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SERVICE DATE – FEBRUARY 28, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 739

EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING PROCEEDINGS

Decided: February 27, 2018

AGENCY: Surface Transportation Board.

ACTION: Final Rule.

SUMMARY: In this decision, the Surface Transportation Board (the Board) modifies its regulations to permit, subject to disclosure requirements, ex parte communications in informal rulemaking proceedings. The Board also adopts other changes to its ex parte rules that would clarify and update when and how interested persons may communicate informally with the Board regarding pending proceedings other than rulemakings. The intent of the modified regulations is to enhance the Board’s ability to make informed decisions through increased stakeholder communications while ensuring that the Board’s record-building process in rulemaking proceedings remains transparent and fair.

DATES: This rule is effective on April 4, 2018.

ADDRESSES: Requests for information or questions regarding this final rule should reference Docket No. EP 739 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet at (202) 245-0368. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The Board’s current regulations at 49 C.F.R. § 1102.2 generally prohibit most informal communications between the Board and interested persons concerning the merits of pending Board proceedings. These regulations require that communications with the Board or Board staff regarding the merits of an “on-the-record” Board proceeding not be made on an ex parte basis (i.e., without the knowledge or consent of the parties to the proceeding).¹ See 49 C.F.R. § 1102.2(a)(3), (c). The current regulations detail the

¹ “On-the-record proceeding” means “any matter described in Sections 556–557 of the Administrative Procedure Act [(APA)] (5 U.S.C. 556–557) or any matter required by the

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procedures required in the event an impermissible communication occurs and the potential sanctions for violations. See 49 C.F.R. § 1102.2(e), (f).

In 1977, the Board’s predecessor agency, the Interstate Commerce Commission (ICC), determined that the general prohibition on ex parte communications in proceedings should include the informal rulemaking proceedings the Board uses to promulgate regulations.² See Revised Rules of Practice, 358 I.C.C. 323, 345 (1977).³ At that time, several court decisions expressed the view that ex parte communications in informal rulemaking proceedings were inherently suspect.⁴ Accordingly, it has long been the agency’s practice to prohibit meetings with individual stakeholders on issues that are the topic of pending informal rulemaking proceedings.

At the same time, however, other court decisions were more tolerant of ex parte communications in informal rulemaking proceedings, so long as the proceedings were not quasi-

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Constitution, statute, Board rule, or by decision in the particular case, that is decided solely on the record made in a Board proceeding.” 49 C.F.R. § 1102.2(a)(1).

² The APA, 5 U.S.C. §§ 551-559, governs two categories of agency rulemaking: formal and informal. Formal rulemaking is subject to specific procedural requirements, including hearings, presiding officers, and a strict ex parte prohibition. See 5 U.S.C. § 556-57. But most federal agency rulemakings, including the Board’s, are informal rulemaking proceedings subject instead to the less restrictive “notice-and-comment” requirements of 5 U.S.C. § 553.

³ In Revised Rules of Practice, the ICC stated “ex parte communication during a rulemaking is just as improper as it is during any other proceeding. The Commission’s decisions should be influenced only by statements that are a matter of public record.” 358 I.C.C. at 345.

⁴ See, e.g., Home Box Office v. Fed. Comm’ns Comm’n, 567 F.2d 9, 51-59 (D.C. Cir. 1977) (finding that ex parte communications that occurred after the notice of proposed rulemaking (NPRM) violated the due process rights of the parties who were not privy to the communications because the written administrative record would not reflect the possible “undue influence” exerted by those stakeholders who had engaged in ex parte communications); Nat’l Small Shipments Traffic Conference v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1978) (finding ex parte communications “violate[d] the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decision making,” foreclosing effective judicial review); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959) (finding that undisclosed ex parte communications between agency commissioners and a stakeholder were unlawful because the informal rulemaking involved “resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open”).

adjudicative in nature and the process remained fair.⁵ In 1981, in Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981), the U.S. Court of Appeals for the District of Columbia Circuit significantly clarified and liberalized treatment of this issue. In that case, the court considered the “timing, source, mode, content, and the extent of . . . disclosure” of numerous written and oral ex parte communications received after the close of the comment period to determine whether those communications violated the governing statute or due process. Id. at 391. The court held that, because the agency docketed most of the ex parte communications and none of the comments were docketed “so late as to preclude any effective public comment,” the agency satisfied its statutory requirements. Id. at 398. The court also declined to prohibit ex parte communications in informal rulemakings on constitutional due process grounds, and even held that not all ex parte communications must necessarily be docketed (implicitly concluding that whether such communications require docketing depends on case-specific circumstances). Id. at 402-04. Today, Sierra Club is considered the most recent influential decision on ex parte communications in informal rulemakings and is often cited by courts for the proposition that ex parte communications in informal agency rulemaking are generally permissible.⁶

More recently, in 2014, the Administrative Conference of the United States (ACUS), the body charged by Congress with recommending agency best practices, provided guidance to agencies indicating that a general prohibition on ex parte communications in informal rulemaking proceedings is neither required nor advisable. Ex Parte Commc’ns in Informal Rulemaking Proceedings (2014 ACUS Recommendation), 79 Fed. Reg. 35,988, 35,994 (June 25, 2014). ACUS concluded that ex parte communications in informal rulemaking proceedings “convey a variety of benefits to both agencies and the public,” although it acknowledged that fairness issues can arise if certain groups have, or are perceived to have, “greater access to agency personnel than others.” Id. However, in balancing these competing considerations, ACUS urged agencies to consider placing few, if any, restrictions on ex parte communications

⁵ See, e.g., Action for Children’s Television v. Fed. Commc’ns Comm’n, 564 F.2d 458 (D.C. Cir. 1977) (upholding the agency’s decision not to issue proposed rules and finding no APA violation for ex parte discussions where the agency provided a meaningful opportunity for public participation and the proceeding did not involve competing claims for a valuable privilege).

⁶ See, e.g., Tex. Office of Pub. Util. Counsel v. Fed. Commc’ns Comm’n, 265 F.3d 313, 327 (5th Cir. 2001) (“Generally, *ex parte* contact is not shunned in the administrative agency arena as it is in the judicial context. In fact, agency action often demands it.”); Ammex, Inc. v. United States, 23 Ct. Int’l Trade 549, 569 n.16 (1999) (noting that the decision at issue “constitutes an exercise of ‘informal’ rulemaking under the [APA] and, as such, is not subject to the prohibition on ex parte communications set forth in 5 U.S.C. § 557(d)(1) (1994)”); Portland Audubon Soc. v. Endangered Species Comm., 984 F.2d 1534, 1545-46 (9th Cir. 1993) (“The decision in [Sierra Club] that the contacts were not impermissible was based explicitly on the fact that the proceeding involved was *informal* rulemaking to which the APA restrictions on ex parte communications are not applicable.”).

that occur *before* an NPRM is issued because communications at this early stage are less likely to cause harm and more likely to “help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.” *Id.* ACUS further recommended that agencies establish clear procedures ensuring that all ex parte communications occurring *after* an NPRM is issued, whether planned or unplanned, be disclosed.

Starting in 2015, the Board began to look at the possibility of conducting ex parte meetings to gain more stakeholder input in the informal rulemaking process. As a result, the Board waived the ex parte prohibition to permit Board Members or designated Board staff to participate in ex parte communications in two proceedings.⁷ See Reciprocal Switching, EP 711 (Sub-No. 1), slip op. at 28-29 (STB served July 27, 2016)⁸; U.S. Rail Serv. Issues—Performance Data Reporting, EP 724 (Sub-No. 4), slip op. at 2-3 (STB served Nov. 9, 2015). Many stakeholders in these proceedings expressed appreciation for the opportunity to meet with Board Members or Board staff regarding the merits of the proposed rules and expressed the hope to interact with the Board informally in the future as well.⁹ In these meetings, parties have been able to respond directly to questions from Board Members and Board staff on the feasibility and utility of certain aspects of the Board’s proposals.

