

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 739

Ex Parte Communications in Informal Rulemaking Proceedings

**Joint Opening Comments of the
Rail Customer Coalition**

Pursuant to the Notice of Proposed Rulemaking served by the Surface Transportation Board (“STB” or “Board”) in the above-captioned docket on September 28, 2017 (“NPRM”), the American Chemistry Council, The Fertilizer Institute, The National Industrial Transportation League, American Fuel and Petrochemical Manufacturers, Independent Lubricant Manufacturers Association, International Warehouse Logistics Association, American Forest & Paper Association, Alliance for Rail Competition, Private Railcar Food and Beverage Association, Glass Packaging Institute, National Association of Chemical Distributors, The Chlorine Institute, Alliance of Automobile Manufacturers, Association of Global Automakers, American Petroleum Institute, American Malting Barley Association, Corn Refiners Association, Portland Cement Association, and Plastics Industry Association (collectively “the Rail Customer Coalition” or “RCC”), hereby submit these Joint Opening comments on proposals for modifying the Board’s rules concerning *ex parte* communications in informal rulemaking proceedings. The RCC offers these comments in support of the Board’s proposals as both a matter of law and policy.

The members of the RCC represent a broad spectrum of industries which appear frequently in proceedings before the Board. Many of their member companies also appear before the Board. Most notably, several of these associations and/or their members have participated in *ex parte* meetings with Board members in two recent proceedings where the

Board has relaxed its *ex parte* communication rules on a case-by-case basis. *See Reciprocal Switching*, EP 711 (Sub-No. 1), slip op. at 28-29 (served July 27, 2016); *U.S. Rail Serv. Issues—Performance Data Reporting*, EP 724 (Sub-No. 4), slip op. at 2-3 (served Nov. 9, 2015). In addition, they have participated in *ex parte* meetings with Board staff that facilitated the Board’s issuance of an Advanced Notice of Proposed Rulemaking in *Expediting Rate Cases*, EP 733, slip op. at 2 (served June 15, 2016). Their overall experience with these meetings has been very positive and they believe that enshrining those procedures in the Board’s rules will benefit the Board, its stakeholders, and the general public. While the RCC appreciates the Board’s willingness to conduct *ex parte* meetings via telephone or video conference so as to afford more stakeholders the opportunity to engage in such communications, the RCC also encourages the Board to hold such meetings in the field, where stakeholders conduct their daily business and the Board can achieve a greater sense of how proposed rules may impact those businesses.

The Board proposes to modify its *ex parte* communication rules, at 49 C.F.R. § 1102.2, both to permit *ex parte* communications in informal rulemaking proceedings and to clarify and update those rules as to when and how interested persons may communicate informally with the Board in proceedings other than rulemakings. Although the current rules do not prohibit *ex parte* communications in informal rulemaking proceedings, the agency’s practice over the past 40 years has been to apply those prohibitions to informal rulemakings.¹ The Board proposes to

¹ Pursuant to a plain reading of the current rules, the prohibition on *ex parte* communications applies only to an “on-the-record proceeding,” which is defined as “any matter described in Sections 556-557 of the Administrative Procedure Act” or “required by the Constitution, statute, Board rule, or by decision in the particular case, that is decided on the record made in a Board proceeding.” 49 C.F.R. §§ 1102.2(a) and (c). Because informal rulemakings are conducted under Section 553 of the APA, such proceedings are not within the scope of the current prohibition upon *ex parte* communications. As a matter of practice, however, the agency has applied this prohibition to informal rulemaking proceedings since 1977. *Revised Rules of Practice*, 358 I.C.C. 323, 345 (1977).

modify that practice by adopting procedures pursuant to which *ex parte* communications may occur in informal rulemakings in a fair and transparent manner and to clarify that *ex parte* communications are not prohibited at all prior to the issuance of a Notice of Proposed Rulemaking. In addition, the Board proposes to allow *ex parte* communications related to environmental laws and judicial review of matters already decided by the Board. Lastly, the Board proposes modifications and clarifications that better reflect the conduct of proceedings before the Board today versus when the ICC originally adopted the current *ex parte* communication rules.

