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Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

Re: EP 724 (Sub-No. 4), *United States Rail Service Issues – Performance Data Reporting*

Dear Ms. Brown:

The Association of American Railroads hereby files the attached reply to the petition for reconsideration filed on November 30, 2015 in the above docketed proceeding.

Sincerely,

Timothy J. Strafford  
Counsel for the Association  
of American Railroads

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 724 (Sub-No. 4)

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UNITED STATES RAIL SERVICE ISSUES –  
PERFORMANCE DATA REPORTING

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REPLY COMMENTS OF THE ASSOCIATION  
OF AMERICAN RAILROADS

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On November 30, 2015, two attorneys that practice before the Surface Transportation Board (“Board” or “STB”), Thomas F. McFarland and Gordon P. MacDougall (collectively, “Practitioners”), filed a petition for reconsideration of the decision served in this proceeding on November 9, 2015 (“November decision”). The November decision waived the Board’s general prohibition on ex parte communications in this proceeding, finding good cause to allow Board staff to meet with interested stakeholders to discuss railroad operating metrics.

The Association of American Railroads (“AAR”) hereby submits this reply in opposition to the petition. For the reasons discussed below, Practitioners have failed to show that the November decision contained material error. The petition for reconsideration should therefore be denied.

**Background**

The Board began this proceeding to obtain more detailed data regarding railroad service issues caused by unforeseen shifts in demand for rail service during the historically difficult 2013-2014 winter season. In October of 2014, the Board directed Class I railroad carriers to

temporarily file ten weekly operating data reports, each with multiple subparts.<sup>1</sup> The agency has noted that it “has been using this data to track the railroad industry’s recovery from a sustained service downturn, which began in late 2013 and lasted throughout 2014.”<sup>2</sup> Despite improved rail service, the Board proposed in December 2014 to make almost all of those reports permanent by regulation, added additional proposed reporting requirements, and sought public comment on other potential reporting requirements.<sup>3</sup>

In two rounds of written comments, the AAR argued against codifying permanent, granular reporting requirements that may have been useful in monitoring the specific service disruptions that occurred. Instead, the AAR contended that a regime of permanent macro-level monitoring and targeted issue-specific temporary metrics would ensure that the Board has access to the information it needs to fulfill its statutory responsibilities. The AAR also suggested that the best way for the Board to develop the most useful and least burdensome reporting requirements would be through a constructive dialogue between the railroads and Board staff.

The November decision noted that railroad operating data is highly technical and varies between carriers and that different shippers and other stakeholders may have different needs or uses for service data. The Board agreed with the AAR and other commenters that the Board’s staff would benefit from a dialogue with stakeholders and from the ability to obtain more detailed information through follow-up questions about existing data collections and their

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<sup>1</sup> *United States Rail Service Issues – Performance Data Reporting*, EP 724 (Sub-No. 4)(STB served Oct. 14, 2014).

<sup>2</sup> <http://www.stb.dot.gov/85256593004F576F.nsf/0/54185AC0BB70548385257F070075D387?OpenDocument> (last accessed December 8, 2015).

<sup>3</sup> *United States Rail Service Issues – Performance Data Reporting*, EP 724 (Sub-No. 4)(STB served Dec. 30, 2014).

uses by shippers. The Board concluded that meetings between staff and all interested stakeholders would allow the Board to develop better final rules. November decision at 2.

As a result, the Board waived its general prohibition on ex parte communications in this proceeding to allow such meetings. At the same time, the Board put in place a number of procedural safeguards to ensure a fair and neutral process. The November decision stated that the Board will disclose the substance of every meeting (including the identity of meeting participants) by placing summaries of all meetings and any handouts presented in the record and posting them on the Board's website. The Board stated that it would, after all meetings are held and summaries disclosed, issue an additional order reopening the docket to provide parties an opportunity to submit written comments in response to the summaries. The Board also stated that before taking any final action, the agency expects to issue a supplemental notice of proposed rulemaking with revised data collection metrics and provide opportunity for additional comments on the newly proposed rule.

### **Argument**

Practitioners have failed to demonstrate any material error in the November decision. The decision complies fully with the Board's rules and all governing law. Though the Board generally prohibits ex parte communications in pending proceedings pursuant to 49 C.F.R. § 1102.2, the Board's rules are explicit that otherwise prohibited ex parte communications can be allowed by order of the Board. 49 C.F.R. § 1102.2(b)(1). The Board is also to generally construe its rules liberally "to secure just, speedy and inexpensive determination of the issues presented." 49 C.F.R. § 1100.3. Moreover, the Board can waive a rule for good cause. 49 C.F.R. § 1110.9; 49 U.S.C § 721.