Based on the developments in case law related to ex parte communications and the Board’s own experiences waiving its ex parte prohibitions in the two recent proceedings, the Board determined that it was appropriate to revisit the agency’s strict prohibition on ex parte communications in informal rulemaking proceedings. The Board also determined that certain other aspects of its ex parte regulations that apply to proceedings other than rulemakings could

⁷ Greater use of ex parte meetings in Board rulemaking proceedings was also a topic of the U.S. Senate Committee on Commerce, Science, and Transportation’s August 11, 2016 hearing. See Freight Rail Reform: Implementation of the STB Reauthorization Act of 2015: Field Hearing Before the S. Comm. on Commerce, Sci., & Transp., 114th Cong. 32, 35, 46, 50-52, 57, 69, 72 (2016), <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg23228/pdf/CHRG-114shrg23228.pdf>.

⁸ In the Board’s July 27, 2016 decision, which embraced Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Docket No. EP 711, the Board terminated the proceeding in Docket No. EP 711, and all meetings with Board Members are taking place under Reciprocal Switching, Docket No. EP 711 (Sub-No. 1).

⁹ See, e.g., Summary of Ex Parte Meeting Between Packaging Corp. of Am. & Board Member Begeman at 3, Aug. 3, 2017, Reciprocal Switching, EP 711 (Sub-No. 1); Summary of Ex Parte Meeting Between the Am. Chemistry Council & Board Member Miller at 1, Mar. 22, 2017, Reciprocal Switching, EP 711 (Sub-No. 1); Summary of Ex Parte Meeting Between CSX Transp. & STB Staff at 1, Dec. 16, 2015, U.S. Rail Serv. Issues—Performance Data Reporting, EP 724 (Sub-No. 4).

be clarified and updated to reflect current practices and better guide stakeholders and agency personnel. Accordingly, the Board issued an NPRM on September 28, 2017, proposing to: 1) modify its regulations to permit, subject to disclosure requirements, ex parte communications in informal rulemaking proceedings, and 2) change its ex parte rules to clarify and update when and how interested persons may communicate informally with the Board regarding pending proceedings other than rulemakings. See Ex Parte Commc'ns in Informal Rulemaking Proceedings (NPRM), EP 739 (STB served Sept. 28, 2017). The Board received nine opening comments and three reply comments on the NPRM.¹⁰

Below, the Board addresses the comments submitted by parties in response to the NPRM and discusses clarifications and modifications being adopted in the final rule. Appendix A contains the text of the final rule.

Changes to Definitions. In the NPRM, the Board proposed to add two new definitions to § 1102.2(a): “informal rulemaking proceeding” and “covered proceedings.” “Informal rulemaking proceeding” would include any proceeding to issue, amend, or repeal rules pursuant to 49 C.F.R. part 1110 and 5 U.S.C. § 553. “Covered proceedings” would encompass both on-the-record proceedings and informal rulemaking proceedings following the issuance of an NPRM.¹¹ The Board further proposed, as discussed in more detail below, that ex parte

¹⁰ Comments were received from the following organizations: 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); the American Short Line and Regional Railroad Association (ASLRRA); the Association of American Railroads (AAR); BNSF Railway Company (BNSF); the Freight Rail Customer Alliance (FRCA); the George Mason University Antonin Scalia Law School Administrative Law Clinic (GMU); the National Grain and Feed Association (NGFA); Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board (SMART); and the Western Coal Traffic League (WCTL). On November 1, 2017, the Board also received a letter from NGFA informing the Board that the following national agricultural producer and agribusiness organizations notified NGFA that they support NGFA’s opening comments: National Association of State Departments of Agriculture, National Council of Farmer Cooperatives, National Farmers Union, National Oilseed Processors Association, and North American Millers’ Association.

¹¹ Accordingly, the Board proposed to replace references to “on-the-record proceedings” with “covered proceedings,” as appropriate, throughout § 1102.2.

communications would be permitted in informal rulemaking proceedings (subject to disclosure requirements for those communications occurring post-NPRM), but would remain prohibited in on-the-record proceedings.

Additionally, the Board proposed redefining an “ex parte communication” as “an oral or written communication that concerns the merits or substantive outcome of a pending proceeding; is made without notice to all parties and without an opportunity for all parties to be present; and could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.” This proposed new definition would alter the existing definition in two ways; first, by removing the existing concept that communications are only ex parte if made “by or on behalf of a party” and second, by removing the suggestion that an ex parte communication that is made with the “consent of any other party” could be permissible.

The Board noted in the NPRM that these revisions would not change the generally understood concept that certain communications, by their very nature, do not concern the merits or substantive outcome of pending proceedings or are not made to Board Members or staff who are reasonably expected to participate in Board decisions. Such permissible communications include, for example, communications about purely procedural issues; public statements or speeches by Board Members or staff that merely provide general and publicly available information about a proceeding; communications that solely concern the status of a proceeding; and communications with the Board’s Rail Customer and Public Assistance Program.

ASLRRRA, NGFA, and RCC support the proposed changes to the definitions. (ASLRRRA Comments 3; NGFA Comments 5; RCC Comments 7.) ASLRRRA argues that the proposed definitions and amendments preserve the transparency and fairness of the rulemaking process. (ASLRRRA Comments 3.)

WCTL supports the Board’s proposed changes to the definition of “ex parte communication.” (WCTL Comments 23; WCTL Reply 9.) WCTL agrees with the Board that ex parte communications can be made by non-parties and that the definition of “ex parte communication” should encompass communications made by these non-parties. (WCTL Reply 9.) WCTL argues, however, that the Board should amend the definition of “on-the-record proceeding” to expressly include rate reasonableness and unreasonable practice adjudications. (WCTL Comments 19.) According to WCTL, rate reasonableness and unreasonable practice cases may not technically be formal “on-the-record” proceedings within the meaning of the APA, and adding the suggested text would remove any uncertainty. (Id. at 20.) AAR states that it does not oppose WCTL’s suggestion. (AAR Reply 5.)

The final rule will adopt the proposal as set forth in the NPRM. It is not necessary to amend the definition of “on-the-record proceeding” to specifically include rate reasonableness and unreasonable practice adjudications, as WCTL suggests. Although rate reasonableness and unreasonable practice formal complaints may not technically be covered by the APA definition of on-the-record proceedings, the definition of that term in the Board’s regulations is sufficient to

cover those types of proceedings, which are decided solely on the record. See 49 C.F.R. § 1102.2(a)(1).

Communications That Are Not Prohibited. The Board also proposed in the NPRM to modify § 1102.2(b) to include additional categories of ex parte communications that are permissible *and* would not be subject to the disclosure requirements of proposed § 1102.2(e) and (g), discussed in more detail below. Specifically, the Board proposed adding to this category communications related to an informal rulemaking proceeding prior to the issuance of an NPRM;¹² communications related to the Board’s implementation of the National Environmental Policy Act and related environmental laws; and communications concerning judicial review of a matter that has already been decided by the Board made between parties to the litigation and the Board or Board staff involved in that litigation. Additionally, the Board proposed to modify the existing regulations to remove from § 1102.2(b)(1) the language permitting any communication “to which all the parties to the proceeding agree.”

