

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No. 731

Rules Relating To Board-Initiated Investigations

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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INTRODUCTION

The Association of American Railroads (AAR), on behalf of itself and its freight railroad members, respectfully submits these reply comments in connection with the Surface Transportation Board’s Notice of Proposed Rulemaking in Docket No. EP 731, *Rules Relating To Board-Initiated Investigations* (May 6, 2016) (Decision).

These reply comments respond to suggestions by certain commenters that the Board modify its proposed rules to allow for greater “transparency” and “accountability” by eliminating confidentiality protections, by making Preliminary Fact-Findings and Board-Initiated Investigations public proceedings, and by granting nonparties intervention rights at these early stages. *See* Comments of National Grain and Feed Association (“NGFA Comments”) at 4-8; Comments of City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (“Jersey City Comments”) at 12-16; Comments of National Industrial Transportation League (“NITL Comments”) at 2-3.

As discussed below, these suggestions are misplaced and should be rejected. The purpose of the Preliminary Fact-Finding and Board-Initiated Investigation phases is to enable the Board to gather the necessary information to determine whether a Formal Board Proceeding is required. Notifying the public that the Board is gathering facts or investigating an issue—and allowing others claiming an interest in the proceeding to become “parties” to the fact-gathering or investigation—would frustrate that purpose, transform an information-gathering process into an adversarial proceeding, and impose

reputational and other harms on those parties ultimately found not to have done anything wrong. Eliminating confidentiality protections would make it harder—not easier—for the Board to gather the information it needs, as parties would be reluctant to volunteer information, knowing that the information would quickly become public and could be used against them in litigation. Although the commenters emphasize the importance of public participation and transparency, those objectives are fully served at the Formal Board Proceeding phase, where interested parties may seek to submit information and intervene under the Board’s existing rules. The commenters identify no other agency that has opened up its fact-gathering and investigatory activities to public involvement in the way that they urge the Board to do here.

BACKGROUND

Proposed Rule 1122.3 provides for a “nonpublic” Preliminary Fact-Finding phase. The preamble describes Preliminary Fact-Finding as a “nonpublic inquiry regarding an issue to determine if there is a potential violation of 49 U.S.C. Subtitle IV, Part A, of national or regional significance that warrants a Board-Initiated Investigation.” Decision at 3. The preamble explains that “[a]s a matter of policy, Preliminary Fact-Finding generally would be nonpublic and confidential, subject to the provisions found in Section 1122.6, in order to protect the integrity of any subsequent investigation and to protect parties involved from possibly unwarranted reputational or other harm.” Decision at 4 (footnote omitted).

Proposed Rule 1122.4 similarly provides for a “nonpublic” Board-Initiated Investigation. The preamble states that “[a]s with Preliminary Fact-Finding, Board-

Initiated Investigations generally would be nonpublic and confidential, except as provided by Section 1122.6, in order to protect the integrity of the process and to protect parties under investigation from possibly unwarranted reputational damage or other harm.” Decision at 4.

Proposed Rule 1122.6 specifically addresses confidentiality. While it “allows the public disclosure of information and documents obtained during Preliminary Fact-Finding or a Board-Initiated Investigation, and the existence of Preliminary Fact-Finding or a Board-Initiated Investigation,” under certain specified circumstances, Decision at 4 n.3, the general rule is that “[a]ll information and documents obtained under § 1122.3 or § 1122.4 . . . and all activities conducted by the Board under this part prior to the opening of a Formal Board Proceeding, shall be treated as nonpublic by the Board and its staff.”

DISCUSSION

Several commenters urge the Board to modify these aspects of the proposed rules by making Preliminary Fact-Finding and Board-Initiated Investigations public rather than nonpublic. The commenters argue that greater “transparency,” and more opportunities for them to participate in these early phases, will have various public benefits. *See* NGFA Comments at 4-8; Jersey City Comments at 12-16; NITL Comments at 2-3. None of these arguments have merit.

First, the commenters’ arguments rest on a flawed premise: that the rules as proposed will prevent the Board from obtaining information necessary to its decisionmaking process because interested parties may be unaware of the proceeding and thus unable to submit evidence. *See, e.g.*, NGFA Comments at 5-6; NITL Comments at 2.

