

ORIGINAL

Before the

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SURFACE TRANSPORTATION BOARD

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Part of
Public Record

Ex Parte 739

EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING
PROCEEDINGS

REPLY COMMENTS



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November 16, 2017

Before the
SURFACE TRANSPORTATION BOARD

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REPLY COMMENTS

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits these reply comments in response to initial comments filed on or about November 1, 2017, by seven parties, to the Surface Transportation Board (STB or Board) Notice of Proposed Rulemaking (NPRM), dated September 26, 2017 (served September 28), 82 Fed.

^{1/} New York State Legislative Director for SMART/TD , with offices at 35 Fuller Road, Albany, NY 12205.

Reg. 45771-79 (October 2, 2017).^{2/} The initial comments of those supporting the NPRM do not present convincing arguments to warrant the NPRM's drastic revision of the long-standing ICC/STB prohibitions of ex parte communications in most agency proceedings. Indeed, the rules against ex parte communications prevail throughout U.S. legal and judicial history. Absent appropriate controls, the free-running ex parte communication process becomes an administrative nightmare. See: Home Box Office, Inc. v. FCC, 567 F.2d 9, 52-53 (D.C. Cir. 1977), and remarks of FCC Chairman Wiley, at fn. 117, concerning the impropriety of ex parte "seriatim presentations."

I. REPEAL OF THE STB'S RULES AGAINST EX
PARTE COMMUNICATIONS WILL NOT PROMOTE
AGENCY EFFICIENCY OR IMPROVE DECISIONMAKING

The thrust of those supporting the STB's NPRM is the argument that face-to-face communication with STB Members renders greater efficiency than does written words alone. See: BNSF, 2; AAR,3-4; RCC,3-4; ALL-ALC, 2; ASLRRA, 4. This is also claimed to be true for communications with agency staff. See: AAR,

^{2/} These other parties are Association of American Railroads (AAR), American Short Line & Regional Railroad Association (ASLRRA), BNSF Railway Company (BNSF), Western Coal Traffic League (WCTL), Antonin Scalia Law School-Administrative Law Clinic (ASL-ALC), Rail Customer Coalition (RCC), and National Grain and Feed Association (RCC), the latter also submitted a supplemental letter.

4,7; BNSF, 1; ASL-ALC, 7. The efficiency and decisionmaking contentions favoring oral communication, are stated to be even superior to the written word. This oral superiority for issue determination was perhaps most strongly voiced by Board Member Miller during the U.S. Senate Committee on Commerce, Etc. field hearing held August 11, 2016, at Sioux Falls, SD:^{3/}

“I think these ex parte meetings are extremely important. They allow members to delve more deeply into the issues than reading pleadings will ever allow for. The ability to ask questions and resolve misunderstandings is so vital. For these reasons, I urge the Board to repeal our rule that prohibits these meetings rather than simply waiving them on a case-by-case basis.”

There is nothing to suggest that face-to-face communication will better promote efficiency so as to substitute for the written word in the decisionmaking process. The real impact of ex parte communication repeal would be to limit the audience, restrict the spread of knowledge, and to impair the final action.^{4/}

A. Oral Argument. The exchange of face-to-face communications at the STB and its predecessor ICC, traditionally occurred during oral argument, where Questions and Answers (Q&A) were exchanged by agency members and the

^{3/} U.S. Senate Committee on Commerce, Science, and Transportation, Field Hearing. Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015, at 32. (S. Hrg. 114-524, August 11, 2016).

^{4/} It is noteworthy that permitting ex parte communications would not surplant or bar protective order requests in the same proceeding or subject matter.

practitioners, with follow-up by other agency members and practitioners in the audience awaiting their turn--all in the open and above board--not through the secrecy of an ex parte manner. Moreover, the agency can conduct business by a division of its members or by a single member, again in an open forum. In short, the benefit of future Q&A oral communication can be at oral argument, as such as been the practice for many decades in the past, without ex parte communication.

