

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte 724 (Sub-No. 4)

239782

UNITED STATES RAIL SERVICE ISSUES-PERFORMANCE DATA REPORTING

ENTERED
Office of Proceedings
December 23, 2015
Part of
Public Record

RESPONSE TO EX PARTE MEETING REPORTS

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Concerned Agency Practitioners

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Preliminary Statement

Participants, Thomas F. McFarland and Gordon P. MacDougall, submit this response to the 15 summaries of ex parte meetings conducted by Surface Transportation Board (STB) Staff, during the November 16-December 7 period following STB issuance of its November 9, 2015 decision, in this rulemaking proceeding, which had been instituted earlier on December 30, 2014. 80 Fed. Reg. 473-80 (Jan. 6, 2015).

The STB on December 16, 2015, issued its decision inviting comments to the Staff-prepared summaries of the ex parte meetings, and directed a December 23, 2015 due date for such responses.

The December 16, 2015 STB decision noted that these two participants on November 30, 2015, had filed a petition for reconsideration of the STB's November 9, 2015 STB decision, which

remains pending. (Decision, 12/16/15, n.1).^{1/}

Our comments regarding the meeting summary postings are as follows:

Characteristics of Meetings

The STB's November 9, 2015 decision establishing the ex parte meetings provided for disclosure of the substance of each meeting, by posting in the docket, a summary of the conversations, including the names/titles of all attendees, all views expressed, and all data presented, and a copy of any handout given or presented to Board staff at the meeting. Board staff would prepare each meeting summary which, with any handouts, would be placed in the record as soon as practicable following each meeting. Meetings were designated to take place at the STB's offices in Washington, DC, or by telephone conference (pursuant to each party's request). To schedule meetings, parties were directed to contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance.^{2/} (Decision, 11/9/15, p.3).

^{1/} To the best of our information, only Association of American Railroads (AAR), has elected to file a reply to our petition for reconsideration, advancing legal theories not relied upon by the STB in its purported justification (two citations) for its waiver action. (Decision, 11/9/15, at 2 n.3). Cf. Pet. for Reconsid., 11/30/15, at 8, 9-10, 11. The prohibition of ex parte communications is particularly sensitive to these two agency practitioners, as they participated individually or through members of their law firm, in the 1977 agency rules revision.

^{2/}The organizational acronym is OPAGAC. The STB's website states the office of rail Customer and Public Assistance program (RCPA) is housed within OPAGAC. It is headed by the Deputy Director of OPAGAC, whom the website also lists as the contact person for Rail Energy Transportation Advisory Council (RETAC). We are informed, by attendance at the December 1, 2015 RETAC gathering, that the status of the X-724 meetings was presented.

There were 15 meeting summaries posted on the STB's website. ^{3/} The individual meeting summaries are not identified by name--only listed on the website as "Filed for Surface Transportation Board" and titled "Miscellaneous." A reader must download each Miscellaneous listing to determine the 15 individual meetings, dates, and participants. This is time-consuming, particularly if the reader is searching for an individual meeting report and, in addition, may be unaware of the availability (although limited in time) of a visit to the public docket room at the agency's Washington DC office.

Attached hereto as Appendix A is our compilation of the 15 conferences, with meeting date, publication date, STB identification number, outside party, and format. The 15 items are far fewer in number than the 35 parties and 30 parties, respectively, filing opening and reply comments, to the NPRM. (Decision, 11/9/15, at 1).

Background of Participants

Although the STB's November 9, 2015 decision specified that the names/titles of all attendees at the meetings would be posted in the meeting summaries (Decision, 11/9/15, at 3), this requirement was only applied to non-STB personnel. However, since it is the agency staff which was the stated concern of the November 9 decision, the absence of staff identification is critical, particularly since whatever rules evolve will likely be important, and

^{3/}The STB's November 9, 2015 decision did not advise the filings could be examined at the Board's public docket room, unlike the usual practice where notice is given in the Federal Register. Cf. NPRM, 80 Fed. Reg. 473, 474 (Jan. 6, 2015). The STB announced its library (which also serves as its public docket room) would be open only between 10 AM and 3PM, effective November 18, 2015.

perhaps controlling, in formal agency proceedings. Over the years, staff members in the Office of Proceedings, and Administrative Law Judges (ALJ), have been quite important in resolving disputes brought to the agency.

