

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE COMMUNICATIONS IN
INFORMAL RULEMAKING PROCEEDINGS

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) Docket No. EP 739
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**REPLY COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE**

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The Western Coal Traffic League (“WCTL”) submits these Reply Comments in accordance with the Surface Transportation Board’s (“STB” or “Board”) notice served in this proceeding on September 28, 2017 (“EP 739 Notice” or “Notice”). WCTL’s Reply Comments respond to the opening comments filed by: American Short Line and Regional Railroad Association (“ASLRRA”); Association of American Railroads (“AAR”); BNSF Railway Company (“BNSF”); George Mason University Antonin Scalia Law School Administrative Law Clinic (“ALC”); National Grain and Feed Association (“NGFA”); Rail Customer Coalition (“RCC”); and Samuel J. Nasca for, and on behalf of, SMART/Transportation Division, New York State Legislative Board (“SMART/TD-NY”).

SUMMARY

In its Comments, WCTL supported some of the Board’s proposed changes to the Board’s current rules governing ex parte communications in informal rulemaking proceedings and asked the Board to modify or clarify others. One of the modifications WCTL proposed was a requirement that the Board’s ex parte communication disclosure rules apply to proceedings instituted by an advance notice of proposed rulemaking (“ANPRM”). The AAR suggests a similar change to the Board’s proposed rules. Both WCTL and the AAR believe the public disclosure of these communications would facilitate a robust and fair ANPRM process.

WCTL also suggested that the Board consider whether to permit ex parte communications in informal rulemaking proceedings on a proceeding-by-proceeding basis. SMART/TD-NY filed comments generally supporting the proceeding-by-proceeding approach. The RCC filed comments suggesting that the Board not allow ex parte communications in informal rulemaking proceedings involving the establishment of standards the Board applies to decide administrative adjudications. WCTL's proceeding-by-proceeding proposal accommodates the concerns raised by SMART/TD-NY and the RCC.

WCTL does not support two of the proposals presented by other commenters. The RCC and NGFA suggest that the Board permit post-comment period ex parte communications. WCTL opposes this suggestion because its adoption would add unnecessary costs and delays in STB rulemaking proceedings. STB rulemaking proceedings are already very costly for shippers and frequently take far too long to decide.

The AAR suggests that the Board permit unrestrained ex parte communications in merger cases. The STB previously held it would not consider ex parte communications in merger cases because such consideration would delay cases, was unfair to non-carrier stakeholders, and raised complex procedural due process issues. The Board's current policy is the correct one and one that should not be changed in this proceeding.

WCTL supports several of the Board's proposals: changing the definition of ex parte communications to encompass communications made by non-parties to the proceeding; exempting environmental compliance and court-case related communications from ex parte communication disclosure requirements; revising the procedures to be followed when the Board receives a prohibited ex parte communication; and establishing a uniform set of procedures for

the disclosure of permitted ex parte communications in informal rulemaking proceedings. Other commenters support these changes, as well.

Finally, WCTL and other prominent shipper groups have asked the Board to end its regulatory freeze in major pending rulemaking proceedings. The freeze – not the Board’s ex parte communications rules – is the principal problem that shippers face today with the Board’s administration of its informal rulemaking docket.

REPLY COMMENTS

I. Several Commenters Support, in Whole or in Part, WCTL’s Suggested Modifications to the Board’s Proposed Changes to Its Ex Parte Communications Rules

Several commenters support, in whole or in part, WCTL’s suggestion that the Board apply its proposed ex parte communication disclosure rules in ANPRM proceedings and WCTL’s suggestion that the Board consider relaxing its current prohibitions on ex parte communications on a proceeding-by-proceeding basis.

A. The Board’s Rules Governing Ex Parte Communications Should Apply in All Docketed Informal Rulemaking Proceedings Where Public Comments Are Sought

The Board proposes to allow “*unconstrained* ex parte communications in informal rulemaking proceedings until an NPRM is issued.”¹ The Board states that it is making this proposal because “free-flowing communications with stakeholders should be encouraged during the exploratory, pre-NPRM phase of a rulemaking proceeding.”²

In its Comments, WCTL suggested that the better approach is to apply ex parte communication rules (and limitations) to all publicly docketed STB informal rulemaking

¹ Notice, slip op. at 10 (emphasis in original).

