

SERVICE DATE – NOVEMBER 9, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 724 (Sub-No. 4)

UNITED STATES RAIL SERVICE ISSUES—PERFORMANCE DATA REPORTING

Digest:<sup>1</sup> The Board announces that it will waive its general prohibition on ex parte communications and permit interested parties to schedule meetings with Board staff to discuss the proposed rules on railroad performance data reporting.

Decided: November 6, 2015

On October 8, 2014, in response to service challenges affecting a broad cross-section of rail shippers, the Board ordered all Class I railroads and the Chicago Transportation Coordination Office (CTCO), through its Class I members, to begin filing, on an interim basis, weekly reports containing specific railroad performance data. See U.S. Rail Serv. Issues—Data Collection, EP 724 (Sub-No. 3) (STB served Oct. 8, 2014). Pursuant to a decision served on December 30, 2014, in U.S. Rail Service Issues—Performance Data Reporting, Docket No. EP 724 (Sub-No. 4), the Board proposed new regulations requiring all Class I railroads and the CTCO, through its Class I members, to permanently report certain service performance metrics on a weekly and quarterly basis, and following certain service and/or operational triggers.

Comments on the proposed rule were due by March 2, 2015, and reply comments were due by April 29, 2015. The Board received 17 opening comments submitted by 35 parties and nine reply comments from 30 parties. A number of parties filed written comments<sup>2</sup> requesting meetings with Board staff to discuss the proposed rail service performance metrics.

The agency has long interpreted its general ex parte communication prohibition to encompass informal rulemakings such as this one. Our predecessor agency, the Interstate Commerce Commission, stated “that 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.” Revised Rules of Practice, 358 I.C.C.

---

<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 Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> See, e.g., CSXT Comments 3; NITL Comments 5; TTMS Comments 6; AAR Reply 10. But see WCTL Reply 9 (stating that private, informal meetings with railroads are unnecessary, especially where they would exclude shippers).

323, 345 (1977). However, the Board can waive its regulation on ex parte communications in appropriate proceedings.<sup>3</sup> In doing so, the Board can take steps to ensure that a fair process is established, including notice, disclosure, and an opportunity for all parties to comment on information discussed during informal meetings.

In this quasi-legislative proceeding,<sup>4</sup> we find good reason to waive our prohibition on ex parte communications. It is important to make sure that any rule we adopt regarding service data results in the collection of information that will be useful to the agency and its stakeholders. As the comments submitted so far have demonstrated, the manner in which railroads collect and maintain data has a number of technical aspects and varies between carriers. In addition, shippers and other stakeholders may have different needs or uses for service data. While some information explaining this has already been submitted on the written record, we believe it would be beneficial for the Board's staff to obtain more detailed information from interested parties and to ask follow-up questions about existing data collections, how the proposed data collection might be used by entities other than the Board, and other related issues. Moreover, as the Board recognized in the notice of proposed rulemaking, this would be the Board's first permanent collection of service-related data. We believe that having informal dialogue through meetings, rather than relying on a written record alone, will help the agency better understand these issues—including technical questions regarding the data—and ultimately develop better final rules than we could develop without these meetings. Accordingly, the Board will waive the ex parte prohibition in this proceeding for the limited purpose of permitting parties to have discussions with Board staff so that the agency may develop a more complete record with regard to technical issues and move this proceeding forward in an expeditious manner.<sup>5</sup>

---

<sup>3</sup> The Board has occasionally waived its regulations, when necessary, in various contexts. See, e.g., Ark. Midland R.R.—Trackage Rights Exemption—Caddo Valley R.R., FD 35530 (STB served June 14, 2011); Seminole Gulf Ry.—Aban. Exemption—in Lee Cty., Fla., AB 400 (Sub-No. 2X) (STB served Dec. 22, 1994).

<sup>4</sup> This informal rulemaking is essentially legislative in nature because of its focus on policy or law to be implemented in the future rather than as an evaluation of past conduct. Adjudication, on the other hand, is concerned with the determination of past and present rights and liabilities. See Attorney General's Manual on the Administrative Procedure Act (1947) at 14. See also Int'l Tel. & Tel. Corp. v. Am. Tel. & Tel. Co., 444 F. Supp. 1148, 1158 (S.D.N.Y. 1978) (“The most important difference, then, between ‘legislative’ and ‘adjudicatory’ facts is in the nature of the facts themselves. A legislative body is not confined to clearly defined issues of past conduct, but, rather, may properly consider a multitude of factors in determining what prospective rule will be most beneficial. As a result, rulemaking bodies do not generally make the kind of discrete factual findings of past conduct that the adjudicative process is specifically designed to provide. Cf. H. Hart & A. Sacks, *The Legal Process* 384-85 (unbound manuscript 1958).”).

<sup>5</sup> The Board's Canons of Ethics also prohibit ex parte communications, when the Board is acting quasi-judicially, beyond those that are “clearly proper in view of the administrative work of the Board.” See 49 C.F.R. § 1103.14. In this proceeding, which is not quasi-judicial in nature, the Board is explicitly waiving its ex parte communications prohibition, making such communications proper to the extent specified in this decision.