NGFA, RCC, and WCTL support including environmental review and judicial review communications within the scope of permitted ex parte communications. (NGFA Comments 5; RCC Comments 7; WCTL Comments 2; WCTL Reply 2, 10.) ASLRRA, NGFA, and RCC also support the proposal to permit ex parte communications prior to the issuance of an NPRM. (ASLRRA Comments 3; NGFA Comments 3; RCC Comments 7.) ASLRRA argues that allowing undisclosed ex parte communications prior to the issuance of an NPRM would enable the Board to obtain helpful stakeholder input, particularly in the preliminary stages of a rulemaking proceeding, without adversely implicating due process or raising administrative concerns. (ASLRRA Comments 3.) NGFA likewise supports permitting undisclosed ex parte communications before the issuance of an NPRM. (NGFA Comments 3.) According to NGFA, the information the Board gathers prior to the issuance of an NPRM would be evident within the NPRM itself. (Id.) NGFA, however, suggests that the Board adopt the practice of including in the NPRM a list of the identities of all stakeholders who provided input, as the Board did in Expediting Rate Cases, EP 733, slip op. at 2 n.3 (STB served June 15, 2016). (Id.)

AAR, FRCA, SMART, and WCTL object to the Board’s proposal to permit undisclosed ex parte communications prior to the issuance of an NPRM. (See AAR Comments 5-6; FRCA Comments 1; SMART Comments 10; WCTL Comments 21; AAR Reply 4.) AAR argues that the Board should require the disclosure of ex parte contacts occurring after the issuance of an ANPRM. (AAR Comments 5-6.) For cases initiated by a petition for rulemaking, AAR suggests that ex parte communications should be permitted, subject to disclosure requirements, once that petition has been filed and docketed. (AAR Reply 5.) AAR argues that such a rule would be consistent with Department of Transportation (DOT) policy that recommends disclosure of ex

¹² For example, informal communications following a notice of intent to institute a rulemaking proceeding or an advance notice of proposed rulemaking (ANPRM) would not be prohibited. See 49 C.F.R. § 1110.3(b).

parte communications upon issuance of an ANPRM, and Federal Aviation Administration rules that require disclosure of ex parte communications before an ANPRM or an NPRM. (AAR Comments 6.) According to AAR, permitting such ex parte communications without disclosure may discourage stakeholder participation on the record. (AAR Comments 6; AAR Reply 4-5.)¹³

WCTL likewise argues that the Board should apply ex parte communication disclosure rules and limitations to all publicly-docketed informal rulemaking proceedings where the Board has sought public comments (e.g., if the Board initiates a docketed proceeding using an ANPRM, the ex parte communication rules would apply starting when the ANPRM is docketed). (WCTL Comments 21; WCTL Reply 3-4.) WCTL argues that this would better advance the Board's objective of "free flowing" communications by allowing all interested members of the public to see what others are saying in ex parte meetings and to then respond to these communications. (WCTL Comments 21; WCTL Reply 4.) According to WCTL, permitting undisclosed ex parte communications prior to the issuance of an NPRM would discourage parties from filing detailed comments in response to ANPRMs and similar forms of pre-NPRM notices when those comments may be rejected based on ex parte communications that the parties were unaware of and had no opportunity to rebut. (WCTL Comments 21.) FRCA agrees with WCTL that disclosure requirements "should not become operative only after an [NPRM] is served." (FRCA Comments 1.) Lastly, SMART argues that the 2014 ACUS Recommendation raises potential harms that would apply to ex parte communications prior to issuance of an NPRM (although the alleged potential harms are not specified by SMART). (SMART Comments 9-10 (citing 2014 ACUS Recommendation, 79 Fed. Reg. at 35,993-95).)

Having reviewed the comments, the Board continues to believe that the benefits of not requiring disclosure for ex parte communications prior to the issuance of an NPRM outweigh the potential harms. Regarding the benefits, the Board agrees with ASLRRRA that such communication would enable the Board to obtain helpful stakeholder input in crafting proposed regulations. Informal communications with stakeholders prior to issuance of an NPRM provide

¹³ AAR also asks the Board to clarify whether ex parte communications would be permitted in major rail merger proceedings and suggests that the Board add a new paragraph § 1102.2(b)(7) permitting, as a communication that is not prohibited, "[a]ny communication permitted by statute." (AAR Comments 7.) WCTL objected to AAR's suggestion, arguing that it does not comply with the provisions of 49 U.S.C. § 11324(f) and conflicts with the Board's 1996 determination not to exercise its statutory authority under § 11324(f) to permit ex parte communications in merger cases. (WCTL Reply 8-9 (citing Pet. of Fieldston Co. to Establish Procedures Regarding Ex Parte Commc'ns in R.R. Merger Proceedings, 1 S.T.B. 1083, 1084-85 (1996)).) The Board finds that this request, related to major merger proceedings, is outside the scope of this proceeding, which focuses primarily on informal rulemaking proceedings; however, parties are free to raise the issue of the permissibility of ex parte communications in individual major merger proceedings.

an opportunity for the Board to obtain useful information and input that would inform the development of the Board’s proposal and help identify the issues the agency should consider. In fact, the final report to ACUS, on which the 2014 ACUS Recommendation is based, states that “pre-NPRM ex parte communications are generally beneficial and do not implicate administrative and due process principles.” Esa L. Sferra-Bonistalli, Ex Parte Commc’ns in Informal Rulemaking Final Report (Final Report), 69 (May 1, 2014) (prepared for consideration of the Admin. Conference of the U.S.), <https://www.acus.gov/report/final-ex-parte-communications-report>. The report continued, stating that “[r]ather than restricting [ex parte] communications, agencies should experiment with how they can capitalize on the communications’ value.” Id. at 85. Thus, permitting informal communications pre-NPRM, without restrictions, such as disclosure and timing requirements, could lead to better policy-making by enabling a freer flow of communication during the preliminary, exploratory phase of a rulemaking proceeding.

The Board believes that these benefits outweigh any potential harms. SMART’s claim—that the ACUS report raises some important potential and anticipated harms that would apply to ex parte communications prior to issuance of an NPRM—is inconsistent with the conclusion of ACUS’s recommendations. ACUS expressly states that “[b]efore an agency issues [an NPRM], few if any restrictions on ex parte communications are desirable.” 2014 ACUS Recommendation, 79 Fed. Reg. at 35,994. ACUS further states that pre-NPRM communications are “less likely” to pose the same harms as ex parte communications that take place later in the process, and “can help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.” Id.

In addition, the potential harm identified by both WCTL and AAR—that commenters would be less likely to file comments on the record during a proceeding—seems unlikely. In a recent case where the Board invited and/or received informal stakeholder communications prior to the initiation of a proceeding, participation in the subsequent proceeding remained at a high level. See, e.g., Expediting Rate Cases, Docket No. EP 733 (25 comments received following informal communications). The Board believes that stakeholders will continue to weigh in on proposed rules (through written comments and/or disclosed ex parte communications) even where they have had an opportunity to share general and preliminary views with the agency pre-NPRM. Additionally, as the Board noted in the NPRM, any information gathered in a pre-NPRM meeting that the Board incorporates or relies upon in its proposal will be evident in the NPRM itself. See NPRM, EP 739, slip op. at 10. The public would have an opportunity to examine and respond to that information.¹⁴ The Board believes that parties will still have the

¹⁴ For example, as the Board noted in the NPRM, in Docket No. EP 733, Expediting Rate Cases, where Board staff held informal meetings with stakeholders with the goal of enhancing the Board staff’s perspective on strategies and pathways to expedite and streamline rate cases, parties were permitted to comment on the details of the proposal, including those

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incentive to participate through written comments following informal ex parte communications to ensure that the Board has a record that reflects their views.

For these reasons, the final rule will adopt the proposal regarding communications that are not prohibited as set forth in the NPRM.