² *Id.*

proceedings where the Board has sought public comments.³ For example, if the Board initiates a docketed proceeding using an ANPRM, the ex parte communication disclosure rules would apply starting when the proceeding is docketed. If the Board finds the proceeding is one where ex parte communications should be permitted, the net effect under the Board's modified proposals would be that ex parte communications would be permitted, so long as the contents of the communication were properly memorialized in the public docket.

WCTL's suggested approach should better advance the Board's objective of "free flowing" communications by allowing all interested members of the public to see what others are saying in ex parte meetings and by giving other parties the opportunity to then respond to these communications. Obviously, that cannot happen if the ex parte communications are secret, as the Board proposes. In addition, the Board's proposal would dis-incent the public from filing detailed comments responding to ANPRMs and similar forms of pre-NPRM notices. Parties could spend hundreds of thousands of dollars on detailed opening and reply comments responding to pre-NPRM notices, only to later find that the Board has decided to reject their contentions based on secret, behind-closed-doors discussions that they neither knew about, nor had any opportunity to rebut.

The AAR agrees with WCTL.⁴ In its Comments, the AAR suggests that the Board "requir[e] disclosure of ex parte contacts after the issuance of an [ANPRM]."⁵ The AAR correctly observes that "[d]isclosure of ex parte communications after the issuance of an ANPRM would allow all stakeholders to participate equally in the proceeding and provide

³ WCTL Comments at 20-22.

⁴ See AAR Comments at 5-7.

⁵ *Id.* at 6.

responsive information to the agency as it considers whether to amend its rules and to provide information helpful in formulating a proposed rule;”⁶ that “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;”⁷ and that “such a rule would be consistent with” rules adopted by other federal agencies.⁸

B. The Board Should Decide Whether to Permit Ex Parte Communications in Quasi-Legislative Informal Rulemaking Proceedings on a Proceeding-By-Proceeding Basis After Consideration of All Relevant Factors

In its Comments, WCTL suggested that the Board amend its proposal to allow the Board to make determinations whether to allow ex parte communications in an informal rulemaking proceeding on a proceeding-by-proceeding basis after considering all relevant factors, including: additional costs that shippers will incur if the Board considers ex parte communications; regulatory delays associated with consideration of ex parte communications; whether there are alternative, more efficient means to supplement the record; whether consideration of ex parte communications will create an un-level playing field (or the perception thereof); the nature of the proceeding (*e.g.*, does it involve standards the Board intends to apply when deciding administrative adjudications); and the interests of Board Members in considering ex parte communications to assist them in deciding issues raised in informal rulemaking proceedings.⁹

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* (citing ex parte communication policies adopted by the Department of Transportation and the Federal Aviation Administration). *See also* WCTL Comments at 22 n.65 (citing ex parte communication policies adopted by the Department of Energy).

⁹ WCTL Comments at 14-20.

SMART/TD-NY agrees with WCTL that the Board should not adopt a blanket policy permitting *ex parte* communications in all informal rulemaking proceedings, noting, “[t]he fact that the STB has the ability to waive its *ex parte* communications prohibition in special or emergency situations, and has done so in two recent proceedings, demonstrates that STB does not require an automatic blanket removal of its *ex parte* communications rule, irrespective of need.”¹⁰ SMART/TD-NY also emphasizes that across-the-board approval of *ex parte* communications in informal rulemaking proceedings would be particularly detrimental to rail employee stakeholders who frequently are not located in Washington D.C. and lack the time and resources to actively engage in *ex parte* communications.¹¹

In its Comments, the RCC expresses concern about the Board’s proposal to consider *ex parte* communications in informal rulemaking proceedings where the Board is considering adopting new regulatory standards that might be applied in pending administrative adjudications.¹² The RCC states that “[t]he Board should take care in such circumstances to ensure that *ex parte* communications in the rulemaking proceeding do not bleed into, and potentially influence, the adjudicatory proceeding,”¹³ and suggests the Board can avoid this problem by “prohibit[ing] all *ex parte* communications in such circumstances.”¹⁴

WCTL’s suggested changes to the Board’s proposed rules respond to the concerns raised by both SMART/TD-NY and the RCC. Under WCTL’s approach, the Board is free to

¹⁰ SMART/TD-NY Comments at 7.

