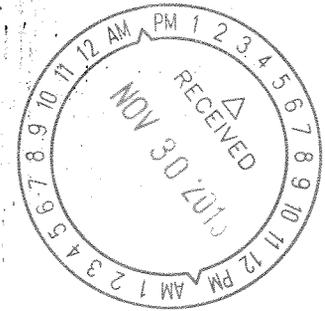


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Ex Parte 724 (Sub-No. 4)

UNITED STATES RAIL SERVICE ISSUES-PERFORMANCE DATA REPORTING

239641

PETITION FOR RECONSIDERATION
OF BOARD RULE WAIVER DECISION

ENTERED
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November 30, 2015
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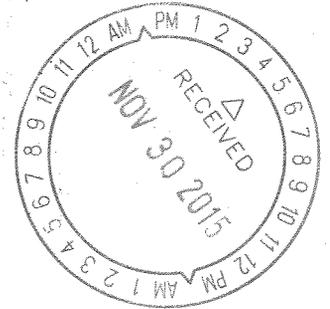
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Concerned Agency Practitioners

November 30, 2015

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Preliminary Statement

Petitioners, Thomas F. McFarland and Gordon P. MacDougall, are presently, and have been for many years, frequent participants as counsel and attorneys for various participants in proceedings before the Surface Transportation Board (STB), and its predecessor Interstate Commerce Commission (ICC).^{1/}

Petitioners will have an interest in the future Class 1 rail carrier service performance metrics as part of their respective counsel/attorney roles in representation matters at the STB. They have not heretofore directly participated in the interim rules established October 8, 2014 in this proceeding, or in the notice of proposed rulemaking (NPRM) issued December 30, 2014,^{2/} The Board's decision served November 9, 2015, waiving its ex parte

^{1/} Both were admitted to practice before the ICC at a time when such was mandatory. Both became members of the Assn. of ICC Practitioners, McFarland in 1968, MacDougall in 1957, and have maintained continuous membership in its successor organizations.

^{2/} 80 Fed. Reg. 473-80 (Jan. 6, 2015).

communication prohibition rule, and scheduling individual meetings (including confidential material) with Board Staff, is a conceded departure from the Board's long-standing rules, warranting participation by these petitioners at this time in this rulemaking proceeding. Any person may petition the Board to issue, amend, or repeal a rule. 49 CFR 1110.2(b); 5 U.S.C. 553(e). Here, petitioners seek to amend and repeal the Board's action vacating its ex parte prohibition rule, so as to restore the rule in its long-maintained form.^{3/}

The Board should reconsider its November 9, 2015 decision, and void its decision, based upon material error.

Background

Severe rail carrier operating conditions during the 2013-14 winter season caused the STB to conduct hearings April 10, 2014 and September 4, 2014, with particular emphasis concerning Canadian Pacific Railway Company (CP) and BNSF Railway Company (BNSF), and special attention given to the Chicago gateway. The STB at the time monitored various metrics of railroad performance primarily from information available on the websites of the Association of American Railroads (AAR) and individual carriers.

The STB following the April 2014 hearing directed CP and BNSF to provide weekly status reports on fertilizer shipments and grain transportation. Ex Parte No. 724 (Sub-No. 1), U.S. Rail

^{3/} This provision of the Administrative Procedure Act "...applies not only to substantive rules but also to interpretations and statements of general policy, and to organizational and procedural rules. It is applicable both to existing rules and to proposed or tentative rules." Attorney General's Manual on the Administrative Procedure Act, 38 (1947).

Serv. Issues (April 15, 2014); Ex Parte 724 (Sub-No. 2), U.S. Rail Serv. Issues (June 20, 2014).

The STB issued three decisions subsequent to its two issuances in early 2014.

1. October 8, 2014 Decision. The STB found there was a need for broader standardized performance data from the railroad industry so as to address existing service challenges. As a result, on October 8, 2014, in a newly-instituted proceeding, Ex Parte 724 (Sub-No.3), United States Rail Service Issues-Data Collection (Interim Data Order),^{4/} the Board directed all Class I carriers, on a temporary basis, to file weekly reports, for ten categories of rail operations, such as average train speed for certain train types, average dwell time in various yards, cars on line by car type, grain cars loaded and billed by state. The data filed with the Board is to be made publicly available. Rail carriers operating in Chicago,^{5/} were to provide specific conditions at eleven named yards, among other information. Technical questions regarding compliance with the STB's order were directed to a specific staff unit within STB.^{6/} The STB's October 8, 2014 order discontinued the earlier CP and BNSF directives, with two exceptions. Ex Parte 724 (Sub-No. 3), at 2n.7 (Oct. 8, 2014).

2. December 30, 2014 Decision. The STB on December 30, 2014 issued a Notice of Proposed Rulemaking (NPRM), the net effect

^{4/}The term "Interim Data Order" was not named as such until later. See reference in subsequently instituted Ex Parte 724 (Sub-No. 4), at 2 (Dec. 30, 2014).

^{5/}BNSF, Union Pacific, CSXT, Norfolk Southern, CP and CN.