B. Administrative Law Judges & Present Staff Expertise. The STB Members seemingly have some dissatisfaction concerning the experience level of staff, which may have been affected by the ICC Termination Act of 1995, that resulted in significant staff reduction through transfer to other agencies, early retirements, and other adverse factors.^{5/} In any event, even before the year 1995 troubles, it was often said, particularly by one or more commissioners, that ICC practitioners may be more knowledgeable of ICC law and procedures than agency staff or its commissioners.

A study by two "Concerned Agency Practitioners," filed two years ago in Ex Parte 724 (Sub No. 4), United States Rail Service Issues-Performance Data

^{5/} The dissatisfaction by the Congress with the ICC in the early 1990s, was largely fueled, in the opinion of some, to failure of agency staff (and thus the ICC itself) to act correctly in connection with the "overcharge/ undercharge" crisis in the motor carrier industry--and not due to disfavor with the railroad industry or by its customers at that time.

Reporting (Dec. 23, 2015), suggested a lesser degree of agency experience for staff engaged in ex parte meetings, than traditionally had been the experience situation in the Office of Proceedings or with the ALJs. The “Concerned Agency Practitioners” study is attached hereto as Appendix 1.

The STB abolished its corps of ALJs carried over from the ICC, electing instead to rely upon ALJ staff at another agency-Federal Energy Regulatory Commission (FERC). This is not deemed satisfactory. STB and FERC operate under different statutes and have differing history. The former ICC Commissioners and STB Members frequently consulted ALJ offices for expertise, outside an ALJ’s given proceeding, for general statutory and other information advice. Of course, ordinary STB staffers were necessarily unhappy with such practice, as the ALJs sometimes might be considered by staffers to be competitive.

Restoration by the STB of its own ALJ corps should go a long way toward any STB Member or staff need for extensive ex parte communication with outside practitioners or non-parties.

C. ACUS and Other Agencies Practice. Commenters supporting repeal or revision of the STB’s ex parte communication rule call attention to the 2014 recommendations of the Administrative Council of the United States (ACUS), and/or to the practices of several other agencies. SMART/TD-NY responded to the

ACUS recommendations in its initial comments. (SMART/TD-NY, at 8-10)(Nov. 1, 2017; ID 244641).^{6/}

The practices of other agencies are not particularly relevant. Many of the agencies are in the Executive branch, whereas STB is an independent agency of the U.S. Congress. Most of the important independent agencies have independent ALJs, who are in a position to exercise control to help prevent gross improprieties, and to render mature opinions and advice. The STB has abolished its independent ALJs. For an extensive history of the ICC's management of its internal and external procedures, which repeal of the ex parte rules would undermine, see: Sharfman, I.L., The Interstate Commerce Commission, Vol. IV-Rules of Practice, 163-254; Procedure and Administrative Independence, 254-74 (Commonwealth Fund, 1937).^{7/}

^{6/} The SMART/TD-NY initial Comments at p.5, para. 1, line 6, mistakenly substituted "U.S. Code" for the intended "Code of Federal Regulations."

^{7/} ICC practice and procedure has been reviewed every 25 years as part of the Board's former practitioner organization annual meeting, beginning with 1937. See: 5 Geo.Wash. L. Rev. 288 (March,1937); 31 Geo. Wash. L. Rev. 1 (October, 1962); 16 Transp. L. Journ. 1 (1987). The 125th anniversary of the ICC was not celebrated by the Washington-based ATLP; however, the late Judge Richard D. Cudahy, with a group of Chicago lawyers, said to be mainly from Sidley & Austin, ran a 125 Years symposium in Milwaukee, papers published in the form of a final convocation. 125 Years Since the Interstate Commerce Act, 95 Marq. L. Rev. 1123(Summer, 2012).

II. EXPERIENCE WITH EX PARTE COMMUNICATIONS DEMONSTRATES PREJUDICE TO PUBLIC PARTIES

A. Ex Parte 733. NGFA points to STB's action in Ex Parte 733, Expediting Rate Cases, served June 15, 2016, as an example of ex parte communication which should be unrestrained. (NGFA, 3). RCC also makes reference to Ex Parte 733. (RCC, 2). The STB's NPRM notes with approval the informal ex parte discussions by its staff with stakeholders in April 2016. (NPRM, 10-11 n.12).