Communications That Are Prohibited. In the NPRM, the Board proposed to modify § 1102.2(c)(1) by adding the introductory clause, “[e]xcept to the extent permitted by these rules” to reflect the fact that the revised rules would now govern, but not entirely prohibit, ex parte communications.

The Board also proposed amending § 1102.2(d) to clarify when ex parte prohibitions would take effect and how long they would remain in effect. Specifically, the NPRM provided that the prohibitions against ex parte communications in on-the-record proceedings would begin when the first filing or Board decision in a proceeding 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. The Board further proposed that, in informal rulemaking proceedings, except as provided in the new § 1102.2(g), discussed in more detail below, the prohibitions on ex parte communications would begin when the Board issues an NPRM. Lastly, the Board proposed to clarify that ex parte prohibitions in covered proceedings would remain in effect until the proceeding is no longer subject to administrative reconsideration under 49 U.S.C. § 1322(c) or judicial review.

Commenters generally support this proposal. ASLRRRA states that it supports the proposed changes to § 1102.2(d), which clarify when ex parte prohibitions would begin. (ASLRRRA Comments 3.) Likewise, NGFA states that it supports changing the provision on when ex parte prohibitions begin to better reflect the various ways Board proceedings are initiated. (NGFA Comments 5.) NGFA and RCC also both support application of the ex parte prohibitions when the first filing or Board decision is posted to the public docket in an on-the-record proceeding. (Id.; RCC Comments 7-8.) No commenters raised specific objections to this aspect of the Board’s proposal. Accordingly, the final rule will adopt the proposal as set forth in the NPRM.

Procedures Upon Receipt of Prohibited Ex Parte Communications. The Board also proposed to revise § 1102.2 (e) and (f), which entail the procedures required of Board Members and employees upon receipt of prohibited ex parte communications and sanctions, to reflect the fact that some ex parte communications would now be permissible under the revised regulation. First, the proposed rules clarified that the procedures in § 1102.2(e)(1) and (2) would apply to

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stemming from feedback gathered in the informal meetings. See NPRM, EP 739, slip op. at 10 n.12; see also Expediting Rate Cases, EP 733, slip op. at 1 (STB served June 15, 2017).

“[a]ny Board Member, hearing officer or Board employee” who receives an ex parte communication. Second, the proposal clarified that the procedures set forth in the existing § 1102.2(e) and (f) would apply only to communications not otherwise permitted by the regulation. Lastly, the Board proposed to amend the provision in § 1102.2(e)(1)—that currently requires the Chief of the Office of Proceedings’ Section of Administration to place any written communication or a written summary of an oral communication not permitted by these regulations in the public correspondence file—to also require that such placements be made “promptly” and contain a label indicating that the prohibited ex parte communication is not part of the decisional record of the proceeding.

The only comment in response to this aspect of the proposal was from WCTL, which states that it agrees with the Board’s proposal to clarify the procedures the Board should follow if a Board Member or Board staff receives a prohibited ex parte communication. (WCTL Comments 24; WCTL Reply 10.) No commenters objected to the proposal. Accordingly, the final rule will adopt the proposal as set forth in the NPRM.

Ex Parte Communications in Informal Rulemaking Proceedings. In the NPRM, the Board proposed to add a new § 1102.2(g) specifically governing ex parte communications in informal rulemaking proceedings that occur following the issuance of an NPRM, at which point disclosure requirements would attach. Under the proposed rule, ex parte communications with Board Members in informal rulemaking proceedings following the issuance of an NPRM would be permitted, subject to disclosure requirements, until 20 days before the deadline for reply comments to the NPRM, unless otherwise specified by the Board. The proposed rules provided that Board Members may delegate their participation in such ex parte communications to Board staff.

Under the proposed rules, ex parte communications in informal rulemaking proceedings that occur outside of the permitted meeting period, that are made to Board staff where such participation has not been delegated by the Board, or that do not comply with the required disclosure requirements would be subject to the sanctions provided in § 1102.2(f). Further, the proposed rules provided that, to schedule an ex parte meeting, parties should contact the Board’s Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238 or the Board Member office with whom the meeting is requested, unless otherwise specified by the Board.

The proposed rules also required that the substance of each ex parte meeting be disclosed by the Board by posting in the docket of the proceeding a written meeting summary of the arguments, information, and data presented at each meeting and a copy of any handouts given or presented. The proposed meeting summary would also disclose basic information about the meeting, including the date and location of the ex parte communication (or means of communication in the case of telephone calls or video-conferencing) and a list of attendees/participants. The proposed rules further provided that the meeting summaries would have to be sufficiently detailed to describe the substance of the ex parte communication. Under

the proposed rules, presenters could be required to resubmit summaries that are insufficiently detailed or that contain inaccuracies as to the substance of the presentation.

The proposed rules also provided that a single meeting summary could be submitted to the Board even if multiple parties, persons, or counsel were involved in the same ex parte meeting. In such instances, it would be the responsibility of the person submitting the summary to ensure that all other parties at the meeting agree to the form and content of the summary. The proposed rules would permit parties to present confidential information during ex parte meetings. Under the proposed rules, if the presentations contain material that a party asserts is confidential under an existing protective order governing the proceeding, parties would be required to present a public version and a confidential version of ex parte summaries and any handouts. If a protective order has not been issued in the proceeding at the time the presenter seeks to file a meeting summary or handout containing confidential information, the proposed rules provided that the presenting party would have to file a request with the Board seeking such an order no later than the date it submits its meeting summary. The proposed rules also required parties to submit summaries within two business days of an ex parte presentation or meeting. Under the proposed rules, the Board would post the summaries within seven days of submission of a summary that is complete for posting.

Comments in Support. Most commenters were supportive of the Board's proposal to permit, subject to disclosure requirements, ex parte communications in informal rulemaking proceedings. (See AAR Comments 2; ASLRRRA Comments 1; BNSF Comments 1; GMU Comments 1; RCC Comments 3.) AAR and ASLRRRA state that the Board should adopt the proposed rules because they will lead to better reasoned decision-making and more informed rules. (AAR Comments 3; see also ASLRRRA Comments 4.) AAR argues that the relatively modest burdens that ex parte meetings might place on stakeholders participating in rulemaking proceedings would be outweighed by the benefits of improved flow of relevant information to Board decision makers. (AAR Reply 3.) According to AAR, face-to-face communications would allow the Board to ensure that its data and information have not grown stale over time, and even when communications do not provide new information, face-to-face conversations summarizing and highlighting points of emphasis can provide value to decision-makers. (AAR Comments 4.) AAR also noted that the NPRM is responsive to stakeholder requests for more interaction with Board Members and staff. (Id.) ASLRRRA also supports the proposed process for ex parte communications during informal rulemaking proceedings, stating that it would ensure transparency and fairness. (ASLRRRA Comments 3.) According to ASLRRRA, the Board's proposal meets its goals of enhancing its ability to make informed decisions in informal proceedings while ensuring its record-building in rulemaking proceedings remains transparent and fair. (Id. at 1.)

BNSF likewise supports the Board's proposal, stating that increased communications with the Board regarding informal rulemakings will provide value to both the Board and its stakeholders. (BNSF Comments 2.) According to BNSF, the Board's current ex parte regulations reflect the outdated and overly restrictive view of the Board's predecessor agency, the

ICC, and are “out of step” with long-held doctrines of administrative law, the ex parte rules generally under the APA, and procedures of other federal agencies. (*Id.* at 1-2; *see also* AAR Comments 1 (“[T]he Board’s application of its current regulations unnecessarily prohibits most informal communications with the Board and its staff in the informal rulemaking context.”).) BNSF argues that modernizing the Board’s ex parte rules to permit an increased flow of information and technical expertise between the Board and its stakeholders during informal rulemaking proceedings will enable the Board to engage in more reasoned policymaking and should produce regulatory policies that are more grounded in the complex operational and market realities currently facing the rail industry. (BNSF Comments 1.)

