

STB EX PARTE NO. 619

PETITION OF FIELDSTON CO., INC. TO ESTABLISH
PROCEDURES REGARDING EX PARTE COMMUNICATIONS
IN RAILROAD MERGER PROCEEDINGS

Decided December 31, 1996

The petition is denied as moot in light of the Board's decision not to entertain ex parte communications in railroad merger proceedings.

BY THE BOARD:

By petition filed on November 27, 1996, Fieldston Co., Inc. (Fieldston), which provides economic consulting services, has requested that the Board announce whether it will entertain ex parte communications in railroad merger proceedings. Fieldston has also requested that the Board announce the process to be employed to ensure compliance with the law if the Board decides to entertain ex parte communications.

The issue has arisen because of a change in the law effected by passage of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA) that permits, but does not require, ex parte communications in certain circumstances involving the consolidation, merger, or acquisition of control of railroads in a transaction that involves at least one Class I railroad. Specifically, 49 U.S.C. 11324(f) provides:

(f)(1) To the extent provided in this subsection, proceeding under this subchapter [a consolidation, merger or acquisition of control] relating to a transaction involving at least one Class I rail carrier shall not be considered an adjudication required by statute to be determined on the record after opportunity for an agency hearing, for the purposes of subchapter II of chapter 5 of title 5, United States Code.

(2) Ex parte communications, as defined in section 551(14) of title 5, United States Code, shall be permitted in proceedings described in paragraph (1) of this subsection, subject to the requirements of paragraph (3) of this subsection.

1 S.T.B.

(3)(A) Any member or employee of the Board who makes or receives a written ex parte communication concerning the merits of a proceeding described in paragraph (1) shall promptly place the communication in the public docket of the proceeding.

(B) Any member or employee of the Board who makes or receives an oral ex parte communication concerning the merits of a proceeding described in paragraph (1) shall promptly place a written summary of the oral communication in the public docket of the proceeding.

(4) Nothing in this subsection shall be construed to require the Board or any of its members or employees to engage in any ex parte communication with any person. Nothing in this subsection or any other law shall be construed to limit the authority of the members or employees of the Board, in their discretion, to note in the docket or otherwise publicly the occurrence and substance of an ex parte communication.

The Board's rules, at 49 CFR 1102.2(a)(3), define ex parte communications as "an oral or written communication by or on the behalf of a party [to a pending proceeding] 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." Under 49 CFR 1102.2(c), ex parte communications concerning the merits of a proceeding are prohibited, but section 1102.2(e) establishes the required procedure should ex parte communications occur. These procedures are analogous to those set out in 49 U.S.C. 11324(f)(3).

As discussed below, the members and employees of the Board will not entertain ex parte communications in railroad merger proceedings.

DISCUSSION AND CONCLUSIONS

Our determination not to entertain ex parte communications has a practical basis. We believe that the approach we are taking promotes efficiency, fairness, and public confidence in the Board's decisional process.

Section 11324 removes the statutory prohibition against ex parte communications in rail consolidations involving a Class I railroad as long as a Board member or employee places the communication in the public record. Section 11324 does not, however, compel members or employees to engage in ex parte communications, and, in our view, engaging in, or entertaining, ex parte communications would impede, rather than promote, efficient processing of railroad merger proceedings. Entertainment of ex parte communications would place on Board members and staff the burden of reducing any oral communication to writing and placing it in the public docket. It would also

likely lead to entertaining ex parte communications from all interested parties should the Board entertain them from anyone. The need to issue decisions promptly in these cases requires the Board to adhere to a strict timetable and to impose and maintain a schedule for filing comments, replies, and rebuttal of which all parties are made aware ahead of time. Entertaining comments at the initiative of anyone, and the consequent need to entertain the replies, rebuttals, and so on, would greatly complicate and delay the recordbuilding process and delay the Board's issuance of a prompt decision on the record.

In addition, the principles of fairness are critical to the Board's rail merger procedures, both in terms of actual fairness and in terms of the public's perception of, and confidence in, the fairness of the process. While section 11324 removed the Administrative Procedure Act prohibition against ex parte communications in merger cases, other restrictions on communications made outside the record in those cases remain in place. The statutory scheme enacted by Congress requires the Board to make its decisions in all cases on the basis of a complete record. The requirements for fairness underlying all provisions of the ICCTA demand that the Board accord equal access to all members of the public and militate against a process under which the Board would decide issues based on any off-the-record considerations.

The courts have struck down agency decisions that appear to have been made on the basis of influences other than the merits of the case as set out in the record before the agency. Although section 11324(f) provides that a merger or consolidation shall not be deemed an "adjudication" for purposes of the Administrative Procedure Act's normal prohibitions on ex parte communications, these cases remain adjudications in fact. They require the Board to adjudicate conflicting claims by competing parties. That being the case, mergers remain subject to requirements for procedural due process as articulated in the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972). There, the court held that Congressional interference tainting the administrative process violates the rights of a party to due process under law. *See also, Pillsbury Company v. F.T.C.*, 354 F.2d 952 (1966). The courts have stated that there are due process constraints on agency actions whether or not they are subject to the ex parte rules of the Administrative Procedure Act. *See, ATX, Inc. v. U.S. Dept. of Transp.*, 41 F.3d 1522 (D.C. Cir. 1994) and *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1981).

In sum, we believe that the harm to the process that could be expected to result from the Board's entertainment of ex parte communications outweighs any possible benefits. Were we to take a different position, parties, their attorneys and consultants, and all members of the public would be left to wonder whether the record in a proceeding truly includes all facts and arguments on which a decision is based. The process must be efficient and fair and in the public view. No one should have to be concerned about written or oral communications that are not fully reflected in the public record. Moreover, judicial review of agency railroad merger decisions, which has not been changed by the ICCTA, would be greatly complicated by our exercising our discretion so as to permit ex parte communications.

Because we have decided not to entertain ex parte communications in railroad merger proceedings, there is no need to address the second part of Fieldston's petition as to the process to be employed if we were to entertain ex parte communications.¹

It is ordered:

1. To the extent Fieldston's petition seeks a Board announcement of its position regarding ex parte communications in railroad merger proceedings, that position is set out in this decision.
2. To the extent Fieldston's petition seeks establishment of a process for handling ex parte communications, the petition is denied as moot in light of the Board's decision not to entertain ex parte communications in railroad merger proceedings.
3. This decision is effective on January 8, 1997.

By the Board, Chairman Morgan, Vice Chairman Simmons and Commissioner Owen.

¹ We also note that the agency's existing rules at 49 CFR 1102.2 remain in effect.