However, STB and its supporting commenters repeatedly refer to only two recent STB cases where the agency, starting in 2015, said it waived the ex parte prohibition, so as to permit Board Members or designated Board staff, to participate in two proceedings, citing Reciprocal Switching. (EP 711 (Sub-No. 1)(served July 27, 2016), and U.S. Rail Serv. Issues–Performance Data Reporting (Nov. 2015 Decision). (NPRM, 5).

The STB did not include the third instance in its list of ex parte waivers, i.e. EP 733, Expediting Rate Cases, other than by an obscure footnote, to say that Board staff held meetings in April 2016, with ANPRM decision served (June 15, 2017). (NPRM, 10-11 n.12). ^{8/} The EP 733 proceeding illustrates the prejudicial

^{8/} SMART/TD-NY responded to the same ANPRM (June 15, 2016) as have other parties; the NPRM was served March 31, 2017. It is expected that the controversies are awaiting confirmation of a full-Member agency.

handling of the STB's waiver of the ex parte prohibition. Some 22 interests attended the STB staff meeting or meetings—it is not clear whether one or perhaps several gatherings took place. SMART/TD-NY was not invited to the closed- door and secret meeting(s).

Moreover, STB staff granted the motion by CSXT for a protective order which would protect “highly confidential” material from disclosure at the meeting(s) or otherwise during the proceeding.^{9/}

The STB's handling of EP 733 supports retention of the agency's ex parte prohibition to ensure fairness, to permit participation by all parties, to avoid prejudice, and to promote the public interest.

B. History of the ICC's Handling of Communication Problems. The former ICC was the object of substantial criticism over the conduct of its public hearings, involving communications between ICC personnel and public participants and non-parties, along with other improprieties. The U.S. House Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce, held 10 days of public hearings, during the period January-August 1970. Two volumes of hearings and investigative materials were published, and available in public

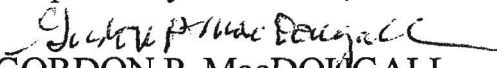
^{9/} STB Decision ID 45428 (Joseph Dettmar, Acting Director, Office of Proceedings)(Sept. 2, 2016).

libraries.^{10/} The biographies of some 70 ICC personnel were examined and made of record. The Special Subcommittee was headed by Chairman Staggers, assisted by other committee members, notably Congressman Dingell. Following the investigation, the ICC's Secretary H. Neil Garson, resigned from the agency. The ICC established the position of Managing Director. Among the early occupants was Robert L. Rebein, an attorney who had served on the House special subcommittee investigation staff.

The 1970 investigation into the ICC's procedures indicates the extreme danger to the STB and to the public of uncontrolled operation of communications between staff and industry parties, as well as staff contacts with other non-agency interests.

The 1970 hearing and investigation record supports retention of the STB's ex parte prohibitions.

Respectfully submitted,


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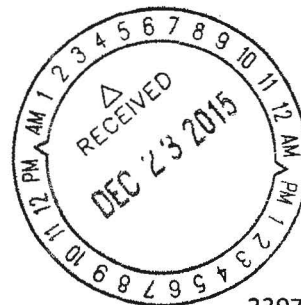
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November 16, 2017

^{10/} Inquiry Into Certain Procedures of the Interstate Commerce Commission, Part 1 and Part 2. U.S. House: Hearings before the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce, Serial No. 91-99 and No. 99-100. Ninety-First Congress, 2d Session (1970)

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte 724 (Sub-No. 4)

239782

UNITED STATES RAIL SERVICE ISSUES-PERFORMANCE DATA REPORTING

ENTERED
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December 23, 2015
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RESPONSE TO EX PARTE MEETING REPORTS

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Concerned Agency Practitioners