GMU asserts that the Board’s proposed changes to the procedures for ex parte communications would promote responsible governance by facilitating promulgation of informed substantive rules while preserving transparency. (GMU Comments 1.) According to GMU, relaxing the Board’s ex parte regulations would remove a procedural hurdle, making it easier for the Board to engage in informed notice-and-comment proceedings, which in turn encourages transparency. (*Id.* at 2.) GMU further argues that the Board has the statutory authority to change its ex parte communications regulations in the context of a notice-and-comment rulemaking, noting that both the APA notice-and-comment requirements and the statutory provisions governing the Board permit ex parte communications during informal rulemaking proceedings. (*Id.* at 2-3.)

RCC agrees that ex parte communications should be permitted in informal rulemaking proceedings if appropriate safeguards to preserve fairness and transparency also are adopted. (RCC Comments 3.) RCC states that ex parte communications in informal rulemakings would ultimately produce better outcomes. (*Id.*) According to RCC, face-to-face dialogue facilitates a more efficient exchange of information, development of ideas, explanation of concepts, and responsiveness to questions and would allow the Board to probe more deeply into subjects based upon the comments submitted. (*Id.* at 3-4.) RCC further states that the Board would also benefit from clarification of concepts and proposals submitted in written comments, especially in proceedings that implicate complex technical matters. (*Id.* at 4.)

As further support for the Board’s proposal, a number of commenters cite their positive experiences participating in ex parte meetings in recent Board proceedings where the agency waived the ex parte prohibition. (*See, e.g.*, BNSF Comments 2 (noting that the ex parte meetings in U.S. Rail Serv. Issues—Performance Data Reporting, Docket No. EP 724 (Sub-No. 4), better informed the Board about highly technical service reporting issues and resulted in regulations that were more efficiently tailored to the realities of railroad operations); NGFA Comments 2-3 (stating that its ex parte meeting in U.S. Rail Serv. Issues—Performance Data Reporting, Docket No. EP 724 (Sub-No. 4), was extremely beneficial because it allowed NGFA to explain the details of their railroad service needs and concerns and to answer Board staff’s questions in a more effective manner); RCC Comments 1-2 (noting positive experiences with ex parte meetings in Reciprocal Switching, Docket No. EP 711 (Sub-No. 1), and U.S. Rail Serv. Issues—

Performance Data Reporting, Docket No. EP 724 (Sub-No. 4), as well as the informal meetings in Expediting Rate Cases, Docket No. EP 733.)

Comments Requesting Modifications. Several commenters, while expressing overall support for the Board's proposal, suggest modifications that they argue would improve the rule. RCC urges the Board to be mindful of informal rulemaking proceedings that are closely associated with pending adjudicatory proceedings. (RCC Comments 6.) In that regard, RCC suggests that the Board establish safeguards against parties using permissible ex parte communications in the rulemaking proceedings to circumvent the prohibition of the same in adjudicatory proceedings. (*Id.*; see also WCTL Comments 18; AAR Reply 5.) RCC suggests that the most effective potential modifications would be to either: 1) not allow ex parte communications in rulemakings that are closely associated with pending cases, or 2) not apply any rules that were developed in a rulemaking that utilized ex parte communications in pending adjudications. (RCC Comments 6.)

NGFA and RCC both suggest that the Board modify the period during which ex parte communications would be permitted. (NGFA Comments 4; RCC Comments 5-6.) Specifically, they suggest that the Board permit ex parte communications for a specified time (e.g., 30 days) after the deadline for filing reply comments—subject to the same disclosure requirement contained in the NPRM—and permit written responses confined specifically to the content of the ex parte communication within 10 days thereafter. (NGFA Comments 4; RCC Comments 5-6.) According to both commenters, under the Board's proposal, which would prohibit ex parte communications within 20 days of the deadline for written reply comments, stakeholders would not have enough time to both participate in ex parte meetings and also review and prepare responses to other parties' written comments. (NGFA Comments 4; RCC Comments 4-5.) RCC adds that, in those proceedings where the Board solicits three rounds of comments, rather than the usual two rounds, 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. (RCC Comments 6.) RCC requests that, at a minimum, 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. (*Id.*) AAR concurs in a modification that would permit ex parte communications for a specific time after the submission of at least two rounds of comments, stating that this change would allow meetings held with Board Members or staff to reflect all the issues in the record and would not create any incentives for parties to hold evidence or arguments back for the reply round. (AAR Reply 4.)

WCTL, however, opposes allowing ex parte communications following the written comment period because it claims that doing so would add unnecessary cost and delay to rulemaking proceedings. (WCTL Reply 7-8.) WCTL also notes that ex parte communications conducted after the comment period has closed are disfavored by ACUS. (*Id.* at 8 (citing 2014 ACUS Recommendation, 79 Fed. Reg. at 35,994).)

Additionally, AAR states that the proposal in § 1102.2(g)(1), which authorizes the Board to delegate its participation in such ex parte communications to Board staff, implies that such a delegation would require an entire board decision, which AAR argues would be unnecessarily formalistic. (AAR Comments 7.) AAR suggests that the Board should expand the proposed rules to indicate that communications with staff during the appropriate period are permissible, subject to disclosure rules. (*Id.*) AAR indicates there are many instances where technical information could be best explained to staff responsible for the subject matter, like financial reporting, costing, or railroad operations. (*Id.*)

Regarding the proposed disclosure requirements, NGFA states that it supports the Board's proposals concerning the preparation and disclosure of ex parte meeting summaries that are detailed sufficiently to describe the substance of the communication, but recommends that the Board shorten the period for posting the meeting summaries from seven calendar days (as the Board proposed) to two business days. (NGFA Comments 4-5.) NGFA argues that this change would align with the two-business-day requirement for meeting summaries to be submitted by the participants in the ex parte communication and would provide for more timely transparency and opportunity for review by interested parties. (*Id.* at 5.)

Comments in Opposition. Some commenters object to the idea of allowing ex parte communication in informal rulemaking proceedings or suggest that, if allowed, such communications be utilized more sparingly. SMART states that railroad employees, represented by SMART, would be adversely affected by a “‘closed door’ and secret [Board] tribunal.” (SMART Comments 4.) According to SMART, the Board's proposal would “abolish[]” the prohibition on ex parte communications in most, if not all rulemakings, since the terms “informal” and “formal” rulemakings are not in the APA. (SMART Comments 3 n.2.) SMART argues that “unrestricted” and “wide-ranging” ex parte communications would be “prejudicial to parties and counsel situated at a distance,” because the Board does not have regional offices and rarely sets hearings outside the Washington, DC area. (SMART Comments 7.) It contends that telephonic communications are “not a satisfactory alternative for face-to-face participation.” (*Id.*) SMART further argues that “[t]here 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”; rather, the “real impact of ex parte communication repeal would be to limit the audience, restrict the spread of knowledge, and . . . impair the final action.” (SMART Reply 4.) SMART also argues that joint meetings conducted with other parties and agency personnel could be problematic. (SMART Comments 8.) According to SMART, the Board need not adopt the proposed rule because it may continue to waive its ex parte prohibition, as it has done in two recent proceedings. (*Id.* at 7.) SMART also argues that the benefit of oral communication can be achieved through oral argument. (SMART Reply 5.)