Attached hereto as Appendix B are the names of STB personnel shown on the 15 meeting summaries; however, missing are the STB's Organizational Acronym identifications for all personnel shown. This information for many years was available to the public in the Employee Telephone Directory, which was distributed by mail to all practitioners, and otherwise also available by request. Moreover, the Directory also was published by the ICC Practitioners Assn. for its subscribers. However, the year 2008 (May), was the last year the Directory was made available outside the agency. Since 2009, the STB staff Directory, with its organizational acronyms, has been strictly off-limits to outside practitioners.

Appendix B indicates that each of the 15 summary conferences were attended by pools of 6 STB employees, of a total of 8 STB employees, with two exceptions (I.D. 239704, 239707), which were meetings composed of 5 employees. All 15 of the meetings were attended by three of the employees.^{4/} Reference to the 2008 and earlier Directory issuances, indicates that all but two of the 8 employees have come to the agency since 2008.^{5/}

In years prior to 2009, practitioners could determine tenure at the agency as well as organizational location of the employee,

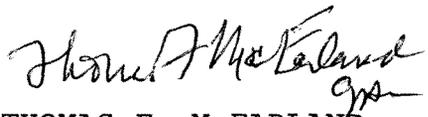
^{4/} Higgins, Novins, Rudi.

^{5/}The two are Molteni and Cooper.

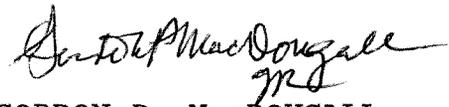
including organizational acronym, room number, and telephone extension.

Appendix B suggests a lesser degree of agency experience for staff engaged in the meetings than traditionally in the Office of Proceedings or the AJLs. The meeting summaries are deficient in not indicating identity information for the agency personnel.

Respectfully submitted,



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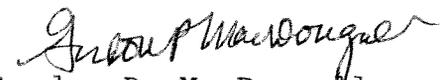
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December 23, 2015

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall

X-724 (Sub-No. 4) Meetings

<u>Board Listing</u>	<u>Staff Meeting</u>	<u>STB I.D.</u>	<u>Outside Party</u>	<u>Format</u>
Dec. 2	Nov. 19	239649	WCTL	Meeting
Dec. 2	Nov. 20	239660	AAR	Meeting
Dec. 4	Nov. 23	239670	Fertilizer Inst.	Meeting
Dec. 8	Nov. 24	239689	NGFA	Meeting
Dec. 9	Nov. 30	239691	NSR	Telephone
Dec.10	Nov. 30	239704	Highroad Consult	Meeting (Dearden)
Dec.10	Dec. 1	239705	BASF	Telephone
Dec.10	Dec. 2	239706	USDA	Meeting
Dec.10	Dec. 2	239707	Chgo Metro Plan.	Telephone
Dec.15	Dec. 3	239715	UP	Meeting
Dec.15	Dec. 3	239717	Ft.Rail Cust.All.	Meeting (Lincoln Elec.)
Dec.15	Dec. 4	239721	KCS	Telephone
Dec.15	Dec. 4	239722	CP	Telephone
Dec.16	Dec. 7	239728	BNSF	Meeting
Dec.16	Dec. 7	239733	CSXT	Meeting

APPENDIX A

STB STAFF PARTICIPATION

<u>I.D.</u>	<u>Higgins</u>	<u>Novins</u>	<u>Rudi</u>	<u>Molteni</u>	<u>Wolfe</u>	<u>Lyons</u>	<u>Bourdon</u>	<u>Cooper</u>
239649	X	X	X	X	X	X		
239660	X	X	X	X	X	X		
239670	X	X	X	X	X		X	
239689	X	X	X	X	X		X	
239691	X	X	X	X	X		X	
239704	X	X	X	X		X		
239705	X	X	X	X	X	X		
239706	X	X	X	X			X	X
239707	X	X	X			X		X
239715	X	X	X	X	X	X		
239717	X	X	X	X	X		X	
239721	X	X	X	X	X	X		
239722	X	X	X	X	X		X	
239728	X	X	X	X	X		X	
239733	X	X	X	X	X	X		

APPENDIX B