But the Board is perfectly capable of acquiring whatever information it needs without having to turn Preliminary Fact-Finding or a Board-Initiated Investigation into a public proceeding. As the preamble explains, in connection with Preliminary Fact-Finding, the Board can gather information from a “variety of sources,” and may make requests for the voluntary production of documents or other information. And in the event the Board chooses to commence a Board-Initiated Investigation, the Investigating Officer may depose witnesses and request the production of documents and records, backed by the power of subpoena. In short, opening up Preliminary Fact-Findings and Board-Initiated Investigations to the public is not necessary to ensure the Board has sufficient information for decisionmaking purposes.

Second, the “transparency” arguments fail to take into account the critical importance of confidentiality, both as to the existence of the proceeding itself, as well as to the need to protect sensitive business information. As the Board correctly recognized, public disclosure that a railroad is the subject of Preliminary Fact-Finding or a Board-Initiated Investigation can cause “unwarranted reputational damage or other harm.” Decision at 4. Likewise, the public disclosure of confidential business information can cause substantial competitive harm. At a minimum, the threat of public disclosure will create the incentive to be less cooperative in the discovery process, as railroads will naturally be more reluctant to produce sensitive business information and data if the proceeding is public in nature.

It is no answer to suggest, *see* NGFA Comments at 6, that while the existence of Preliminary Fact-Finding or a Board-Initiated Investigation can be made public, certain

information (such as the identity of the railroad under investigation and confidential commercial data) could be redacted. For one thing, it is unlikely that the railroad's identity could long be maintained in confidence when placed in the context of the issues or facts being investigated. Moreover, the railroads would have no assurance that the business information *they* deemed confidential would be viewed the same way by the Board, creating the same problem discussed above—if there is a real risk that information produced in confidence will not be maintained in confidence, it creates a disincentive to produce the information in the first place. For this reason, turning Preliminary Fact-Findings and Board-Initiated Investigations into public proceedings will result in the Board obtaining *less* information than it otherwise would.¹

To the extent Proposed Rule 1122.6 warrants modification, it should be revised to clarify that the Board is not claiming absolute power to publicize confidential documents and information at its whim. *See* AAR Opening Comments at 17-18. In addition, the Board should state expressly that it will continue to apply the existing protections and notification requirements for confidential materials set forth in 49 C.F.R. § 1001.4, including in situations where potential complainants seek access to materials gathered during an investigation.

¹ In its comments, SMART/Transportation Division, New York State Legislative Board, argues that this rulemaking is largely unnecessary and that the confidentiality provisions should be deleted and addressed on a case-by-case basis. Not only would this approach fail to provide necessary guidance to Board staff and parties under investigation, but it is inconsistent with the congressional mandate to issue rules that protect due process rights. *See* STB Reauthorization Act, § 12(b) (providing that the Board “shall issue rules” that “satisfy due process requirements”).

NGFA also takes issue with language in the preamble noting that under Proposed Rule 1122.5, the Investigating Officer could propose a settlement offer to the Board, which the Board could approve in lieu of opening a Formal Board Proceeding. NGFA argues that the Board could approve the settlement “out of the public eye.” NGFA Comments at 8. This concern is overstated and there is no need to modify the language in the preamble. The Board’s authority to open a Formal Board Proceeding necessarily includes the lesser power of resolving the matter through settlement or compromise. Although the fact of a settlement and its broad terms might be announced once completed, the details of such announcements are often a negotiated term in settlement discussions. Requiring public disclosure of the terms of proposed settlements would unnecessarily restrict the Board’s discretion and chill settlement discussions.

Third, the commenters identify no federal or state agency that has ever adopted the approach to “transparency” they urge upon the Board. That is because the standard practice at federal agencies is to keep staff investigations confidential, in light of the sensitive reputational and other issues at stake. For example, that is the case at the Securities and Exchange Commission (*see* 17 C.F.R. §§ 202.5(a), 203.5); the Federal Trade Commission (*see* 16 C.F.R. § 2.6; Operating Manual Ch. 3.1.2.2, .3.3.1); the Consumer Financial Protection Bureau (*see* 12 C.F.R. § 1080.14(b)); the Commodity Futures Trading Commission (*see* 17 C.F.R. § 11.3); the Federal Election Commission (*see* 11 C.F.R. § 111.21(a)); the Federal Deposit Insurance Corporation (*see* 12 C.F.R. § 308.147); the Farm Credit Administration (*see* 12 C.F.R. § 622.103); the Federal Maritime Commission (*see* 46 C.F.R. § 502.291); the Federal Energy Regulatory Commission (*see* 18 C.F.R. § 1b.9;

Order on Requests for Rehearing and Clarification, 134 FERC ¶ 61054, 61220 (Jan. 24, 2011)); and the Federal Communications Commission (*see* www.fcc.gov/general/enforcement-primer). The Board should not break new ground by adopting an approach to fact-finding and investigations that is at odds with that of all these other agencies.