^{6/}Office of Public Assistance, Governmental Affairs and Compliance. (OPAGAC).

would be to have the Interim Data Order rules, which had resulted in initial weekly filings beginning October 22, 2014, were now proposed be made permanent, with certain modifications. The agency by its NPRM instituted another new proceeding with a new docket number. Ex Parte 724 (Sub-No. 4), United States Rail Service Issues-Performance Data Reporting (12/30/14).^{7/} The NPRM regulations would be codified at 49 U.S.C. § 1250.1-1250.3, so as to require Class I rail carriers, Class I carriers operating in the Chicago gateway, and the CTRO,^{8/} through its Class I members, to file weekly reports on railroad performance. (Ibid., 10-13).

The STB reasoned that at its April and September 2014 hearings, and thereafter, shippers expressed concern about the lack of publicly available information related to rail service, and sought access to performance data to better understand the scope, magnitude, and impact of service issues as well as the underlying causes and recovery prospects. (Ibid., 2). The STB added that the permanent collection of performance data on a weekly basis would allow continuity and improve the STB's ability to identify and resolve problems. (Ibid., 3).

The STB highlighted transparency as a benefit to shippers and other stakeholders, and data collected under the NPRM would continue to provide for performance transparency in the industry and allow the STB to more rapidly identify and respond to service performance issues. (Ibid., 3).

^{7/}Although the NPRM was served December 30, it was not published until January 6, 2015. 80 Fed. Reg. 473-80.

^{8/} Chicago Transportation Coordination Office.

The NPRM provided that comments could be filed by March 2, 2015, with reply comments due April 29, 2015. Copies of written comments and replies would be posted to the STB's website, and available for self-copying at the STB's Public Docket Room. (Ibid., 1, 8).^{9/}

The NPRM did not include reference to the authority under which the performance rules are proposed, unlike virtually all, or most, STB rulemaking notices. Cf. APA, §4(a).^{10/} The STB on December 31, 2014, issued a press release, announcing the agency proposes new rules requiring Class I railroads to publicly file weekly data reports on service performance.^{11/}

3. November 9, 2015 Decision. The December 30, 2014 NPRM drew 17 opening comments by 35 parties, and 9 reply comments from 30 parties. The STB on November 9, 2015 interrupted the NPRM process, and issued a decision waiving its general prohibition on ex parte contacts, and permit interested parties to schedule meetings with Board staff to discuss the proposed rules. Ex Parte 724 (Sub-No. 4), United States Rail Service Issues-Performance Data Reporting. (11/9/15). The request for the meetings came from three comments,^{12/} endorsed by Association of American Railroads in

^{9/} The NPRM also advised that copies could be available (for a fee) by contacting the STB's Chief Records Officer.

^{10/} However, the October 8, 2014 antecedent decision (subsequently termed interim Data Order) cited 49 U.S.C. §§ 721(b) and 11145(a), as the basic for requiring weekly reports, at p.2. The authority of the STB to require reports, other than annual reports, outside the financial scope, may be challenged, but not by these petitioners.

^{11/} No. 14-21, by designated staff personnel contact press officers Dennis Watson, Janie Sheng.

^{12/} CSX Transportation, Inc. (CSXT); National Industrial Transportation League (NITL); and Texas Trading and Transportation Services (TTMS).

is reply comments. (Decision, 11/9/15, ln.2). The Western Coal Traffic League (WCTL), opposed private informal meeting with railroads, especially where they would exclude shippers. (Ibid., n.2). The STB's November 9 decision stated the meetings would take place between November 16 and December 7, 2015 either at the Board's offices in Washington DC, or by telephone conference (pursuant to each party's request). (Ibid., 3). Provision was made for protective orders to protect confidential or highly confidential information. (Ibid., 3n.7). The STB stated it 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 meetings, all views expressed, and all data presented) and a copy of any handout given or presented to Board staff at the meeting. (Ibid., 3). The STB stated that 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. (Ibid., 3).

After the meetings are held and summaries disclosed, the STB stated it will reopen the docket for seven days to provide parties an opportunity to submit written comments in response to the summaries. Following this comment period, the STB states it anticipates issuance of a supplemental NPRM with revised data collection metrics, and provide opportunity for additional comments on the proposed rule. (Ibid., 3).

The STB's November 9, 2015 decision gave several grounds in support of waiver for its ex parte rules. However, nowhere did the STB cite its ex parte rules, except to state in a single footnote (Ibid., 2n.5) that the Board's Canons of Ethics also prohibit ex

parte communications when the Board is acting quasi-judicially, 49 CFR § 1103.14. (Ibid.).

(a) STB Waiver Power. The November 9, 2015 decision stated that STB decisions should be influenced only by statements that are matters of record, citing Revised Rules of Practice, 358 I.C.C. 323, 334 (1977).^{13/} However, in the instant rulemaking, the STB asserted it can waive its regulation on ex parte communications, citing Ark.Midland R.R.-Trackage Rights Exemption-Caddo Valley R.R., FD 35530 (STB served June 14, 2011); Seminole Gulf Ry.-Aband.Exemption-in LeeCty., Fla., AB 400 (Sub-No. 2X) (STB served Dec. 22, 1994).