As noted, ex parte communications in an informal rulemaking proceeding requires special procedures to ensure fairness and accessibility.<sup>6</sup> Accordingly, we establish the following measures to make clear that all parties will have an opportunity to meet with the Board's staff should they choose to do so, have the ability to review the substance of all such discussions with Board staff, and have the opportunity to file written comments on information presented during discussions with Board staff. Meetings with Board staff will take place between November 16, 2015, and December 7, 2015 either at the Board's offices at 395 E Street, S.W., Washington, DC 20423, or by telephone conference (pursuant to each party's request). The Board will disclose the substance of each meeting by posting, in the docket of this proceeding, a summary of the conversations (including the names/titles of all attendees of the meeting, all views expressed, and all data presented) and a copy of any handout given or presented to Board staff at the meeting. Board staff will prepare each meeting summary, and those summaries, plus any handouts, will be placed in the record as soon as practicable following each meeting.<sup>7</sup> After all meetings are held and summaries disclosed, the Board will issue an order reopening the docket for seven days to provide parties an opportunity to submit written comments in response to the summaries. Following the comment period, the Board expects to issue a supplemental notice of proposed rulemaking with revised data collection metrics and provide opportunity for additional comments on the proposed rule.

To schedule meetings, parties should contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at 202-245-0238.

It is ordered:

1. Parties may schedule meetings with Board staff to discuss information in this proceeding, as discussed above.
2. This decision is effective on its service date.

---

<sup>6</sup> See Sierra Club v. Costle, 657 F.2d 298, 392-93 (D.C. Cir. 1981) (in examining propriety of ex parte communications, courts consider the underlying statute and "basic notions of constitutional due process").

<sup>7</sup> Should parties need to request that certain information or handouts be designated as confidential or highly confidential, they may seek a protective order prior to the meetings. Protective orders typically approved by the Board permit disclosure of confidential information to other parties who have agreed to the terms of the protective order by signing a confidentiality undertaking, and protective orders typically permit disclosure of highly confidential information to outside counsel and consultants of other parties who have signed the corresponding undertaking. Under a typical protective order, a party may challenge another party's designation of information as confidential or highly confidential. In addition, parties should be aware that, while the Board attempts to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. See, e.g., Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 1 n.2 (STB served Dec. 19, 2013).

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller. Vice Chairman Begeman concurred in part with a separate expression and Commissioner Miller concurred with a separate expression.

---

VICE CHAIRMAN BEGEMAN, concurring in part:

The Board needs to move into the 21<sup>st</sup> Century and embrace more interactive, timely, and responsive decision-making. In order to do so, this agency's extreme interpretation of its ex parte communication regulations must be changed. Today's decision begins to make that change, but does not go far enough.

It would be a definite benefit to the Board and the public for members and staff to meet and hear directly from stakeholders during rulemaking proceedings so that we can establish the most informed policies. While I support waiving the ex parte communications prohibition for Board staff as provided here, that waiver should also apply to Board members—the decision makers—so that we could also hear directly from affected stakeholders.

Let me be clear. I am not proposing to make this process more difficult. Member participation need not add burdens on the stakeholders or further delay the proceeding. I would be more than willing to attend the meetings between staff and interested parties and listen to their firsthand perspectives about the rulemaking proposal. If another member were interested in attending those same meetings (which seems unlikely as the majority opted to exclude themselves from this waiver), then we would follow appropriate protocols so there would be no violation of the Sunshine Act.

While I cannot agree with the majority and pass on hearing directly from the stakeholders here, I will nevertheless lend my support to our moving forward. I concur only in allowing Board staff to meet with stakeholders and to disclose the details of those meetings in the docket, but oppose maintaining the status quo for Board members.

I hope that this decision, while imperfect, is a *first* step in loosening some of the agency's ex parte shackles.

---

COMMISSIONER MILLER, concurring :

I am pleased to see the Board take the action of permitting Board staff to conduct ex parte meetings with our stakeholders. The comments we received show that the task of collecting service data and how it is used are perhaps more complicated than we appreciated when the NPRM was issued, and that the best way to truly gain a better understanding is through actual face-to-face discussions with the parties. So even though the Board's action today will prolong this proceeding, I believe it is warranted if it increases our chances of getting these rules right.

I appreciate the concern that these meetings will only be held with Board staff. Ideally, the Board Members should participate in the meetings, and if the agency holds ex parte meetings in future proceedings, that is what I would expect to happen. However, in this particular instance, I believe that there are practical considerations that outweigh the benefit of our participation. Having the Board Members participate would require the parties to schedule three separate meetings, which would make scheduling much more difficult and only further prolong the proceeding. In addition, in this particular situation, I think it is appropriate for the Board Members to be represented by those members of the staff that are more deeply immersed in the day-to-day analysis of the data and have substantial expertise on these matters. I have confidence that our staff will ask the appropriate questions and gather the necessary information that the Board Members will need to ultimately develop well-tailored final rules, and will be able to do so more quickly than if meetings with the Board Members were required.

It is my hope that, in the future, the Board waives its prohibition on ex parte communication in other proceedings. I believe that there are several other proceedings where the Board would benefit from having a direct exchange with the parties. Such communications would enhance the Board's understanding of complicated issues and fill in any gaps in our understanding of the parties' arguments. They would also bring greater transparency to our decision-making process, as stakeholders would gain valuable insight to the Board Members' thinking. Accordingly, I would even go so far as to suggest that the Board remove the general prohibition in the agency's rules (49 C.F.R. § 1102.2) and replace it with a rule that sets forth a process that allows for greater use of ex parte communications in appropriate proceedings. For the moment though, I think the Board's decision today is a significant step in the right direction.