

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 739

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EX PARTE COMMUNICATIONS IN
INFORMAL RULEMAKING PROCEEDINGS

REPLY COMMENTS OF THE ASSOCIATION
OF AMERICAN RAILROADS

Pursuant to the Notice of Proposed Rulemaking (“NPRM”) served on September 28, 2017 by the Surface Transportation Board (“STB” or “Board”) in the above-captioned proceeding, the Association of American Railroads (“AAR”) submits these reply comments. In opening comments filed on November 1, 2017, the AAR generally supported the NPRM proposal because the rule changes will facilitate the rulemaking process while maintaining transparency and protecting due process. The AAR comments also offered suggestions for minor modifications to improve and clarify the rules.

A cross section of shippers, railroads, and academic groups filed comments supporting the changes proposed in the NPRM. BNSF Railway, the American Short Line and Regional Railroad Association, the National Grain and Feed Association, and the Antonin Scalia Law School Administrative Law Clinic each expressed strong support for the proposed rules. These reply comments focus on the comments filed by the Rail Customer Coalition (“RCC”) and the Western Coal Traffic League (“WCTL”) that supported aspects of the proposal, but also asked for modifications and clarifications to the

proposed rules.¹ As explained below, the Board should adopt the proposed rules with minor modifications.²

Comments

Case-By-Case Determination

Though WCTL supports some aspects of the NPRM, it advocates that the Board adopt a case-by-case approach to ex parte communications in notice and comment rulemaking proceedings instead of adopting rules generally permitting communications subject to certain disclosure rules. WCTL suggests that in each rulemaking proceeding the Board should balance potential cost, delay, efficiency, fairness concerns, adjudication standards, and the needs of individual Board members in considering whether to permit ex parte communications.³ In effect, WCTL advocates that the Board maintain the status quo, as the Board currently can waive the prohibitions on ex parte communications in individual rulemaking proceedings on a case-by-case basis.

The AAR opposes WCTL's effort to maintain the status quo and supports the NPRM proposal to create default rules that will encourage communication and the flow of information in the notice and comment rulemaking context. Stakeholders will be best equipped to fully participate in a rulemaking when the rules for such participation are known in advance. And, such pre-established rules would save the Board from expending

¹ WCTL also repeats its contention from EP 740 that the Board should advance WCTL's identified rulemaking proceedings in ways that it favors on its preferred timeframe. The AAR will not address such arguments as they are clearly beyond the scope of this proceeding and have been fully briefed elsewhere. *See* AAR comments, EP 740 (filed Aug, 31, 2017).

² Though SMART/Transportation Division, New York Legislative Board ("SMART/TD-NY") opposed the proposed rules, nothing in its comments undermined the sound reasoning contained in the NPRM.

³ WCTL Opening Comments at 16-18.

its limited time and resources on ad hoc determinations related to ex parte communications in every rulemaking proceeding on its docket. Nevertheless, the proposed rules would allow the Board, on a case-by-case basis, to restrict communications in a particular proceeding, if the concerns cited by WCTL or others present themselves.⁴ The AAR believes that the relatively modest burdens that ex parte meetings might place on stakeholders participating in rulemaking proceedings will be outweighed by the benefits of improved flow of relevant information to Board decision makers.

Technical Conferences

WCTL suggests the greater use of technical conferences, where appropriate, as an alternative to reforming the Board's general ex parte rules.⁵ Rather than being an either/or proposition, the AAR supports the greater use of technical conferences as a supplement to the NPRM proposals. The AAR agrees that in a proceeding dealing with certain technical topics, a technical conference is useful because it "places all pertinent parties in the same room at the same time, is public, and can, in many instances, be a far more efficient process"⁶ The AAR submits, however, that technical conferences can be made more useful if Board staff is encouraged to engage in substantive dialogue with stakeholders,

⁴ WCTL's narrow focus on burdens to shippers seems particularly misplaced as the Board's rulemaking docket in recent years has overwhelmingly reflected proposals – often at the suggestion of shippers – to reregulate or otherwise impose increased regulatory burdens on the railroad industry, including petitions for rulemaking by WCTL itself. *See, e.g., Pet. for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711 (STB served Nov. 4, 2011); *Reciprocal Switching*, EP 711 (Sub-No. 1) (STB served Jul. 27, 2016); *Review of Commodity, Boxcar and TOFC/COFC Exemptions*, EP 704 (Sub-No.1) (STB served Mar. 23, 2016); *Pet. of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model In Determining the Railroad Industry's Cost of Equity*, EP 664 (Sub-No. 2) (STB served Dec. 20, 2013).

⁵ WCTL Opening Comments at 16.

⁶ *Id.*

rather than answering questions only after they have been collected and reviewed. Before engaging in that open dialogue, Board staff can make clear that they are speaking for themselves, and not the Board. But a more free-flowing conversation between stakeholders would enhance everyone's understanding of issues presented. The AAR believes that such dialogue would be consistent with the proposed rules.

Other Suggestions

The AAR generally agrees with, or does not oppose, other suggestions made by WCTL and RCC. For example, RCC suggests that the Board consider permitting ex parte communications for a specific time after the submission of at least two rounds of comments, rather than cutting off the ex parte communications period before reply comments are filed. This change would allow meetings held with Board members or staff to reflect all of the issues in the record and would not create any incentives for parties to hold evidence or arguments back for the reply round. The AAR is mindful of the Board's desire to expeditiously resolve rulemaking proceedings and would therefore suggest a two-week period (ten business days) after the submission of the last round of comments as the cut off for permissible communications.

Consistent with the AAR's opening comments, the AAR agrees with WCTL that the Board should "apply ex parte communications rules (and limitations) to all publicly-docketed STB informal rulemaking proceedings where the Board has sought public comments."⁷ There is no reason not to permit communications at that point, nor to allow communications but not require disclosure. WCTL, like the AAR, points out that allowing

⁷ WCTL Opening Comments at 21.

communications without disclosure after the issuance of an ANPRM may disincite parties from filing comments to the ANPRM.⁸ The AAR suggests that the Board carry that thought one step further and include proceedings that have been initiated by a petition for rulemaking, once that petition has been filed and docketed, in the permit but disclose category.

Similarly, the AAR agrees with RCC and WCTL that the Board should be mindful that parties to adjudicatory proceedings not use discussions in ongoing rulemaking proceedings as an end-run around prohibitions against ex parte communications regarding the adjudicatory proceeding.⁹ The AAR also does not disagree with WCTL that the proposed rules should be applied prospectively and not retroactively. That said, if the Board believes that further communications would be beneficial in ongoing proceedings, it can issue waivers in those particular proceedings on a going-forward basis. The AAR does not share WCTL's perspective that communications in informal proceedings will delay those proceedings.

Finally, the AAR does not oppose WCTL's suggestion that the Board should specifically include rate reasonableness and reasonable practice adjudications as examples of proceedings where ex parte communications would be prohibited.¹⁰

⁸ *Id.*

⁹ RCC Opening Comments at 6; WCTL Opening Comments at 18.

¹⁰ WCTL Opening Comments at 19-20.

Conclusion

Based on the foregoing, the Board should adopt the proposed rules with the modifications described above and in the AAR Opening Comments.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'K. D. Kirmayer'.

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