(b) Quasi-Legislative. The STB characterized this rulemaking proceeding as essentially legislative in nature, rather than adjudicative, because the focus is on policy or law to be implemented in the future, rather than an evaluation of past conduct. The decision referred to its Canons of Ethics prohibiting ex parte communications when acting quasi-judicially, to infer that the opposite, i.e., that quasi-legislative communications were properly permissible. (Ibid., 2).

(c) Restricted to STB Staff-Technical Data. The ex parte waiver would be limited to agency staff, not including agency Members, so the agency could develop a more complete record with regard to technical issues. The STB reads comments submitted thus

^{13/} The 1977 revision to the agency rules of practice was mandated by the 4-R Act (1976). The AAR requested that the prohibition against ex parte communications not be extended to rulemaking proceedings. The agency rejected the AAR's request, stating, "We are of the firm opinion, however, that ex parte communication during a rulemaking is just as improper as it is during any other proceeding." 358 I.C.C. at 345.

far having demonstrated the manner in which railroads collect and maintain data has a number of technical aspects. 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 collection, and how the proposed data collection might be used. (Ibid., 2-30.

(d) Separate Expressions. STB Vice Chairman Begeman concurred in the ex parte prohibition waiver, but would extend the waiver to Board Members as well. (Ibid., 4). Member Miller suggested that the Board remove the STB's general rule prohibiting ex parte communications, and replace it with a process that allows for greater use of ex parte communications. (Ibid. 4-5).

The STB on November 9, 2015 issued a press release stating Board staff will hold informal meetings on reporting of rail service performance data.^{14/}

ARGUMENT

I. THE STB HAS NOT SHOWN IT HAS PRESENT AUTHORITY TO WAIVE THE EX PARTE RULE

The STB in its November 9, 2015 decision claiming to waive its prohibition against ex parte communication, is without legal foundation. The two citations put forth have nothing to do with the ex parte communication rule. The two citations involved exemption cases arising under 49 U.S.C. 10502, where request was made to alter time requirements for transactions otherwise cogni-

^{14/}No. 15-16, by STB press officer contact Dennis Watson; and Michael Harris (Rail Customer & Public Assistance Program).

zable under 49 U.S.C. 10905 or 11323. The citations did not even involve the agency's rules of practice, but rather the OFA deadlines and advance notice requirements. Although in Arkansas Midland Railroad Company, Inc.-Trackage Rights Exemption-Caddo Valley Railroad Company (6/14/11), the carrier sought partial revocation of the class exemption, STB on its own motion found such to be unnecessary, and directed waiver of a STB time regulation. Such perhaps improper exercise of an agency-imposed time regulation is an unsolicited and invalid support for waiver of the rule of practice prohibiting ex parte communications.

The prohibition against ex parte communications has a long history, in addition to the 1977 revision of the ICC's rules, which presently is in effect with minor changes. The prohibition of ex parte communications was the direct result of U.S. House Report 2553, 87th Cong., 2d Session, 10-11 (1962), which stated the House Committee on Interstate & Foreign Commerce expected all agencies subject to its jurisdiction to carry out recommendations of the Administrative Conference of the United States (ACUS) concerning ex parte recommendations.^{15/}

Apart from the U.S. House Committee directive against ex parte communications, the former ICC promulgating the current agency rules of practice, specifically turned down the AAR's request to allow ex parte communications in rulemaking proceedings, supra 8n.13. See: Revised Rules of Practice, 358 I.C.C. 323, 345, aff'd 358 I.C.C. 189, 223, 286, 300-302 (1977).

^{15/} See: ACUS Final Report, at 12-13 (Dec. 15, 1962). We credit the above history of the STB's ex parte prohibition rule to Anderson, Eugene D., ICC Practice and Procedure, 9-12 (Bobbs-Merrill, 1962).

II. THE STB HAS NOT ENTERED
FINDINGS REQUIRED FOR WAIVER

Even assuming, arguendo, that the exemption power of 49 U.S.C. 10502 may extend to the STB's rules of practice, the agency must render findings required by that provision, such as to 49 U.S.C. §10101, transportation policy, limited scope, market abuse, and other factors, none of which findings have been entered here.

Moreover, the STB is not empowered to waive its own rules of practice without a far better showing beyond the assertion this is necessary to educate its staff while keeping the Members (appointed by the President and confirmed by the Senate) out of the process.

The absence of required findings cannot be satisfied by reference to the STB's Canons of Ethics, 49 CFR 1103.14, applicable to practitioners, with its mention of "quasi-judicially" action. Ex Parte 724 (Sub-No 4), at 2n.5. The prohibition applies also to legislative rules, although the NPRM has judicial features. 49 CFR 1102.2, See also: 49 CFR 1019.3.

CONCLUSION

The STB should reconsider its November 9, 2015 decision waiving its prohibition against ex parte communications, and vacate its decision.

Respectfully submitted,

November 30, 2015



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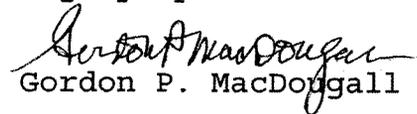
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Concerned Agency Practitioners

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