In giving the Board the power to conduct Board-Initiated Investigations, there can be no serious doubt that Congress envisioned these as nonpublic proceedings. Section 12(b)(1) of the STB Reauthorization Act requires notice of a Board-Initiated Investigation be provided *only* “to the parties under investigation.” If Congress had wished the Board to provide notice to a broader group, such as the public or potentially affected shippers, it would have said so.

Fourth, the NGFA and the Jersey City commenters demand that the Board provide a public explanation in cases where it ultimately decides not to pursue a Board-Initiated Investigation or Formal Board Proceeding. NGFA argues this requirement is necessary to prevent its members from “devot[ing] extraordinary time and resources into preparing and filing” meritless complaints. NGFA Comments at 7. But the way for NGFA’s members to avoid filing meritless complaints is simply to conduct the due diligence necessary to ensure they have a good-faith basis for their factual and legal allegations.²

² The Board’s existing rules—not to mention state ethical codes—already impose this obligation. *See* 49 C.F.R. § 1104.4(a) (attorney’s signature constitutes a certification that he or she “[b]elieves that there is good ground for the document”); *id.*, § 1103.19 (the “practitioner shall try to obtain full knowledge of his client’s cause before advising thereon”); *id.*, § 1103.31 (The “practitioner bears the responsibility for advising as to

The Jersey City commenters take NGFA’s proposal one step further, by arguing that the Board must provide a public explanation for declining to pursue a Formal Board Proceeding so that the Board could be publicly blamed for “fail[ing] to recognize that a violation had occurred,” or for “fail[ing] to conduct a meaningful investigation.” Jersey City Comments at 14. These arguments underscore why a “public explanation” requirement is misplaced: the commenters intend to use the public explanation for why a violation did *not* occur as a basis for falsely asserting that a violation *did* occur.³

Moreover, concerns about the public not understanding the Board’s reasons for declining to initiate a Formal Board Proceeding could be addressed by clarifying the definition of “national or regional significance,” and by clarifying the standards under which the Board will proceed from one phase to the next. *See* AAR Opening Comments at 10 (proposing that Board clarify that individual rate disputes, or disputes involving a single shipper, do not qualify as an issue of “national or regional significance”); *id.* at 8-11 (proposing that Board articulate the standard for determining when a Board-Initiated

questionable transactions, bringing questionable proceedings, or urging questionable defenses.”).

3 The Board should reject the Jersey City commenters’ proposal to define an issue of “national or regional significance” as including “[a]ny unlawful abandonment (removal of structures or sale of real estate) involving a former main line or other historically important rail line, or of any line containing an asset listed on or eligible for the National Register of Historic Places, or the state equivalent, or which is designated as a city landmark.” Jersey City Comments at 12. There is simply no basis to assume that all such abandonments will have a significant effect on the nation or a region. Indeed, in many situations falling within this description (*e.g.*, *former* main lines or *historically* important lines) the effects would be highly localized—confined to a city or town, rather than a region. The Jersey City commenters offer no reason for the Board to adopt a definition that is directly at odds with the plain language of the statute.

Investigation is warranted); *id.* at 20-21 (proposing that Board articulate the standard for determining when a Formal Board Proceeding is warranted). Clarifying the legal standards the Board intends to apply will help provide transparency into the Board's decisionmaking.

Fifth, in arguing for expanded intervention rights, the Jersey City commenters have misread the relevant statutes. *See* Jersey City Comments at 15-16 (citing 28 U.S.C. § 2323 and 49 U.S.C. § 11701(e)(1)). Section 2323 addresses *federal court proceedings* arising from challenges to STB rulemakings or attempts to enforce STB orders. It does not follow that because Congress permits intervention in federal court litigation involving the STB that Congress therefore intended to permit intervention in Preliminary Fact-Finding or Board-Initiated Investigations. As noted above, if Congress had intended broader intervention rights, it could easily have said so. Similarly, Section 11701(e)(1) does not support broader intervention rights. That section simply allows for a right of appeal of Board orders finding violations; it does not remotely support the idea that third parties should be allowed to intervene during the Preliminary Fact-Finding or Board-Initiated Investigation phases.

CONCLUSION

The Board should modify its proposed rules as set forth in AAR's opening comments, and reject the "transparency" arguments discussed above.

Respectfully submitted,

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