December 23, 2015

Before the
SURFACE TRANSPORTATION BOARD

Ex Parte 724 (Sub-No. 4)
UNITED STATES RAIL SERVICE ISSUES-PERFORMANCE DATA REPORTING

RESPONSE TO EX PARTE MEETING REPORTS

Preliminary Statement

Participants, Thomas F. McFarland and Gordon P. MacDougall, submit this response to the 15 summaries of ex parte meetings conducted by Surface Transportation Board (STB) Staff, during the November 16-December 7 period following STB issuance of its November 9, 2015 decision, in this rulemaking proceeding, which had been instituted earlier on December 30, 2014. 80 Fed. Reg. 473-80 (Jan. 6, 2015).

The STB on December 16, 2015, issued its decision inviting comments to the Staff-prepared summaries of the ex parte meetings, and directed a December 23, 2015 due date for such responses.

The December 16, 2015 STB decision noted that these two participants on November 30, 2015, had filed a petition for reconsideration of the STB's November 9, 2015 STB decision, which

remains pending. (Decision, 12/16/15, n.1).^{1/}

Our comments regarding the meeting summary postings are as follows:

Characteristics of Meetings

The STB's November 9, 2015 decision establishing the ex parte meetings provided for disclosure of the substance of each meeting, by posting in the docket, a summary of the conversations, including the names/titles of all attendees, all views expressed, and all data presented, and a copy of any handout given or presented to Board staff at the meeting. Board staff would prepare each meeting summary which, with any handouts, would be placed in the record as soon as practicable following each meeting. Meetings were designated to take place at the STB's offices in Washington, DC, or by telephone conference (pursuant to each party's request). To schedule meetings, parties were directed to contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance.^{2/} (Decision, 11/9/15, p.3).

^{1/} To the best of our information, only Association of American Railroads (AAR), has elected to file a reply to our petition for reconsideration, advancing legal theories not relied upon by the STB in its purported justification (two citations) for its waiver action. (Decision, 11/9/15, at 2 n.3). Cf. Pet. for Reconsid., 11/30/15, at 8, 9-10, 11. The prohibition of ex parte communications is particularly sensitive to these two agency practitioners, as they participated individually or through members of their law firm, in the 1977 agency rules revision.

^{2/} The organizational acronym is OPAGAC. The STB's website states the office of rail Customer and Public Assistance program (RCPA) is housed within OPAGAC. It is headed by the Deputy Director of OPAGAC, whom the website also lists as the contact person for Rail Energy Transportation Advisory Council (RETAC). We are informed, by attendance at the December 1, 2015 RETAC gathering, that the status of the X-724 meetings was presented.

There were 15 meeting summaries posted on the STB's website.^{3/} The individual meeting summaries are not identified by name--only listed on the website as "Filed for Surface Transportation Board" and titled "Miscellaneous." A reader must download each Miscellaneous listing to determine the 15 individual meetings, dates, and participants. This is time-consuming, particularly if the reader is searching for an individual meeting report and, in addition, may be unaware of the availability (although limited in time) of a visit to the public docket room at the agency's Washington DC office.

Attached hereto as Appendix A is our compilation of the 15 conferences, with meeting date, publication date, STB identification number, outside party, and format. The 15 items are far fewer in number than the 35 parties and 30 parties, respectively, filing opening and reply comments, to the NPRM. (Decision, 11/9/15, at 1).

Background of Participants

Although the STB's November 9, 2015 decision specified that the names/titles of all attendees at the meetings would be posted in the meeting summaries (Decision, 11/9/15, at 3), this requirement was only applied to non-STB personnel. However, since it is the agency staff which was the stated concern of the November 9 decision, the absence of staff identification is critical, particularly since whatever rules evolve will likely be important, and

^{3/}The STB's November 9, 2015 decision did not advise the filings could be examined at the Board's public docket room, unlike the usual practice where notice is given in the Federal Register. Cf. NPRM, 80 Fed. Reg. 473, 474 (Jan. 6, 2015). The STB announced its library (which also serves as its public docket room) would be open only between 10 AM and 3PM, effective November 18, 2015.

perhaps controlling, in formal agency proceedings. Over the years, staff members in the Office of Proceedings, and Administrative Law Judges (ALJ), have been quite important in resolving disputes brought to the agency.