WCTL argues that the Board's proposal would increase the cost of participating in a rulemaking proceeding, (WCTL Comments 15), and likely result in substantial administrative delay, (*id.* at 16). WCTL argues that the proposal would lead parties to believe they must participate in the ex parte communication process or they will be “left out.” (*Id.* at 15.) WCTL

also argues that shippers, unlike large railroads, frequently lack the time and financial resources to participate in ex parte meetings, which can create the perception of an unlevel playing field. (Id. at 17.) WCTL further argues that, in many proceedings, the Board may have more efficient administrative tools to address concerns with the record, such as the use of technical conferences. (Id. at 16.) According to WCTL, unless the Board requires that ex parte sessions be video-taped and then makes the tapes publicly available, the perception may continue to be that deals are being done “behind closed doors,” not in open fora. (Id. at 17.) WCTL argues that the Board should instead continue to allow ex parte communications in informal rulemaking proceedings on a case-by-case basis. (Id. at 1, 14, 18; WCTL Reply 2, 5.) WCTL asserts that a case-by-case approach would address concerns raised by other commenters in this proceeding. (WCTL Reply 6-7.)

FRCA agrees with WCTL that the Board should determine whether to permit ex parte communications on a case-by-case basis, although FRCA also acknowledges the benefits of ex parte communications in rulemakings generally. (FRCA Comments 1.) According to FRCA, permitting ex parte communications should not be the “automatic default” until the Board has accumulated more experience with ex parte communications. (Id.)

AAR disagrees with WCTL that ex parte communications could result in administrative delay. (AAR Reply 5.) According to AAR, WCTL’s suggestion of using technical conferences instead of ex parte meetings does not have to be an “either/or” proposition, as greater use of technical conferences could supplement NPRM proposals. (Id. at 3.) AAR also disagrees with WCTL’s suggestion that the Board should permit ex parte communications in informal rulemaking proceedings on a case-by-case basis. (Id. at 2.) AAR argues that stakeholders will be best equipped to fully participate in a rulemaking when the rules for such participation are known in advance. (Id.) AAR notes that pre-established rules would save the Board from expending its limited time and resources on ad hoc determinations related to ex parte communications in every rulemaking proceeding on its docket. (Id. at 2-3.) AAR further asserts that 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. (Id. at 3.)

Board Determination. After considering all of the comments, the Board concludes that direct communications with stakeholders in informal rulemaking proceedings, in accordance with a transparent and fair record-building process, would enhance the Board’s consideration of issues and better enable it to promulgate the most effective regulations. The Board will first address the arguments of commenters that oppose the proposed rule. Then, the Board will address the suggested modifications to the proposed rule.

The commenters that urge the Board to withdraw the proposal in favor of continuing to prohibit ex parte communications in rulemakings have not identified a potential or likely harm that outweighs the benefits of such communications. Specifically, the Board disagrees with SMART that permitting ex parte communications in informal rulemaking proceedings would

create a “secret [Board] tribunal” and with WCTL that ex parte sessions must be video-taped and made publicly available in order not to be perceived as “behind closed doors.” The final rule incorporates safeguards to ensure the rulemaking process remains fair and transparent, such as requiring the written and public disclosure of ex parte communications received after a rule is proposed and providing parties an opportunity to submit written comments in response to those summaries. The Board agrees with RCC that the safeguards the Board has proposed are sufficient to preserve fairness and transparency in informal rulemakings. As noted above, the Board has gained familiarity in recent proceedings with developing such safeguards and has used that experience to develop the proposed rules. Additionally, as several commenters noted, the final rule is consistent with the practices of other agencies and the best practices guidelines published by ACUS.¹⁵

The Board also disagrees that the proposal would disadvantage witnesses and counsel located outside the Washington, DC area, as SMART asserts. As indicated in the NPRM, EP 739, slip op. at 8, 13, parties will be permitted to participate in ex parte meetings via telephone or videoconferencing. Indeed, ex parte meetings have been conducted remotely, and the Board does not believe that there is any significant difference in the effectiveness of the interaction between face-to-face meetings and meetings occurring via telephone or videoconferencing. Additionally, in response to SMART’s argument that there is no evidence that direct communication will promote more efficiency in the decision-making process than written comments, the Board notes that ex parte communications are not intended to replace written comments in a rulemaking. Rather, ex parte communications are a supplement to the written record and provide parties with yet another avenue for communicating their needs and concerns to the Board. Ex parte communications would actually enhance the usefulness of written comments, as such communications would allow Board Members to obtain clarification and seek additional information regarding arguments contained in the written opening comments.

The Board is not persuaded that WCTL’s argument that parties will believe they must participate in the ex parte communication process to avoid having less access than others warrants limiting all parties’ access to this communication tool. A party’s decision whether or not to engage in ex parte communications is not much different than having to decide whether to participate through more traditional means, such as submitting written comments or participating in a hearing. In fact, unlike a traditional hearing, the proposal here would allow parties to

¹⁵ SMART’s assertion that the proposed rule improperly would “abolish[]” the prohibition on ex parte communications in most, if not all, rulemakings is not relevant to this proceeding. The APA prohibits ex parte communications in formal proceedings, but not in informal rulemaking proceedings. See Sierra Club, 657 F.2d at 402 (noting that Congress declined to extend the ex parte prohibition applicable to formal rulemakings to informal rulemakings despite being urged to do so). Should the Board conduct a rulemaking that is subject to the APA restriction, the rules proposed here would not apply.

participate remotely, as the Board is permitting ex parte meetings to be conducted via telephone and videoconference, which could reduce a party's cost to participate in a proceeding. The Board is confident that parties will be able to assess the appropriate level of participation for their organization based on their particularized interest in the subject matter. The Board's intention here is to provide stakeholders with increased access to the Board while maintaining a fair and transparent record-building process, and, for the reasons discussed in this decision, the Board believes the final rule achieves that goal.

Additionally, the Board is not persuaded that permitting ex parte communications in informal rulemaking proceedings will result in "significant administrative delay," as WCTL claims. While WCTL is correct that permitting ex parte communications necessarily will add some time to rulemaking proceedings, the Board believes that the benefit of the additional information provided will outweigh the disadvantages of a slightly longer procedural schedule. Based on the Board's experiences, incorporating ex parte communication into the informal rulemaking process results in final rules that better reflect the needs and concerns of the Board's stakeholders. (See AAR Comments 3; ASLRRRA Comments 4; BNSF Comments 2; NGFA Comments 2-3; RCC Comments 1-2, 3; AAR Reply 3); see also 2014 ACUS Recommendation, 79 Fed. Reg. at 35,994. Contrary to SMART's and WCTL's arguments, the Board does not intend ex parte communications to be a substitute for oral argument or technical conferences in informal rulemaking proceedings. Rather, ex parte communications would supplement the tools currently available in rulemaking proceedings. If the Board believes oral argument or technical conferences would be useful, it may decide to include those steps as a supplement to (or even in lieu of, if the circumstances warrant) ex parte communications.

To the extent that SMART and WCTL argue that the Board's recent practice of waiving the ex parte prohibition in particular proceedings is superior to the proposed rules, the Board agrees with AAR that stakeholders will be better equipped to fully participate in an informal rulemaking when the rules for participation are well-established. As AAR notes, pre-established rules would save the Board from expending time and resources on ex parte determinations in every rulemaking proceeding. Additionally, as several parties note, the Board by decision could restrict communications in a particular proceeding, where appropriate. Thus, the Board will not accept WCTL's and SMART's recommendation that the Board continue to waive its ex parte regulations on a case-by-case basis, rather than adopting changes to its ex parte regulations permitting ex parte regulations in informal rulemaking proceedings.