The Board has set forth a solid legal foundation for its proposals in the NPRM. The Board correctly observes that the current, more restrictive, *ex parte* communication rules are not mandated by the ICC Termination Act or the Administrative Procedures Act (“APA”). Rather, they are the product of a policy decision that the Interstate Commerce Commission (“ICC”) made 40 years ago to include informal rulemaking proceedings within the scope of prohibited *ex parte* communications. NPRM at 2. The Board rightly observes that changes in law and policy over the past 40 years, coupled with recent experience with limited waivers of the current prohibition against *ex parte* communications in informal rulemakings, make it appropriate to revisit that prohibition now. *Id.*

Furthermore, the RCC members agree with the Board’s policy conclusion that *ex parte* communications should be permitted in informal rulemaking proceedings if appropriate safeguards to preserve fairness and transparency also are adopted. *Ex parte* communications in informal rulemakings ultimately produce better outcomes for many reasons. A face-to-face dialogue facilitates a more efficient exchange of information, development of ideas, explanation of concepts, and responsiveness to questions. It allows the Board to probe more deeply into

subjects based upon the comments submitted and to focus on those issues that raise the most questions or are of greater interest. After reading stakeholder comments, the Board may have questions about matters it has identified but the parties have overlooked or to which the parties have only given minor attention. The Board also may benefit from clarification of concepts and proposals submitted in written comments. Proceedings that implicate complex technical matters, in particular, could benefit from the ability to explain those matters in greater detail and address specific points that may be confusing to the Board. Significantly, *ex parte* communications also facilitate the Board's understanding of stakeholder industries and how proposed rules could affect their businesses in both positive and negative ways.

In general, the RCC members believe the safeguards that the Board has proposed are sufficient to preserve fairness and transparency in informal rulemakings. These safeguards are nearly identical to those used in the recent EP 711 (Sub-No. 1) and EP 724 (Sub-No. 4) dockets in which the Board permitted *ex parte* communications. Those procedures worked well from the perspective of the RCC members and should provide comparable safeguards in future rulemakings. However, the RCC members desire to raise two concerns with those safeguards which they encourage the Board to address, and they recommend that the Board consider allowing *ex parte* meetings to occur in pending rulemaking proceedings, such as Ex Parte 704, *Review of Commodity, Boxcar and TOFC/COFC Exemptions*, where the Board previously did not waive its current *ex parte* communication rules.

First, the RCC members are concerned with a new safeguard proposed by the Board that was not employed in EP 711 (Sub-No. 1) or EP 724 (Sub-No. 4). Specifically, the proposal to cut-off *ex parte* communications at 20 days prior to the due date for reply comments undercuts the value of such communications. During the period between opening and reply comments, the

parties are consumed with reading and digesting the opening comments of other parties and formulating their replies, which leaves little, if any, time to prepare for, schedule and participate in *ex parte* meetings. This is most true in large, more complex, proceedings where *ex parte* meetings may be most valuable, because the parties must focus first on the review and evaluation of opening comments (which can be numerous in larger proceedings), followed by engagement with clients and constituents to develop responses, and then draft reply comments. Thus, the current proposal may curtail the number of participants who would otherwise desire to engage in *ex parte* meetings. Furthermore, the value of *ex parte* communications comes mostly after the parties have had sufficient opportunity to evaluate the opening comments of other stakeholders and to fully formulate their own positions based upon the totality of opening and reply comments. A similar situation exists for the Board, which would have more and better-developed questions, as well as better-formulated concepts, after two rounds of comments.

As such, under the Board's proposals, *ex parte* communications will be based upon an incomplete record. It is noteworthy that, in the recent EP 711 (Sub-No. 1) and EP 724 (Sub-No. 4) dockets which the Board references to illustrate the benefits of *ex parte* communications in rulemaking proceedings, NPRM at 7, the Board sought *ex parte* meetings with stakeholders only after all comments had been received. The RCC members believe that the benefits of *ex parte* communications that the Board has noted in the NPRM have been far more valuable precisely because they occurred later in the rulemaking process.

