

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 704 (Sub-No. 1)

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

Digest:¹ To permit informal discussions with stakeholders, the Board waives the general prohibition on ex parte communications in effect when the proceeding was initiated.

Decided: March 18, 2019

On March 23, 2016, the Board issued a notice of proposed rulemaking (NPRM) seeking public comment on its proposal to revoke the existing class exemptions under 49 C.F.R. part 1039 for (1) crushed or broken stone or rip rap; (2) hydraulic cement; (3) coke produced from coal; (4) primary iron or steel products; and (5) iron or steel scrap, wastes, or tailings. Review of Commodity, Boxcar, & TOFC/COFC Exemptions, EP 704 (Sub-No. 1) (STB served Mar. 23, 2016) (with Board member Begeman dissenting). The Board received 23 opening comments on the NPRM and 13 reply comments.

On February 22, 2019, the American Forest & Paper Association (AF&PA) and the Institute of Scrap Recycling Industries, Inc. (ISRI), jointly filed a petition, pursuant to 49 C.F.R. § 1117.1, requesting that the Board waive its prohibition on ex parte communications so that interested stakeholders may meet with Board members to discuss the issues raised in this proceeding. (Pet. 1.) AF&PA and ISRI assert that, given the passage of time since comments were filed and given the new membership on the Board, ex parte communications would facilitate the forward progress of this proceeding and assist the Board in expeditiously reaching an informed decision on the important issues addressed in the comments.² (*Id.* at 6.) AF&PA and ISRI also request that the Board post meeting summaries prepared by parties engaged in

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language in Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Resolute Forest Products, Packaging Corporation of America, Consolidated Scrap Resources, Inc., Tri-State Iron & Metal Company, Reserve Management Group, TMS International Corp., Muskingum Iron & Metal Company, the National Industrial Transportation League, International Paper, Morris Iron & Steel Company, Inc., Commercial Metals Company, the Association of American Railroads, and several members represented by the Rail Customer Coalition submitted statements in support of the waiver petition.

ex parte communications and allow parties to comment on those summaries, which it argues would maintain fairness and accessibility in this proceeding. (Id. at 8.)

When this proceeding was instituted, the agency's long-standing policy, derived from its then-existing regulations, prohibited ex parte communications in informal rulemaking proceedings. Although the Board adopted a final rule in 2018 modifying its regulations to permit ex parte communications in informal rulemaking proceedings, the modified regulations apply only to proceedings initiated on or after the rule's effective date and thus do not apply here. See Ex Parte Commc'ns in Informal Rulemaking Proceedings, EP 739 (STB served Feb. 28, 2018). The Board, however, may waive the prohibition on ex parte communications in pending informal rulemaking proceedings on a case-by-case basis. Id. at 20. Indeed, the Board has waived the prohibition on ex parte communications in particular proceedings to permit such communications, where appropriate. See e.g., Expanding Access to Rate Relief, EP 665 (Sub-No. 2), slip op. at 2 (STB served March 28, 2018).

The Board appreciates the concerns expressed by AF&PA and ISRI. Accordingly, the Board finds good cause to waive the prohibition on ex parte communications in this proceeding for the limited purpose of permitting parties to have discussions with Board members³ so that the agency may develop a more complete record.

The Board establishes the following procedures, modeled after those adopted by the Board in Ex Parte Communications in Informal Rulemaking Proceedings, Docket No. EP 739. Meetings will take place between March 19, 2019, and June 17, 2019, either at the Board's offices at 395 E Street, S.W., Washington, DC 20423, or by telephone conference (pursuant to each party's request). Any party engaged in ex parte communications in this proceeding shall submit to the Board member office with whom the meeting was held a memorandum that states the date and location of the communication, lists the names and titles of all persons who attended (including via phone or video) or otherwise participated in the meeting during which the ex parte communication occurred, and summarizes the data and arguments presented during the ex parte communication. Any written or electronic material shown or given to Board members or Board staff during the meeting must be attached to the memorandum. See 49 C.F.R. § 1102.2(g)(4)(i). If the memorandum, including any attachments, contains information that the presenter asserts is confidential, the presenter must submit a public version and a confidential version of the memorandum. See § 1102.2(g)(4)(iv). Parties must submit their memoranda, in the manner prescribed above, no later than two business days after the ex parte communication; the Board will post the memoranda on its website within five days of submission. See § 1102.2(g)(4)(v)-(vi). Parties will be allowed 10 days, from the close of the ex parte communication period, to submit written comments in response to the memoranda. To schedule meetings, parties should

³ Consistent with Ex Parte Communications in Informal Rulemaking Proceedings, EP 739, slip op. at 20, meetings will be held under the auspices of the Board members' offices and may include Board staff as determined by each Board member.

contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at 202-245-0238.

It is ordered:

1. To permit informal discussions with stakeholders, the Board grants AF&PA and ISRI's petition and waives the general prohibition on ex parte communications in effect when this proceeding was initiated, as discussed above.

2. Parties may schedule meetings with Board members between March 19, 2019, and June 17, 2019.

3. Comments in response to the memoranda are due by June 27, 2019.

4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.