Several parties proposed modifications to the Board's proposed ex parte communication procedures, which the Board addresses below. With regard to the most appropriate deadline for the conclusion of ex parte meetings in an informal rulemaking proceeding, the Board continues to believe that the cutoff should be 20 days before the reply comment deadline. NGFA's, RCC's, and AAR's suggestions—that the Board permit ex parte communications for a specified time after the deadline for filing reply comments—would add an additional round of comments and result in a longer proceeding than under the Board's proposal. Indeed, as WCTL argues, post-comment period ex parte communications are disfavored by ACUS given the propensity of those

communications to delay proceedings if significant information is presented to the agency late in the process. (See WCTL Reply 8; see also 2014 ACUS Recommendation, 79 Fed. Reg. at 35,994.) ACUS notes in 2014 ACUS Recommendation that “the dangers associated with agency reliance on privately-submitted information become more acute” after the comment period closes and may require an agency to reopen the comment period. Post-comment period ex parte communications are also generally discouraged at several other agencies. See Final Report at 57, 59-60, 64 (noting prohibition or discouragement of post-comment period ex parte contacts at DOT, the U.S. Coast Guard, the Department of Education and the Federal Trade Commission). In addition, RCC’s suggestion that the Board could permit written responses limited to just the ex parte communication meeting summaries could lead to disputes between commenters as to whether the response is properly limited to the summaries and put the Board in the position of having to resolve such disputes, which would only add to the complexity of the rulemaking process.

However, considering NGFA’s and RCC’s arguments that parties may have insufficient time during the comment period to both prepare written comments and participate in ex parte meetings, the Board will be cognizant of such constraints when establishing reply comment period deadlines in rulemaking proceedings. Also, in particular proceedings, if a party is unable to both prepare written comments and participate in ex parte meetings within this deadline, it may seek an extension. Additionally, if the Board concludes in a particular proceeding that ex parte discussions would be more beneficial following the submission of written comments (e.g., in highly technical rulemakings where post comment ex parte communication would be beneficial to ensure the Board understands the complex, technical data and arguments), the Board may modify the procedural schedule to permit such discussion. See infra App. A, § 1102.2(g)(1) (“unless otherwise specified by the Board in procedural orders governing the proceeding”).

The Board agrees with RCC that the Board must be mindful of informal rulemaking proceedings that are closely associated with pending adjudicatory proceedings to ensure that permissible ex parte communications in the rulemaking proceedings are not used to circumvent the prohibition of the such communications in the related adjudicatory proceedings. If the Board determines that ex parte communications are not appropriate for a particular rulemaking proceeding based on this concern, it can issue an order declining to permit such meetings in that particular proceeding. And if the Board concludes that ex parte meetings can be used, the Board may provide additional guidelines in its procedural order and inform parties of its expectations at the beginning of ex parte meetings.

AAR raises a concern that the proposed language in § 1102.2(g)(1) implies that Board staff may only participate in ex parte communications after a delegation of authority through an “entire board” decision. The Board clarifies here that, under the proposal, no delegation would be required for Board staff to attend ex parte meetings scheduled with a Board Member (at that Member’s request). A delegation of authority would be required only where the ex parte meetings would occur solely with staff (i.e., no Board Member in attendance), such as the ex

parte meetings that occurred in U.S. Rail Service Issues—Performance Data Reporting, Docket No. EP 724 (Sub No. 4). Thus, it is the Board’s determination that ex parte meetings will be conducted under the auspices of the Board Members’ offices, unless the Board determines otherwise. AAR’s suggestion that the Board permit, as a default option, ex parte communications with any Board staff could render the disclosure process—which is essential to maintaining fairness and transparency—unduly complicated. Under the AAR’s proposal, the number of potential stakeholder meetings could increase exponentially, and after every such meeting, each individual staff contact would be required to be summarized and disclosed in a meeting summary that would be posted to the public docket, to which other parties would then have to review and possibly file responses. The Board, however, recognizes AAR’s concern that there may be instances where interaction with Board technical staff would be beneficial. The Board anticipates that individual Members will make a concerted effort to include relevant staff in ex parte meetings or delegate the meetings to Board staff, when appropriate.

In response to NGFA’s request that the Board shorten the time permitted for meeting summaries to be posted by the Board, the Board will reduce the allotted time from within seven days of submission to within five days of submission. The Board believes that fewer than five days would not provide sufficient time for the Board to confirm that a meeting summary is sufficiently detailed to describe the substance of the presentation and request resubmissions, if necessary. However, the Board will endeavor to post meeting summaries as soon as they are ready. Thus, the final rule will adopt the proposal as set forth in the NPRM with this one modification.

Application of the Final Rule. In its comments, WCTL argues that new ex parte communication rules should not be retroactively applied to pending proceedings. (WCTL Comments 22.) WCTL is concerned generally that the retroactive application of the new rules in pending proceedings would delay Board action in those proceedings. (*Id.* at 23; WCTL Reply 9 n.22.) AAR states that it does not disagree with WCTL and notes that if the Board believes that further communications would be beneficial in ongoing proceedings, the Board could issue waivers in those proceedings on a going-forward basis. (AAR Reply 5.) RCC, however, requests that the Board retroactively apply its new ex parte communications rules in one pending rulemaking proceeding, Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Docket No. EP 704. (RCC Comments 7.) According to RCC, permitting ex parte meetings to occur in that rulemaking proceeding would ensure that the benefits and impacts of any final Board decision are fully understood by the Board and would, given the anticipated changes to the make-up of the Board since the proceeding was first instituted, help in briefing and educating any newly confirmed Board Members in their understanding of the issues. (*Id.*)

The final rule will not be applied retroactively to pending proceedings. Rather, the final rule adopted here will apply to proceedings newly initiated following the effective date of the final rule. The Board, however, may waive the prohibition on ex parte communications in pending informal rulemaking proceedings on a case-by-case basis, as it did prior to the final rule.

In such instances, the Board will set out the procedures that will govern such communications in an order.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601-604. In its final rule, the agency must either include a final regulatory flexibility analysis, § 604(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

In the NPRM, the Board certified under 5 U.S.C. § 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.¹⁶ The Board explained that the proposed regulations provide for participation in ex parte communications with the Board in informal rulemaking proceedings to provide stakeholders with an alternative means of communicating their interests to the Board in a transparent and fair manner. When a party chooses to engage in ex parte communications with the Board in an informal rulemaking proceeding, the requirements contained in these proposed regulations do not have a significant impact on participants, including small entities. The Board noted that, while the proposed rules would require parties to provide written summaries of the ex parte communications, based on the Board's experiences in Reciprocal Switching, Docket No. EP 711 (Sub-No. 1), and U.S. Rail Service Issues—Performance Data Reporting, Docket No. EP 724 (Sub-No. 4), the summary documentation is a minimal burden. The meeting summaries are generally only a few pages long (excluding copies of handouts from the meetings that were attached). For example, the meeting summaries the Board received in U.S. Rail Service Issues—Performance Data Reporting, Docket No. EP 724 (Sub-No. 4), ranged from two to six pages in length. Of those summaries, nearly half were just two pages long. Likewise, in Reciprocal

¹⁶ Effective June 30, 2016, for the RFA analysis for rail carriers subject to Board jurisdiction, the Board defines a "small business" as only those rail carriers classified as Class III rail carriers under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars, or \$35,809,698 or less when adjusted for inflation using 2016 data. Class II rail carriers have annual operating revenues of less than \$250 million in 1991 dollars or less than \$447,621,226 when adjusted for inflation using 2016 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 C.F.R. § 1201.1-1.

Switching, Docket No. EP 711 (Sub-No. 1), the meeting summaries ranged from one to four pages in length, with the majority of those summaries being three or fewer pages long. Therefore, the Board certified under 5 U.S.C. § 605(b) that these proposed rules, if promulgated, would not place any significant burden on a substantial number of small entities.