Consistent with the Board's rules, the November decision waived the general prohibition

on ex parte communications. The Board properly waived its rule here to allow for it to exercise reasoned decision making informed by technical information provided by stakeholders in an interactive setting. Such action was consistent with agency practice where it has waived rules in the past that have been inapplicable or unneeded to a proceeding. *See, e.g., Riverview Trenton Railroad Company – Adverse Abandonment – Wayne County, Mich.*, AB 120 (STB served Apr. 10, 2015); *Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Co.*, FD 33582 (STB served Oct. 27 1998).

Practitioners erroneously conflate the Board’s inherent authority to waive its rules with the exemption cases cited in the November decision as examples of instances where the Board has waived its rules in the past. In so doing, Practitioners suggest that the agency should have satisfied the standards of 49 U.S.C. § 10502 before allowing meetings between stakeholders and agency staff in this proceeding. But the November decision did not exempt a person, a class of persons, or a transaction or service from the application of any provision of Interstate Commerce Act, as amended. Instead, it waived the application of its prohibition on all ex parte contacts in this proceeding to allow meetings between stakeholders and Board’s staff to discuss railroad operating metrics. There was no reason to apply the exemption standard here and therefore no material error in the November decision.

Moreover, waiver was particularly appropriate here because there is no legal requirement that mandates that the Board prohibit the types of meeting contemplated by the November decision. Though the November decision correctly notes that the Board has strictly interpreted its rules on ex parte communications, that interpretation has been a self-imposed restriction that is not mandated by the text of the rules, any statutory provision, or the Constitution. On their face, the Board’s rules prohibit ex parte communications in formal on-the record proceedings

pursuant to 5 U.S.C. §§ 556-557 or in “any matter required by the Constitution, statute, Board rule, or by decision in the particular case, that is decided solely on the record in a Board proceeding.” *See* 49 CFR § 1102.2(a) and (c). This notice and comment rulemaking proceeding is an informal rulemaking under 5 U.S.C. § 553, not a formal on-the record proceeding pursuant to 5 U.S.C. §§ 556-557. *See* Congressional Research Service, *A Brief Overview of Rulemaking and Judicial Review*, at 1-3 (2011) (contrasting formal and informal rulemaking proceedings). There is no Board rule, statutory provision, Constitutional principle, or decision in this proceeding that requires that it be treated as an on-the-record proceeding or that would prohibit the meetings established by the November decision.

In addition to the rule on ex parte communications at 49 CFR § 1102.2, the November decision notes that the Board’s Canons of Ethics for practitioners also prohibit ex parte communications when the Board is acting quasi-judicially. November decision, at 2 & fn. 5. In addition, practitioners are admonished to “scrupulously refrain from going beyond ex parte representations which are clearly proper in light of the administrative work of the Board.” 49 C.F.R. § 1103.14. The Board properly concluded in light of its waiver, that the meetings should be deemed proper for the purposes of its ethical rules. November decision, at 2 & fn. 5. But even if the Board had not formally waived the prohibition on ex parte communications in this proceeding, it is hard to see how meetings regarding a quasi-legislative informal rulemaking, which are available to any and all stakeholders, disclosed publicly, and subject to public comment could run afoul of this rule.

Further, there is nothing in the Administrative Procedure Act that would act as a bar to the meetings established by the November decision, which only prohibits ex parte communications in hearings conducted as part of formal rulemakings or adjudicatory

proceedings.<sup>4</sup> The Court of Appeals for the D.C. Circuit has noted that the APA is silent on ex parte communications in informal rulemakings. “Congressional intent not to restrict ex parte contacts in informal rulemaking under the APA . . . could not be clearer.” *Sierra Club. v. Costle*, 657 F.2d 298, 402 n. 507 (D.C. Cir. 1981). “If Congress wanted to forbid or limit ex parte contacts in every case of informal rulemaking it certainly had a perfect opportunity of doing so when it enacted the Government in the Sunshine Act.”<sup>5</sup> *Action for Children’s Television v. FCC*, 564 F.2d 458, 474 n. 28 (D.C. Cir. 1977). Similarly, the Interstate Commerce Act, as amended by the ICC Termination Act (“ICA”), does not contain a prohibition on ex parte communications.<sup>6</sup>

The November decision is also Constitutionally sound. While due process and notions of fundamental fairness can be implicated by communications in informal rulemaking proceedings, the courts have not found that due process requires a blanket prohibition on ex parte communications in notice and comment rulemaking proceedings. *Electric Power Supply Ass’n v. FERC*, 391 F.3d 1255, 1263 (D.C. Cir. 2004).

Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among “conflicting private claims to valuable privilege,” the insulation of decision maker from ex parte contacts is justified by basic notions of due process to parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of more questionable utility.

*Sierra Club*, 657 F.2d 398, 400 (quoting *Sangamon Valley Television Corp. V. United States*, 268 F.2d 221 (D.C. Cir. 1959).

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<sup>4</sup> 5 U.S.C. § 557(d)(1).

<sup>5</sup> Pub. L. No. 04-409 (1976) (adding the definition of ex parte communications and prohibiting such communications in formal rulemakings and adjudications).

<sup>6</sup> The only reference to ex parte communications in the ICA *allows* such communications in certain circumstances in merger proceedings. 49 U.S.C. 11324(f)(2) and (3).

The disclosure and comment procedures put in place by the November decision clearly satisfy any due process constraints on ex parte communications in this proceeding. *Compare Home Box Office v. Federal Communications Commission*, 567 F.2d 9 (D.C. Cir. 1977) (finding secret ex parte comments in an informal rulemaking violated due process) with *Courtaulds (Alabama) Inc. v. Dixon*, 294 F.2d 899 (D.C. Cir. 1961)(finding no evidence that the Federal Trade Commission “improperly did anything in secret or gave any interested party advantages not shared by all.”). All meetings are being documented and disclosed via the Board’s website. A substantive summary of each meeting is being prepared by Board staff and made public. Any materials used at the meetings will be made public, subject to appropriate confidentiality restrictions. Parties will have the opportunity file formal comments on the summaries and materials. And no final agency action will result from the meetings; the Board has stated that it expects to issue a supplemental notice of proposed rulemaking with revised metrics and provide all interested stakeholders the opportunity to file additional (and likely multiple) comments on the proposed rule.

In fact, due to these procedural safeguards, it is not clear that the staff meetings held in this proceeding even constitute ex parte communication as defined 49 CFR § 1102.2(a)(3). That provision defines an ex parte communication as “an oral or written communication by or on the behalf of a party which is made without the knowledge or consent of any other party that could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.” Both the existence and substance of all communications in this proceeding are being made public by the Board in the form of summaries on the Board’s website, so it is difficult to conclude that such communication is being conducted “without the knowledge or consent of any other party”. Practitioners did not submit written testimony in this

proceeding and parties who expressed concern about potential discussions between Board staff and railroad personnel, like the Western Coal Traffic League, have availed themselves of the opportunity to meet with the agency.

Finally, Practitioners cite to the recommendations of a 1962 Administrative Conference of the United States (“ACUS”) Report as the foundation of the agency’s ban on ex parte communications. But in 1977, ACUS issued Recommendation 77-3, recommending against a general prohibition on ex parte communications in informal rulemakings and focusing on the disclosure of ex parte communications. 42 FR 54,253 (Oct. 5, 1977). *See* Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 Admin. L. Rev. 377, 382 (1978).

Recommendation 77-3 states,

The primary purposes of rulemaking procedures under § 553 are to enhance the agency's knowledge of the subject matter of the proposed rule and to afford all interested persons an adequate opportunity to provide data, views, and arguments with respect to the agency's proposals and any alternative proposals of other interested persons. Section 553 procedures, in some instances, also serve to provide the basis for judicial review. To the extent consistent with all of these purposes, the agencies should have broad discretion to fashion procedures appropriate to the nature and importance of the issues in the proceeding, in order to make rules without undue delay or expense. Informal rulemaking should not be subject to the constraints of the adversary process. Ease of access to information and opinions, whether by recourse to published material, by field research and empirical studies, by consultation with informed persons, or by other means, should not be impaired.

*See* Esa L Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking Final Report to the Administrative Conference of the United States* (May 1, 2014). Indeed, many other agencies, including independent agencies like the Board, regularly accept ex parte communications subject to disclosure rules. *Id.* at 40-64 (summarizing agencies’ policies regarding ex parte communications in informal rulemaking proceedings). The work of ACUS in this area supports

the Board's decision and does not bolster Practitioners' claim of material error. Moreover, the November decision reflects the sort of sound public policy called for in Recommendation 77-3 in that it promotes stakeholder participation in the rulemaking process and will lead to more informed decision making by the agency.

### **Conclusion**

Based on the foregoing, the Board should deny the petition for reconsideration.

Respectfully Submitted,



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