¹¹ *Id.* (“The establishment of wide-ranging *ex parte* communications with STB Members and staff would be prejudicial to parties and counsel situated at a distance. The use of telephone is not a satisfactory alternative for face-to-face participation.”).

¹² *See* RCC Comments at 6-7.

¹³ *Id.* at 7.

¹⁴ *Id.*

consider, and balance, the cost/level playing field concerns raised by SMART/TD-NY, the rulemaking/adjudicatory overlap concerns raised by the RCC, and all other relevant concerns that may arise in a specific informal rulemaking proceeding, before deciding whether to permit ex parte communications in that proceeding.

II. The Board Should Not Adopt Some Suggestions Proposed by Other Commenters

WCTL urges the Board not to adopt two changes suggested by other commenters: changing the cut-off date for receipt of ex parte communications and adopting a rule that allows unconstrained ex parte communications in merger cases.

A. Ex Parte Communications Should Not Extend Beyond the Board's Proposed Cut-Off Date

The Board proposes to cut-off ex parte communications in informal rulemaking proceedings “20 days before the deadline for reply comments to the NPRM, unless otherwise specified by the Board.”¹⁵ The RCC and NGFA suggest that the Board extend this cut-off date to permit ex parte communications for up to 30 days after the close of the comment period, and that these communications be subject to the memoranda reporting requirements detailed in the Board's proposed rules.¹⁶ They also suggest that after a party posts the requisite summary of its post-comment period ex parte communication, the other parties to the proceeding have 10 days to submit a written reply.¹⁷

WCTL does not support this proposal. WCTL is concerned that STB rulemaking proceedings – which already take a lot of time and cost stakeholders a lot of money – will

¹⁵ Notice, slip op. at 12.

¹⁶ RCC Comments at 5-6; NGFA Comments at 3-4.

¹⁷ *Id.*

become even slower and even more expensive if the Board permits post-comment period ex parte communications. Indeed, it is for these very reasons that post-comment period ex parte communications are disfavored by the Administrative Conference of the United States (“ACUS”):

[O]nce the comment period closes, the dangers associated with agency reliance on privately-submitted information become more acute. Interested persons may be particularly keen to discuss with the agency information provided in comments by other persons filed at or near the close of the comment period. Agencies have in some circumstances disclosed significant new information received through such communications and reopened the comment period. This solution is not costless, however, and has the potential to significantly delay a proceeding.¹⁸

WCTL supports the Board’s proposed 20 day pre-reply cut-off date. The Board’s proposal also gives it discretion to set a later cut-off date in an individual proceeding, in the unlikely event that one becomes necessary.

B. The Board Should Not Amend Its Rules to Allow Ex Parte Communications in Merger Cases

The AAR suggests that the Board amend its proposal to add ex parte communications in merger cases to its proposed list of “ex parte communications that are not prohibited and need not be disclosed.”¹⁹ WCTL opposes this suggestion for two reasons.

First, the AAR’s proposal does not comply with the provisions of 49 U.S.C. § 11324(f). That provision allows the STB to exercise its discretion to permit ex parte communications in merger cases, but only if the Board Member or Board staffer receiving the ex parte communication “promptly place[s] the communication in the public docket of the

¹⁸ ACUS, *Administrative Conf. Recommendation 2014–4: “Ex Parte” Communications in Informal Rulemaking Proceedings*, 79 Fed. Reg. 35,988, 35,994 (June 25, 2014) (“2014 ACUS Recommendation”).

¹⁹ See AAR Comments at 7 (proposing to modify proposed 49 C.F.R. § 1102.2(b)).

proceeding” (if the communication is written), or “promptly place[s] a written summary of the oral communication in the public docket of the proceeding” (if the communication is oral).²⁰

The AAR’s proposal does away with the statutory disclosure requirements.