The final rule adopted here revises the rules proposed in the NPRM; however, the same basis for the Board's certification of the proposed rule applies to the final rule. Thus, the Board again certifies under 5 U.S.C. § 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

List of subjects in 49 CFR Part 1102

Administrative practice and procedure.

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the Federal Register.
2. This decision is effective April 4, 2018.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

By the Board, Board Members Begeman and Miller.

APPENDIX A

Changes to Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board amends 49 C.F.R. part 1102 as follows:

49 C.F.R. PART 1102—COMMUNICATIONS

1. The authority citation for part 1102 is revised to read as follows:

Authority: 49 U.S.C. § 1321.

2. Amend § 1102.2 as follows:
 - a. Revise the section heading;
 - b. In paragraph (a), redesignate paragraphs (a)(2) and (3) as paragraphs (a)(4) and (5) and add new paragraphs (2) and (3);
 - c. Revise newly redesignated paragraph (a)(5);
 - d. Revise paragraph (b) introductory text;
 - e. Revise paragraph (b)(1);
 - f. Redesignate paragraphs (b)(2) and (3) as paragraphs (b)(3) and (4), and add new paragraphs (b)(2), (5), and (6);
 - g. Revise newly designated paragraphs (b)(3) and (4);
 - h. Revise paragraphs (c) introductory text, (c)(1), (c)(2), and (d);
 - i. Revise paragraph (e);
 - j. In paragraph (f)(1), remove “concerning the merits of a proceeding”;
 - k. In paragraph (f)(2), add “covered” before the word “proceeding”;
 - l. Revise paragraph (f)(3); and
 - m. Add a new paragraph (g).

The revisions and additions read as follows:

§ 1102.2 Procedures governing ex parte communications.

(a) * * *

(2) “Informal rulemaking proceeding” means a proceeding to issue, amend, or repeal rules pursuant to 5 U.S.C. § 553 and part 1110 of this chapter.

(3) “Covered proceedings” means on-the-record proceedings and informal rulemaking proceedings following the issuance of a notice of proposed rulemaking.

* * * * *

(5) “Ex parte communication” means an oral or written communication that concerns the merits or substantive outcome of a pending proceeding; is made without notice to all parties and without an opportunity for all parties to be present; and could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.

(b) *Ex parte communications that are not prohibited and need not be disclosed.*

(1) Any communication that the Board formally rules may be made on an ex parte basis;

(2) Any communication occurring in informal rulemaking proceedings prior to the issuance of a notice of proposed rulemaking;

(3) Any communication of facts or contention which has general significance for a regulated industry if the communicator cannot reasonably be expected to have known that the facts or contentions are material to a substantive issue in a pending covered proceeding in which it is interested;

(4) Any communication by means of the news media that in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publication with respect to pending covered proceedings;

(5) Any communications related solely to the preparation of documents necessary for the Board's implementation of the National Environmental Policy Act and related environmental laws, pursuant to part 1105 of this chapter;

(6) Any communication concerning judicial review of a matter that has already been decided by the Board made between parties to the litigation and the Board or Board staff who are involved in that litigation.

(c) *General Prohibitions.*

(1) Except to the extent permitted by these rules, no party, counsel, agent of a party, or person who intercedes in any covered proceeding shall engage in any ex parte communication with any Board Member, hearing officer, or Board employee who participates, or who may reasonably be expected to participate, in the decision in the proceeding.

(2) No Board Member, hearing officer, or Board employee who participates, or is reasonably expected to participate, in the decision in a covered proceeding shall invite or knowingly entertain any ex parte communication or engage in any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

(d) *When prohibitions take effect.* In on-the-record proceedings, the prohibitions against ex parte communications apply from the date on which the first filing or Board decision in a proceeding is posted to the public docket by the Board, or when the person responsible for the communication has knowledge that such a filing has been filed, or at any time the Board, by rule or decision, specifies, whichever occurs first. In informal rulemaking proceedings, except as provided in paragraph (g) of this section, the prohibitions against ex parte communications apply following the issuance of a notice of proposed rulemaking. The prohibitions in covered proceedings continue until the proceeding is no longer subject to administrative reconsideration under 49 U.S.C. § 1322(c) or judicial review.

(e) *Procedure required of Board Members and Board staff upon receipt of prohibited ex parte communications.*

(1) Any Board Member, hearing officer, or Board employee who receives an ex parte communication not permitted by these regulations must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board. The Section Chief shall promptly place the written material or summary in the correspondence section of the public docket of the proceeding with a designation indicating that it is a prohibited ex parte communication that is not part of the decisional record.

(2) Any Board Member, hearing officer, or Board employee who is the recipient of such ex parte communication may request a ruling from the Board's Designated Agency Ethics Official as to whether the communication is a prohibited ex parte communication. The Designated Agency Ethics Official shall promptly reply to such requests. The Chief, Section of Administration, Office of Proceedings, shall promptly notify the Chairman of the Board of such ex parte communications sent to the Section Chief. The Designated Agency Ethics Official shall promptly notify the Chairman of all requests for rulings sent to the Designated Agency Ethics Official. The Chairman may require that any communication be placed in the correspondence section of the docket when fairness requires that it be made public, even if it is not a prohibited communication. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

(f) * * *

(1) The Board may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited ex parte communication.

(2) The relief or benefit sought by a party to a covered proceeding may be denied if the party or the party's agent knowingly and willfully violates these rules.

(3) The Board may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Board employee who knowingly and willfully violates these rules.

(g) *Ex parte communications in informal rulemaking proceedings; disclosure requirements.*

(1) Notwithstanding paragraph (c) of this section, ex parte communications with Board Members in informal rulemaking proceedings are permitted after the issuance of a notice of proposed rulemaking and until 20 days before the deadline for reply comments set forth in the notice of proposed rulemaking, unless otherwise specified by the Board in procedural orders governing the proceeding. The Board may delegate its participation in such ex parte communications to Board staff. All such ex parte communications must be disclosed in accordance with paragraph (g)(4) of this section. Any person who engages in such ex parte communications must comply with any schedule and additional instructions provided by the Board in the proceeding. Communications that do not comply with this section or with the schedule and instructions established in the proceeding are not permitted and are subject to the procedures and sanctions in paragraphs (e) and (f) of this section.

(2) To schedule ex parte meetings permitted under paragraph (g)(1) of this section, parties should contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance or the Board Member office with whom the meeting is requested, unless otherwise specified by the Board.

(3) Parties seeking to present confidential information during an ex parte communication must inform the Board of the confidentiality of the information at the time of the presentation and must comply with the disclosure requirements in paragraph (g)(4)(iv) of this section.

(4) The following disclosure requirements apply to ex parte communications permitted under paragraph (g)(1) of this section:

(i) Any person who engages in ex parte communications in an informal rulemaking proceeding shall submit to the Board Member office or delegated Board staff 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.

(ii) Memoranda must be sufficiently detailed to describe the substance of the presentation. Board Members or Board staff may ask presenters to resubmit memoranda that are not sufficiently detailed.

(iii) If a single meeting includes presentations from multiple parties, counsel, or persons, a single summary may be submitted so long as all presenters agree to the form and content of the summary.

(iv) If a 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. If there is no existing protective order governing the proceeding, the presenter must, at the same time the presenter submits its public and redacted memoranda, file a request with the Board seeking such an order pursuant to § 1104.14 of this chapter.

(v) Memoranda must be submitted to the Board in the manner prescribed no later than two business days after the ex parte communication.

(vi) Ex parte memoranda submitted under this section will be posted on the Board's website in the docket for the informal rulemaking proceeding within five days of submission. If a presenter has requested confidential treatment for all or part of a memorandum, only the public version will appear on the Board's website. Persons seeking access to the confidential version must do so pursuant to the protective order governing the proceeding.