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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 739
EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING PROCEEDINGS

COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION

The American Short Line and Regional Railroad Association ("ASLRRA" or "Association") is the national trade association representing the nation's 600 Class II and III railroads commonly referred to as "short lines." Most short line railroads operating in the U.S. today are small and locally based.

Together short line railroads operate just under 47,500 route miles, or nearly one third of the national railroad network. Short lines operate in 49 states and in 36 of those states they operate at least one quarter of the state's total rail network, and in five states they operate 100 percent of the state's rail network. Short lines are often called the first mile/last mile operators of the nation's railroad system as they handle the origin or destination of nearly one out of every five rail cars moving on the national system.

Summary

ASLRRA files these Comments in support of the proposed modifications by the Surface Transportation Board ("STB" or "Board") of its regulations found at 49 C.F.R. § 1102.2 in Docket Number No. EP 739, Ex Parte Communications in Informal Rulemaking Proceedings (STB served Sept. 28, 2017) ("EP 739"). We believe that the Board's intent to enhance its ability to make informed decisions through increased stakeholder communications in informal proceedings is timely and needed. Generally, the STB's proposal is well-researched, well-thought out, and persuasive. The proposal meets the Board's goals of enhancing its ability to make informed decisions in informal proceedings while ensuring its record-building in rulemaking proceedings remains transparent and fair.

General Discussion

STB Review of the Current Regulations, Recent Case Law, and Guidances

The Board did an excellent job describing the history of the current regulations concerning ex parte communications, the D.C. Court of Appeals decision in Sierra Club v. Costle, 657 F. 2d 298 (D.C. Cir. 1981) interpreting the Administrative Procedures Act, and the 2014 provision by the Administrative Council of the United States ("ACUS") a best-practices guidance to agencies. Using these sources as a

predicate to its proposed changes to the current rule results in a cogent decision relating to when and how ex parte communications can be used or not used by interested parties and provides clear guidance about the precise procedures to be used by interested parties in informal proceedings and by interested parties in formal proceedings regarding ex parte communications.

The Board's Rationale for Revisions

As rationale for the proposed changes, the Board relied on two recent cases in which it allowed ex parte communications. In Reciprocal Switching, EP 711 (Sub-No. 1), slip op. at 28-29 (STB served July 27, 2016) and U.S. Rail Serv. Issues – Performance Data Reporting, (U.S. Rail Serv. Issues Nov. 2015 Decision), EP 724 (Sub-No. 4), slip op. at 2-3 (STB served Nov. 9, 2015), the STB waived the ex parte prohibitions to allow the Board and designated staff to participate in ex parte communications. In doing so, it established how and when the ex parte meetings could take place. In both, the parties that have participated thus far have expressed appreciation for the opportunity to meet with the individual Board members and staff to express their views. These opportunities coupled with the recent developments in case law and the guidance provided by ACUS, lead the Board to determine to re-examine its ex parte regulations to permit and govern ex parte communications in informal rulemaking proceedings.

We believe that so long as the Board balances the benefits of ex parte communications with institutional concerns regarding transparency and fairness, the new approach set forth in EP 739 would facilitate a more candid and potentially interactive dialogue of key issues [and] ... be an indispensable avenue for agencies to obtain the information necessary to develop sound, workable policies." Ex Parte Commc'ns in Informal Rulemaking Proceedings, 79 Fed. Reg. 35,988, 35,994 (June 25, 2014). We think the NPRM provides just such a balance.

Comments on the Proposed Rule

Changes to Definitions

The proposal suggests changes to the definitions governing ex parte communications. It proposes changes to communications that are and are not prohibited and changes to the procedures required when prohibited communications are received. The new definition of covered proceedings includes both on-the-record proceedings and informal rulemaking ones. Adoption of this change would clarify to which type proceeding the new ex parte regulations apply. In addition, the proposed definitions redefine the meaning of ex parte communications, which clear up when such communications are in fact ex parte and further place the Board in the position of determining whether to permit the communications rather than other parties. The Board also proposes to amend the current rules to include other categories where ex

parte communications are permissible – all of which do not threaten transparency or fairness but may still have an impact on a proceeding.

Adding the new or amended definitions clarify that the regulations govern instead of prohibiting all ex parte communications – all to ensure clarity. Moreover, the proposed definitions or amendments to them preserve the transparency and fairness to the process that the parties need and require. Thus, ASLRRRA supports them.

Ex Parte Communications Prior to Issuance of an NPRM

This part of the proposed rule would allow ex parte communications prior to the issuance of an NPRM. These communications would, in the words of the STB, allow "unconstrained" communications in any such proceeding. We concur with the Board's view that allowing such communications would enable it to obtain stakeholder input that could help the Board and the stakeholders in designing broad policies, particularly in the preliminary stages of a rulemaking proceeding. We believe this aspect of the proposed rule will accomplish that and also does not adversely implicate due process or administrative concerns.

Later in the notice, the Board returns to the issue of ex parte communications prior to the issuance of an NPRM. Ex Parte 739 at pp. 12 – 13. The proposed rule provides that while ex parte communications would be allowable in an informal proceeding, that allowance would end on the issuance of an NPRM. At that time, after the timelines proposed, the parties cannot engage in ex parte communications, but if they do, anything said or communicated on an ex parte basis will be entered into the record and the party in violation of the rules could be subject to sanctions.

The Board also describes in considerable detail the process it proposes for ex parte communications during informal proceedings, including prompt disclosure of ex parte communications, a written summary of meetings with such details as who attended and a description of the arguments and information presented. EP 739 at pp. 12 – 13. These and other related details ensure transparency and fairness in the process and therefore we support these portions of the proposed rule, too.

Prohibited Communications

The Board proposes to clarify when ex parte communications are prohibited. Rather than use the term "docketed" as the point at which such communications are prohibited, it says prohibitions against ex parte communications would apply when the first filing or Board decision is posted to the public docket or when the person responsible for a communication knows that the first filing has been filed with the Board, whichever occurs first. In effect, in informal proceedings, the prohibition would not take effect until an NPRM is issued by the Board. We support these changes as they clarify when the prohibition about ex parte communications begin.

Conclusion

ASLRRA applauds the STB for undertaking the review and revision of the rules in 49 C.F.R. 1102.2. It is time for the Board to revise the rules to allow ex parte communications in informal proceedings. The proposed rule will allow the Board to make better, informed decisions while still ensuring the Board's record building process remains transparent and fair. The proposal is aligned with case law and other agency practices and closely follows the Guidelines published by ACUS. For these reasons, we support the changes the Board has proposed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Linda Bauer Darr", with a stylized flourish at the end.

Linda Bauer Darr
President
American Short Line and Regional Railroad Association

November 1, 2017