



November 16, 2017

BY ELECTRONIC FILING

Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: EP 739,
Ex Parte Communications in Informal Rulemaking Proceedings

Dear Ms. Brown,

The Freight Rail Customer Alliance (“FRCA”), an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers representing more than 3,500 manufacturing and agriculture companies, electric utilities, fuel suppliers, and their customers, submits these brief reply comments in the above-captioned proceeding regarding ex parte communications in informal rulemaking proceedings.

Allowing ex parte communications in informal rulemaking proceedings has the potential to provide the Surface Transportation Board (“Board”) with additional information relevant to its deliberations that it might not receive otherwise. Also, face-to-face communications can enable questions to be raised and responsive information provided in a way that is not possible in a written narrative. Ex parte communications thus can result in higher-quality decisions.

At the same time, the effectiveness and efficacy of such interactive communications require that there be appropriate and adequate safeguards so that ex parte communications do not devolve into private conversations and undermine the operation of a level playing field. The requirement for full and timely disclosure of such communications in a critical one, and, as the Western Coal Traffic League (“League”) notes, should not become operative only after a notice of proposed rulemaking is served. Likewise, there should be a clear and adequate cut-off for such communications, in particular to make sure that significant ex parte communications are not deferred until the end of a proposed rulemaking, depriving others of a full opportunity to respond.

FRCA also agrees with the League that there should not be an automatic default that such ex parte communications should be allowed, but the determination should instead be made by the Board on a case-by-case basis, at least until the Board has accumulated substantially more experience with such communications than it has to date.



Freight Rail
Customer Alliance

Cynthia T. Brown, Chief
November 16, 2017
Page 2

In addition, the Board should be cognizant of the potential for additional information to result in further delay, which would likely be exacerbated by the removal of a cut-off date, thereby encouraging parties to save their best for last.

In short, allowing ex parte communications has some potential to do good, but also some potential to do harm. The Board should proceed carefully and cautiously in this area, with due regard for the possibility of unintended consequences.

Respectfully submitted,

Ann Warner
Executive Director
Freight Rail Customer Alliance