Second, the STB determined in 1996 that it would not exercise its statutory authority under § 11324(f) to permit ex parte communications in merger cases because such consideration would result in unreasonable case processing delays, create the perception of an unfair process, and could raise significant due process issues if the Board relied on non-record communications in deciding merger cases.²¹ The same holds true today.²²

III. WCTL and Other Commenters Support Many of the Board’s Proposed Changes to Its Ex Parte Communications Rules

WCTL supports several of the Board’s proposed changes to its current ex parte communications rules:

- WCTL supports the Board’s proposal to modify the definition of “ex parte communication.”²³ WCTL agrees with the Board that ex parte communications can be made by non-parties, and the definition of “ex parte communication” should encompass communications made by these non-parties.
- WCTL agrees with the Board’s proposals to exempt from ex parte communication prohibitions, communications that the Board formally rules may be made on an ex parte basis,

²⁰ 49 U.S.C. § 11324(f).

²¹ See *Pet. of Fieldston Co., Inc., to Establish Procedures Regarding Ex Parte Commc’ns in R.R. Merger Proceedings*, 1 S.T.B. 1083, 1084-85 (1996); WCTL Comments at 4-5.

²² The RCC also requests that the Board retroactively apply its new ex parte communications rules in one pending rulemaking proceeding – *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704. See RCC Comments at 7. WCTL generally opposes the retroactive application of the new rules in pending proceedings because it would further delay Board action in these proceedings. See WCTL Comments at 22-23. However, since WCTL is not a party to EP 704, it takes no position on RCC’s request other than to suggest that if the Board grants it, the Board limit retroactive application of its new rules to only one pending proceeding – EP 704.

²³ See Notice, slip op. at 9.

communications concerning compliance with the National Environmental Policy Act, and communications concerning judicial appeals of STB decisions.²⁴ WCTL sees no need to limit these forms of ex parte communications, nor any reason why such communications need to be publicly disclosed.

- WCTL agrees with the Board’s proposal to clarify the procedures the Board should follow if a Board Member, or Board staffer, receives a prohibited ex parte communication.²⁵ WCTL also agrees with the Board’s proposal to adopt a standardized set of disclosure procedures to apply when parties make permitted ex parte communications in informal rulemaking proceedings.²⁶

Several other commenters support these proposals as well.²⁷

IV. The Board Must End Its Regulatory Freeze

WCTL emphasized in its Comments that the Board’s proposals to change its ex parte communications rules for application in informal rulemaking proceedings do not address the most important issue shippers face today with regard to these proceedings: the Board’s self-imposed policy of freezing any substantive action in the four most important informal

²⁴ *Id.* at 10-11.

²⁵ *Id.* at 12.

²⁶ *Id.* at 12-14. The Board proposes to post on its website party-prepared memoranda memorializing a party’s ex parte communications “within seven days” of the party’s submission of its memorandum. *Id.* at 19. NGFA suggests the Board reduce the seven day period to two business days. See NGFA Comments at 4. WCTL will defer to the Board’s judgment on how much time it needs to review and post these memoranda, but WCTL certainly has no objection to the Board’s adoption of NGFA’s proposed two business day rule. The Board also proposes that ex parte communications be permitted only with Board Members, unless the Board delegates its participation to Board staff. See Notice, slip op. at 18. The AAR maintains that “[r]equiring formal delegation of authority [to Board staff] . . . would be time-consuming and counterproductive.” AAR Comments at 7. WCTL will defer to the Board’s judgment on how “time-consuming” it is for the Board to delegate receipt of ex parte communications to Board staff. However, WCTL does believe that the Board is best served by a process where the Board controls which staff members it believes should participate in ex parte communications (if any). The Board’s proposal in its current form achieves this objective.

²⁷ See, e.g., ALC Comments at 5-7; ASLRRA Comments at 2-3; BNSF Comments at 3; NGFA Comments at 5; RCC Comments at 7-8.

proceedings pending the President's appointment, and the Senate's confirmation, of a "full complement" of Board Members.²⁸ WCTL, and other prominent shippers,²⁹ have requested that the Board end the freeze and WCTL again urges the Board to do so.

CONCLUSION

WCTL respectfully requests that the Board revise its proposed rules in the manner set forth in WCTL's Comments and Reply Comments.

Respectfully submitted,

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²⁸ See WCTL Comments at 13-14.

²⁹ See *Petition of the Western Coal Traffic League to Terminate the Regulatory Freeze in Four Pending Proceedings*, EP 740, The National Industrial Transportation League Comments at 3 (Aug. 31, 2017); *id.*, The American Forest & Paper Association Comments at 6 (Aug. 31, 2017) (asking the Board to end the freeze in a fifth pending proceeding – EP 704).