The RCC members are mindful that the Board has proposed the 20-day cut-off as a means to preserve fairness and transparency. But they suggest the Board consider alternatives that would permit *ex parte* communications for a specified time after the submission of at least two rounds of comments. For example, the Board could permit *ex parte* communications for up

to 30 days after the filing of reply comments and permit parties to submit written responses to those communications 10 days thereafter. Such responses should be strictly limited to the content of the *ex parte* meeting summaries. In some rulemaking proceedings, the Board has solicited three rounds of comments, rather than the usual two rounds. In those situations, the Board could apply its 20-day rule to the third round of comments and still preserve most of the benefits from *ex parte* communications. At a minimum, the RCC members ask that the Board express its willingness to extend the 20-day deadline on a case-by-case basis when appropriate to realize the benefits of *ex parte* communications in informal rulemakings.

Second, the RCC members urge the Board to be mindful of informal rulemaking proceedings that are closely associated with pending adjudicatory proceedings and to establish safeguards against permissible *ex parte* communications in the former being used to perform an end-run around prohibited *ex parte* communications in the latter. Two historical examples of this situation come to mind, both of which pertained to rulemakings concerning rail rate cases that had the potential to impact pending cases. In *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1), slip op. at 2 (served Feb. 27, 2006) the Board instituted a rulemaking to address major issues regarding the proper application of the stand-alone cost (“SAC”) test and, in the same decision, held two pending rate adjudicatory proceedings in abeyance so the Board could implement whatever changes it decided to adopt in the rulemaking. Similarly, in *Rate Regulation Reforms*, Ex Parte No. 715 (served July 25, 2012), the Board proposed new rules pertaining to the use of cross-over traffic and the allocation of cross-over traffic revenue in SAC cases. Although the Board expressed its intent not to apply the rules it adopted to pending cases, the railroad defendants in three such cases moved to hold those cases in abeyance. The Board denied the railroad motions but ultimately did apply its new rules to those cases. In theory, if the

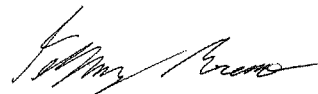
Board's proposed *ex parte* communication rules had been effective during these two rulemakings, the parties to those cases could have engaged in *ex parte* communications in the rulemaking proceeding that otherwise would have been prohibited in their pending adjudication. The Board should take care in such circumstances to ensure that *ex parte* communications in the rulemaking proceeding do not bleed into, and potentially influence, the adjudicatory proceeding. The two cleanest and most effective means of doing so are either to prohibit all *ex parte* communications in such circumstances or to not apply newly-adopted rules to pending cases.

Third, the RCC members believe that the benefits of *ex parte* meetings described above would also apply to a pending rulemaking proceeding—Ex Parte 704, *Review of Commodity, Boxcar and TOFC/COFC Exemptions*, even though the Board previously did not authorize such meetings in that proceeding. Permitting *ex parte* meetings to occur in that rulemaking proceeding would ensure that the benefits and impacts of any final Board decision to revoke existing exemptions are fully understood by the Board. Further, based on anticipated changes to the make-up of the Board since this proceeding was first instituted, authorizing *ex parte* meetings in EP 704 would help in briefing and educating any newly confirmed Board members in their understanding of the issues. Accordingly, the RCC members request that the Board specifically permit the occurrence of *ex parte* meetings in EP 704 during a specific period of time to be determined by the Board upon the issuance of a decision in this proceeding.

Finally, although these comments do not separately address each individual proposal in the NPRM, RCC members support those proposals. This includes the proposed new and modified definitions; 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.

Respectfully submitted.



Jeffrey O. Moreno, Esq.
Karyn A. Booth, Esq.
Thompson Hine LLP
1919 M Street, NW Suite 700
Washington, DC 20036
(202) 263-4107

Counsel for the Rail Customer Coalition

Dated: November 1, 2017