(E)x parte communication during a rulemaking is just as improper as it is during any other proceeding. The Commission’s decisions should be influenced only by statements that are a matter of public record.”).

³ The only reference to ex parte communications in the statute allows such communications in certain circumstances in merger proceedings. See 49 U.S.C. § 11324(f).

⁴ See, e.g., *Sierra Club. v. Costle*, 657 F.2d 298, 402 n. 507 (D.C. Cir. 1981) (“Congressional intent not to restrict ex parte contacts in informal rulemaking under the APA . . . could not be clearer.”).

⁵ ACUS, Recommendation 2014-4, *Ex Parte Communications in Informal Rulemaking* (adopted June 6, 2014).

Comments

I. The Board Should Adopt the Proposed Rules Because They Will Lead to Better Reasoned Decision-Making and More Informed Rules.

The Board has recognized that its charge from Congress to promulgate rules necessary to carry out its limited statutory mandate to regulate the railroad industry can often implicate highly technical aspects of railroad operations and business practices.⁶ Recent experience has demonstrated the limits of the notice and comment rulemaking process in devising such technical rules. For example, railroad costing in the regulatory context is an arcane process implicating railroad operations and accounting principles. Long, detailed filings are currently necessary to explain the parties' positions and to probe the agency's reasoning. Though technical conferences are one tool to improve that process,⁷ reliance on written comments on technical matters can lead to delay and drawn out proceedings.⁸

The NPRM proposal would improve the agency's ability to gather information from stakeholders through informal dialogue. Such interaction can inform agency rules by allowing for back and forth conversation and question and answer.⁹ "Public stakeholders provide a variety of information through ex parte communications that is useful during the pre-NPRM period, including technical data, an understanding of technology, knowledge of

⁶ *U.S. Rail Service Issues – Performance Data Reporting*, EP 724 (Sub-No. 4), slip op. at 2 (STB served Nov. 9, 2015).

⁷ *See, e.g., Review of the General Purpose Costing System*, EP 431 (Sub-No. 4) (STB served Aug. 4, 2016) (scheduling a technical conference).

⁸ STB Status Letter to Senate Commerce Committee on Commerce, Science and Transportation (Apr. 3, 2017) (noting the complexity of the issues involved in the EP 431 (Sub-No. 4) proceeding had delayed the proceeding).

⁹ ACUS, Recommendation 2014-4, Ex Parte Communications in Informal Rulemaking, at 2 (adopted June 6, 2014) ("These meetings can facilitate a more candid and potentially interactive dialogue of key issues . . .").

market dynamics, suggestions of potential unintended consequences, and policy and political information.”¹⁰ Face-to-face communications also allow the agency to ensure that its data and information have not grown stale over time. Even when communications do not provide new information, face-to-face conversations summarizing and highlighting points of emphasis can provide value to decision-makers at the Board.¹¹ Ex parte meetings, subject to appropriate disclosure requirements, best allow the agency to leverage its own expertise and limited staff resources. The process described in the NPRM would allow for better consideration of issues before the agency expends the time and effort to draft proposed rules.¹²

The NPRM proposal is also responsive to stakeholder requests for more interaction with STB members and staff. As noted, the AAR has consistently called on the Board to consult with the industry in formulating rules.¹³ The National Grain and Feed Association echoed the AAR’s recommendation to the regulatory reform task force to reform the Board’s ex parte rules. Other groups representing shippers have also asked the Board for the ability to interact with STB staff in other contexts.¹⁴

II. The Proposed Rules are Consistent with Other Independent Agency Practice.

The NPRM proposals are consistent with other agency practice, including independent agencies like the Board.¹⁵ For example, the Federal Communications Commission (“FCC”)

¹⁰ Esa L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking Final Report to the Administrative Conference of the United States*, at 18 (May 1, 2014).

¹¹ *Id.* at 17.

¹² See *Accelerated Reporting Requirements for Class I Railroads*, EP 701 (STB served Feb. 18, 2016).

¹³ See, e.g., AAR letter, EP 738, *Regulatory Reform Task Force* (filed June 29, 2016).

¹⁴ WCTL Comments, EP 733, *Expediting Rate Cases*, at 62 (filed Aug. 1, 2016).

