

1 SERVICE DATE - JANUARY 8, 1997

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3 This decision will be included in the Bound volume of printed
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6 21375
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9 SURFACE TRANSPORTATION BOARD

10
11 DECISION

12
13 STB Ex Parte No. 619

14
15 PETITION OF FIELDSTON CO., INC. TO ESTABLISH
16 PROCEDURES REGARDING EX PARTE COMMUNICATIONS
17 IN RAILROAD MERGER PROCEEDINGS
18

19
20 Decided: December 31, 1996
21
22

23 By petition filed on November 27, 1996, Fieldston Co., Inc.
24 (Fieldston), which provides economic consulting services, has
25 requested that the Board announce whether it will entertain ex
26 parte communications in railroad merger proceedings. Fieldston
27 has also requested that the Board announce the process to be
28 employed to ensure compliance with the law if the Board decides
29 to entertain ex parte communications.
30

31 The issue has arisen because of a change in the law effected
32 by passage of the ICC Termination Act of 1995, Pub. L. No. 104-
33 88, 109 Stat. 803 (ICCTA) that permits, but does not require, ex
34 parte communications in certain circumstances involving the
35 consolidation, merger, or acquisition of control of railroads in
36 a transaction that involves at least one Class I railroad.
37 Specifically, 49 U.S.C. 11324(f) provides:
38

39 "(f)(1) To the extent provided in this subsection, a
40 proceeding under this subchapter [a consolidation, merger or
41 acquisition of control] relating to a transaction involving
42 at least one Class I rail carrier shall not be considered an
43 adjudication required by statute to be determined on the
44 record after opportunity for an agency hearing, for the
45 purposes of subchapter II of chapter 5 of title 5, United
46 States Code.
47

48 (2) Ex parte communications, as defined in section
49 551(14) of title 5, United States Code, shall be permitted
50 in proceedings described in paragraph (1) of this
51 subsection, subject to the requirements of paragraph (3) of
52 this subsection.
53

54 (3)(A) Any member or employee of the Board who makes or
55 receives a written ex parte communication concerning the
56 merits of a proceeding described in paragraph (1) shall
57 promptly place the communication in the public docket
58 of the
59 proceeding.
60

61 (B) Any member or employee of the Board who makes or
62 receives an oral ex parte communication concerning the
63 merits of a proceeding described in paragraph (1) shall
64 promptly place a written summary of the oral communication
65 in the public docket of the proceeding.
66

1 place. The statutory scheme enacted by Congress requires the
2 Board to make its decisions in all cases on the basis of a
3 complete record. The requirements for fairness underlying all
4 provisions of the ICCTA demand that the Board accord equal access
5 to all members of the public and militate against a process under
6 which the Board would decide issues based on any off-the-record
7 considerations.
8

9 The courts have struck down agency decisions that appear to
10 have been made on the basis of influences other than the merits
11 of the case as set out in the record before the agency. Although
12 section 11324(f) provides that a merger or consolidation shall
13 not be deemed an "adjudication" for purposes of the
14 Administrative Procedure Act's normal prohibitions on ex parte
15 communications, these cases remain adjudications in fact. They
16 require the Board to adjudicate conflicting claims by competing
17 parties. That being the case, mergers remain subject to
18 requirements for procedural due process as articulated in the
19 decision of the U.S. Court of Appeals for the District of Columbia
20 Circuit in District of Columbia Fed'n of Civic Ass'ns v. Volpe,
21 459 F.2d 1231 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972).
22 There, the court held that Congressional interference tainting
23 the administrative process violates the rights of a party to due
24 process under law. See also Pillsbury Company v. F.T.C., 354
25 F.2d 952 (1966). The courts have stated that there are due
26 process constraints on agency actions whether or not they are
27 subject to the ex parte rules of the Administrative Procedure
28 Act. See ATX, Inc. v. U.S. Dept. of Transp., 41 F.3d 1522 (D.C.
29 Cir. 1994) and No Oilport! v. Carter, 520 F. Supp. 334 (W.D.
30 Wash. 1981).
31

32 In sum, we believe that the harm to the process that could
33 be expected to result from the Board's entertainment of ex parte
34 communications outweighs any possible benefits. Were we to take
35 a different position, parties, their attorneys and consultants,
36 and all members of the public would be left to wonder whether the
37 record in a proceeding truly includes all facts and arguments on
38 which a decision is based. The process must be efficient and
39 fair and in the public view. No one should have to be concerned
40 about written or oral communications that are not fully reflected
41 in the public record. Moreover, judicial review of agency
42 railroad merger decisions, which has not been changed by the
43 ICCTA, would be greatly complicated by our exercising our
44 discretion so as to permit ex parte communications.
45

46 Because we have decided not to entertain ex parte
47 communications in railroad merger proceedings, there is no need
48 to address the second part of Fieldston's petition as to the
49 process to be employed if we were to entertain ex parte
50 communications.¹
51

52
53 It is ordered:
54

55 1. To the extent Fieldston's petition seeks a Board
56 announcement of its position regarding ex parte communications in
57 railroad merger proceedings, that position is set out in this
58 decision.

¹ We also note that the agency's existing rules at 49 CFR 1102.2 remain in effect.

1 2. To the extent Fieldston's petition seeks establishment
2 of a process for handling ex parte communications, the petition
3 is denied as moot in light of the Board's decision not to
4 entertain ex parte communications in railroad merger proceedings.
5

6 3. This decision is effective on January 8, 1997.
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8 By the Board, Chairman Morgan, Vice Chairman Simmons and
9 Commissioner Owen.
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Vernon A. Williams
Secretary