

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 665 (Sub-No. 2)

EXPANDING ACCESS TO RATE RELIEF

Digest:<sup>1</sup> In this decision, to permit informal discussions with stakeholders, the Board waives the general prohibition on ex parte communications in effect when this proceeding was initiated.

Decided: March 28, 2018

On August 31, 2016, the Board issued an Advance Notice of Proposed Rulemaking (ANPRM) seeking comment on procedures that could comprise a new rate reasonableness methodology for small disputes that would be more affordable and accessible to shippers of all commodities. The Board received 11 opening comments on the ANPRM and eight reply comments.

At the time this proceeding was instituted, the agency's long-standing policy, derived from its then-existing regulations, prohibited ex parte communications in informal rulemaking proceedings. Although the Board recently adopted a final rule modifying its regulations to permit and govern ex parte communications in informal rulemaking proceedings, the modified regulations apply only to proceedings initiated on or after the effective date and thus do not apply to this proceeding. See Ex Parte Commc'ns in Informal Rulemaking Proceedings (Final Rule), EP 739 (STB served Feb. 28, 2018). The Board, however, has waived the prohibition on ex parte communications in particular proceedings to permit such communications, where appropriate. See e.g., Reciprocal Switching, EP 711 (Sub-No. 1), slip op. at 28-29 (STB served July 27, 2016); U.S. Rail Serv. Issues—Performance Data Reporting, EP 724 (Sub-No. 4), slip op. at 2 (STB served Nov. 9, 2015).

In this proceeding, the Board finds good reason to waive the ex parte prohibition to permit informal communications with stakeholders. The Board recognizes the concerns expressed in the comments in response to the ANPRM, which warrant further consideration before this proceeding could advance to the notice of proposed rulemaking (NPRM) stage. Informal discussions would help the Board obtain a more thorough understanding of the interests of stakeholders and perhaps provide additional ideas regarding new rate review methodologies.

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

Moreover, the Board recently established a new agency rate reform task force to explore alternative rate reasonableness methodologies and is interested in facilitating informal interactions with stakeholders to discuss rate case alternatives. Given the complexity involved in examining the reasonableness of rail transportation rates and the potentially far-reaching effects of establishing a new rate reasonableness methodology, the Board believes an informal forum where the agency can communicate directly with individual stakeholders in real time and ask follow-up questions would be a useful means of obtaining stakeholder input. Because those informal discussions could involve issues or comments submitted in this proceeding, the Board has determined that waiving the ex parte restriction is warranted.

The Board has determined that disclosure of informal communications is not necessary here given the preliminary, exploratory stage of the proceeding. In this proceeding, unlike other recent proceedings in which the Board waived the prohibition on ex parte communications subject to specific disclosure requirements, the Board has not issued an NPRM. In considering the potential benefits and harms of undisclosed informal stakeholder communications at this stage of the proceeding, the Board finds that permitting informal communications, without disclosure and timing requirements, would enable a freer flow of communication. As the Board recently explained in the Final Rule, EP 739, slip op. at 8-9, unconstrained communications early in a proceeding enable the Board to obtain useful information and input that would inform the development of the Board's proposal, help identify the issues the agency should consider in crafting proposed regulations, and have little potential for harm. See also Adoption of Recommendations, 79 Fed. Reg. 35,988, 35,994 (June 25, 2014) (recommendation adopted by the Administrative Conference of the United States urging agencies to consider placing few, if any, restrictions on ex parte communications that occur *before* an NPRM is issued because these communications 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").

For the reasons discussed above, to permit informal discussions with stakeholders, the Board will waive the general prohibition on ex parte communications in effect when this proceeding was initiated. Thus, parties may discuss matters related to this proceeding with the Board and Board staff. The waiver will remain in effect until further order of the Board.

It is ordered:

1. To permit informal discussions with stakeholders, the Board waives the general prohibition on ex parte communications in effect when this proceeding was initiated, as discussed above.
2. This decision is effective on March 28, 2018.

By the Board, Board Members Begeman and Miller.