¹⁵ Esa L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking Final Report to the Administrative Conference of the United States* (May 1, 2014).

has adopted rules encouraging both oral and written ex parte communications in FCC proceedings, including informal rulemaking.¹⁶ The FCC most recently amended its rules in 2011¹⁷ and applies to informal rulemakings through a definition of parties to a proceeding as “members of the general public after the issuance of notice of proposed rulemaking” or other similar order.¹⁸ Informal rulemakings at the FCC are “permit but disclose” proceedings where ex parte communications are allowed subject to disclosure rules similar to the NPRM proposal.¹⁹ Ex parte communications in informal rulemaking proceedings are only restricted during “Sunshine period” preceding a meeting of the Commission.²⁰ At the Federal Energy Regulatory Commission (“FERC”), off-the-record communications are generally prohibited only in on-the-record proceedings.²¹ Notice and comment rulemakings conducted under 5 U.S.C. § 553 are explicitly excluded from the term “contested on-the-record proceeding” for which that rule governing off-the record communications apply.²²

III. The Board Should Make Minor Adjustments to the Proposed Rules.

A. Communications After an Advance Notice of Proposed Rulemaking

The NPRM proposal generally strikes the right balance between improving the flow of information to the agency and maintaining due process and transparency by allowing ex parte communications subject to disclosure. One area where this balance could be improved is by

¹⁶ See 47 C.F.R. Part 1.

¹⁷ See *Amendment of the Commission’s Ex Parte Rules and Other Procedural Rules*, FCC 11-11, GC Docket No. 10- 43, Report and Order (Feb. 2, 2011).

¹⁸ 47 C.F.R. § 1.1202(d)(5).

¹⁹ See 47 C.F.R. § 1.206(a).

²⁰ 47 C.F.R. § 1.1203.

²¹ 18 C.F.R. § 385.2201(b).

²² 18 C.F.R. § 385.2201(c)(ii).

requiring disclosure of ex parte contacts after the issuance of an Advance Notice of Proposed Rulemaking (“ANPRM”). Though not required by the APA, an ANPRM initiates a rulemaking proceeding and puts the public on notice that the agency is considering a change in its rules. The AAR would not in any way seek to inhibit the agency’s ability to collect relevant information from stakeholders at the ANPRM stage, but suggests that there are benefits of a permit but disclose approach, with no commensurate downside.

Disclosure of ex parte communications after the issuance of an ANPRM would allow all stakeholders to participate equally in the proceeding and provide responsive information to the agency as it considers whether to amend its rules and to provide information helpful in formulating a proposed rule. Indeed, the availability of ex parte communications without disclosure may have the unintended effect of discouraging stakeholder participation on the record when the Board seeks public comment through an APRM. Conversely, the requirement to disclose those contacts should not chill any appropriate communications or otherwise limit the agency’s ability to gather information. Moreover, such a rule would be consistent with Department of Transportation (“DOT”) policy that recommends disclosure of ex parte communications upon issuance of an ANPRM.²³ Modal administrations apply this policy by rule. For example, the Federal Aviation Administration (“FAA”) prescribes disclosure of ex parte communications before an ANPRM or an NPRM.²⁴

²³ See Department of Transportation, Order 2100.2 “Policies for Public Contacts in Rule Making” 4 (Oct. 5, 1970), available at <https://www.regulationwriters.com/library/DOT2100-2.PDF>.

²⁴ See 14 CFR Appendix 1 to Part II.

B. Statutory Exception

The Board should consider whether the changes proposed in the NPRM may have unintended consequences beyond the informal rulemaking context. For example, though the Board references 49 U.S.C. § 11324(f) in the decision, the proposed rules do not explicitly acknowledge that ex parte communications are permitted in major rail merger proceedings. The Board should address this ambiguity by clarifying the proposed rule by adding an additional permissible ex parte communication to § 1102.2(b)(7): “Any communication permitted by statute.”

C. Communications with Board Staff

The NPRM contemplates permissible post-NPRM communications with “Board Members” and authorizes “the Board” to delegate its participation in such ex parte communications to Board staff.”²⁵ The wording of the proposed rules suggest that ex parte communications with Board staff would be impermissible after the issuance of an NPRM unless specifically delegated to staff by an entire board action. Such a procedure is unnecessarily formalistic. The Board should expand the proposed rules to include communications with staff during the comment period as permissible communications subject to disclosure rules. There are many instances where technical information could be best explained to staff responsible for the subject matter, like financial reporting, costing, or railroad operations. Requiring formal delegation of authority for such meetings would be time-consuming and counterproductive. Instead, allowing meetings with staff subject to disclosure requirements would put all stakeholders on notice of the subjects discussed.

²⁵ NPRM at 18, proposed 49 C.F.R. §1102 (g)(1).

Conclusion

Based on the foregoing, the Board should adopt the proposed rules with the modifications described above.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Kathryn D. Kirmayer', with a stylized flourish extending to the right.

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