Attached hereto as Appendix B are the names of STB personnel shown on the 15 meeting summaries; however, missing are the STB's Organizational Acronym identifications for all personnel shown. This information for many years was available to the public in the Employee Telephone Directory, which was distributed by mail to all practitioners, and otherwise also available by request. Moreover, the Directory also was published by the ICC Practitioners Assn. for its subscribers. However, the year 2008 (May), was the last year the Directory was made available outside the agency. Since 2009, the STB staff Directory, with its organizational acronyms, has been strictly off-limits to outside practitioners.

Appendix B indicates that each of the 15 summary conferences were attended by pools of 6 STB employees, of a total of 8 STB employees, with two exceptions (I.D. 239704, 239707), which were meetings composed of 5 employees. All 15 of the meetings were attended by three of the employees.^{4/} Reference to the 2008 and earlier Directory issuances, indicates that all but two of the 8^{5/} employees have come to the agency since 2008.

In years prior to 2009, practitioners could determine tenure at the agency as well as organizational location of the employee,

^{4/} Higgins, Novins, Rudi.

^{5/}The two are Molteni and Cooper.

including organizational acronym, room number, and telephone extension.

Appendix B suggests a lesser degree of agency experience for staff engaged in the meetings than traditionally in the Office of Proceedings or the AJLs. The meeting summaries are deficient in not indicating identity information for the agency personnel.

Respectfully submitted,



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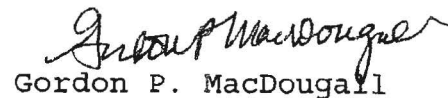
Concerned Agency Practitioners

December 23, 2015

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall

X-724 (Sub-No. 4) Meetings

<u>Board Listing</u>	<u>Staff Meeting</u>	<u>STB I.D.</u>	<u>Outside Party</u>	<u>Format</u>
Dec. 2	Nov. 19	239649	WCTL	Meeting
Dec. 2	Nov. 20	239660	AAR	Meeting
Dec. 4	Nov. 23	239670	Fertilizer Inst.	Meeting
Dec. 8	Nov. 24	239689	NGFA	Meeting
Dec. 9	Nov. 30	239691	NSR	Telephone
Dec.10	Nov. 30	239704	Highroad Consult	Meeting (Dearden)
Dec.10	Dec. 1	239705	BASF	Telephone
Dec.10	Dec. 2	239706	USDA	Meeting
Dec.10	Dec. 2	239707	Chgo Metro Plan.	Telephone
Dec.15	Dec. 3	239715	UP	Meeting
Dec.15	Dec. 3	239717	Ft.Rail Cust.All.	Meeting (Lincoln Elec.)
Dec.15	Dec. 4	239721	KCS	Telephone
Dec.15	Dec. 4	239722	CP	Telephone
Dec.16	Dec. 7	239728	BNSF	Meeting
Dec.16	Dec. 7	239733	CSXT	Meeting

APPENDIX A

STB STAFF PARTICIPATION

<u>I.D.</u>	<u>Higgins</u>	<u>Novins</u>	<u>Rudi</u>	<u>Molteni</u>	<u>Wolfe</u>	<u>Lyons</u>	<u>Bourdon</u>	<u>Cooper</u>
239649	X	X	X	X	X	X		
239660	X	X	X	X	X	X		
239670	X	X	X	X	X		X	
239689	X	X	X	X	X		X	
239691	X	X	X	X	X		X	
239704	X	X	X	X		X		
239705	X	X	X	X	X	X		
239706	X	X	X	X			X	X
239707	X	X	X			X		X
239715	X	X	X	X	X	X		
239717	X	X	X	X	X		X	
239721	X	X	X	X	X	X		
239722	X	X	X	X	X		X	
239728	X	X	X	X	X		X	
239733	X	X	X	X	X	X		

APPENDIX B