

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Docket No. EP 739

***EX PARTE* COMMUNICATIONS IN INFORMAL RULEMAKING PROCEEDINGS**

**OPENING COMMENTS
OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

The National Grain and Feed Association (“NGFA”) hereby submits Opening Comments in response to the Surface Transportation Board’s (“Board”) Notice of Proposed Rulemaking (“NPRM”) decided on September 26, 2017 and served in this docket on September 28, 2017. The NPRM proposes to modify the Board’s regulations to permit, subject to disclosure requirements, *ex parte* communications in informal rulemaking proceedings. The proposal also would make changes to the Board’s *ex parte* rules that would clarify and update when and how interested persons may communicate with the Board in pending proceedings other than rulemakings. As expounded upon in these Opening Comments, the NGFA strongly supports the Board’s proposals in the NPRM, while offering several recommendations designed to improve the rule further.

I.

IDENTITY AND INTEREST OF NGFA

The NGFA, established in 1896, consists of more than 1,000 grain, feed, milling, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed

processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry. The NGFA also consists of 34 affiliated state and regional agribusiness associations, has a joint operating and services agreement with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

II.

COMMENTS ON COMPONENTS OF THE NPRM

As the NPRM points out, the Board's general prohibition on *ex parte* communications in informal rulemaking proceedings is not required by any law or Board regulation, but rather has been the result of an agency policy that dates to 1977. NPRM at 2. The NPRM also correctly points out that the case law on *ex parte* communications in informal rulemakings has evolved over the past 40 years, resulting in federal agencies having more flexibility to engage in such communications. The 2014 consensus of the Administrative Conference of the United States ("ACUS") cited in the NRPM provides further support for the Board formally updating and modernizing its *ex parte* communication rules.

Finally, the proposed changes to the Board's rules are a natural progression of the recent successful efforts by the Board to obtain stakeholder input by waiving the policy prohibiting *ex parte* communications in two pending informal rulemakings, in one of which the NGFA already has participated. Specifically, on November 24, 2015 representatives of the NGFA participated in an informal meeting with Board staff in *United States Rail Service Issues – Performance Data Reporting*, EP 724 (Sub – No. 4), after the Board waived its *ex parte* rules to seek stakeholder input on the Board's proposed rules governing service metric information to be submitted by the Class I railroads. The NGFA representatives in attendance found the session to be extremely

beneficial in terms of permitting them to explain to Board staff some of the details of their railroad service needs and concerns, and to engage in a discussion and answer the staff's questions. To the NGFA, this enabled key issues to be aired that would not have been communicated as effectively solely to the Board in a written filing. The Board also has waived its *ex parte* rules to seek stakeholder input on its proposed rules in *Reciprocal Switching EP 711* (Sub-No.1), and many parties have taken the opportunity to provide such input to Board members and staff. NGFA anticipates participating in such meetings soon with Board members and/or Board staff to discuss its members' concerns and views on the Board's proposed reciprocal switching rules.

The Board's proposals in the NPRM, therefore, are supported by existing law, modern administrative agency practices, and the Board's own successes in pending rulemaking proceedings. The NGFA accordingly strongly supports the proposals in the NPRM, and offers the following comments and recommendations on a few specific components of it.

1. Pre-NPRM Communications

The NGFA supports the proposal that communications prior to the issuance of a NPRM should be "unconstrained," meaning the contact, disclosure and reporting requirements would not apply. NPRM at 10. The NGFA appreciates that information the Board gathers prior to the issuance of a NPRM would be evident within the NPRM itself. *Id.* However, the NGFA recommends that the Board adopt the practice of including in the NPRM a listing of the identities of all stakeholders who provided such "unconstrained" input, consistent with its treatment of such input in *Expediting Rate Cases*, EP 733 (served June 15, 2017) (footnote 3).

2. Ex Parte Communications in Informal Rulemaking Proceedings

The proposed rules would prohibit *ex parte* communications in informal rulemaking proceedings 20 days before the deadline for submitting reply comments, unless otherwise specified

by the Board. NPRM at 12. The NGFA notes that prior to the deadline for submitting reply comments, stakeholders most likely will not have had ample time or opportunity to consider and evaluate fully the arguments of other parties submitting opening comments in a proceeding, nor to develop responses to any challenges that other parties may present regarding the stakeholder's own opening comments. Indeed, the Board itself may have more insightful and relevant questions once reviewing the opening comments thoroughly.

For these reasons, the NGFA recommends strongly that the Board consider extending this cut-off date, since its strict application could result in the Board missing out on valuable input from stakeholders after the opening round of comments on a proposed rule, as they formulate their responses in reply comments to the submissions of other parties.¹ One potential solution would be for the Board to permit *ex parte* communications for a specified time (e.g., 30 days) after the deadline for filing reply comments – subject to the same memoranda reporting contained in the NPRM to ensure transparency and fairness – and permit written responses confined specifically to the content of the *ex parte* communication within 10 days thereafter.

In addition, the NGFA generally supports the Board's proposals to ensure fairness and transparency in *ex parte* communications by requiring persons engaged in such communications to submit a memorandum that identifies the participants, date and location, and a detailed summary of the substance of the presentation. However, the NGFA recommends that the Board shorten – to two business days – the proposed seven (calendar) days it proposes to take before posting completed (and presumably STB-approved) memoranda containing detailed summaries of *ex parte*

¹ The NGFA notes that this rule would have cut-off any *ex parte* communications on the NPRM several days prior to the filing of opening comments on the NPRM, since the date for reply comments is November 16, 2017. Further, this standard was not employed by the Board in EP 711 (Sub-No. 1) or EP 724 (Sub-No. 4).

communications. NPRM at 14. This recommended change would align with the two-business-day requirement for memoranda to be submitted by the participants in the *ex parte* communication, and provide for more timely transparency and opportunity for review by interested parties.

3. Prohibited *Ex Parte* Communications

The proposed rules would amend paragraph (d) to clarify when the *ex parte* prohibitions take effect. The NGFA does not disagree with the Board’s belief that changing this provision to implement “more general ‘docketing’” triggers would better reflect the various ways Board proceedings are initiated. NPRM at 11.

4. Meeting Summaries

The NGFA concurs with the Board’s proposals concerning the preparation and disclosure of *ex parte* meeting summaries that are detailed sufficiently to describe the substance of the communication, and to require the resubmission of summaries that are insufficiently detailed or that contain inaccuracies about the substance of the presentations or recommendations conveyed during *ex parte* communications. NPRM at 13. The NGFA also supports the Board’s proposal to provide an opportunity for parties to respond to any information contained in the meeting summaries.

5. Other Components of NPRM

While not specifically addressed herein, the NGFA supports other components of the Board’s NPRM, including, but not limited to, its proposed new and modified definitions for “*ex parte communication*,” “informal rulemaking proceeding” and “covered proceedings”; the inclusion of pre-NPRM, environmental review and judicial review communications within the scope of permitted *ex parte* communications; and application of the *ex parte* prohibitions when the first filing or Board decision in a proceeding is posted to the public docket.

III.

CONCLUSION

In conclusion, the NGFA strongly supports the Board's proposal to revise its regulations governing *ex parte* communications in informal rulemaking proceedings, and to clarify other aspects of its *ex parte* communications rules.

Respectfully submitted,

A handwritten signature in black ink that reads "Randall C. Gordon".

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