

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**PETITION FOR RULEMAKING--
AMENDMENTS TO REGULATIONS
GOVERNING EX PARTE
COMMUNICATIONS**

Ex Parte No. 782

COMMENTS OF FREIGHT RAIL CUSTOMER ALLIANCE

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Dated: May 29, 2026

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COMMENTS OF FREIGHT RAIL CUSTOMER ALLIANCE

The Freight Rail Customer Alliance (“FRCA”)¹ respectfully submits these comments in response to the advance notice of proposed rulemaking that the Surface Transportation Board (“Board” or “STB”) served in the above-captioned proceeding on April 10, 2026 (“ANPR” or “Notice”). The Board’s Notice seeks comments regarding a petition filed by the Association of American Railroads (“AAR”) to relax or eliminate various restrictions on ex parte communications at 49 C.F.R. Part 11102.

I. SUMMARY

FRCA expressed misgivings regarding the AAR proposals in comments that FRCA submitted nearly a year ago on June 5, 2025. FRCA remains concerned that adopting the AAR’s proposal will sacrifice transparency and exacerbate an already unlevel playing field. While the proposed changes may appear neutral on their face, the asymmetry of interests and resources (such as time, personnel, and money) that

¹ FRCA, www.railvoices.org, is an umbrella membership organization that includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies, and their consumers. The mission of FRCA’s growing coalition of industries and associations is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices.

dominates matters before the Board will cause the proposals to favor railroad interests over customer and consumer interests in practice.

The proposals are also generally unlikely to improve efficiency or improve decision-making. The proposals are more likely to result in additional procedural delay, not the expedition or efficiency gains posited by the AAR. The arms races that will likely ensue, especially in the more controversial proceedings that are already subject to protracted delay, will exacerbate existing problems, create further delay, and increase expenses. The effect will be to make it harder for the Board to take needed actions, which will benefit the AAR and its members.

To the extent the Board concludes the rules should be relaxed, the better approach is to do so on a case-by-case basis, rather than proceed on a one-size-fits-all basis, and to continue to funnel individual matters through the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) and its Rail Customer Public Assistance (RCPA).

II. DISCUSSION

A. "Uncontested" Proceedings

The Board begins its substantive discussion by stating that AAR's first proposal, to allow ex parte communications in uncontested proceedings, is not even necessary. The ANPR states that ex parte communications do not exist in uncontested one-party proceedings because "all parties" are present as "there is no other party without an opportunity to be present." Notice at 5.

This treatment ignores important considerations. Other parties may well be monitoring the proceeding and/or have an interest in the outcome. Such parties may not participate actively due to a lack of resources and/or knowledge, or they may fear retaliation. In other cases, opposition may emerge later, such as when a party proceeds with a notice of exemption subject to a later objection or potentially a petition for reconsideration.

Also, railroad discussion of an ostensibly uncontested matter in one proceeding may easily bleed into discussion or information that is useful for contested proceedings involving the same railroad or counsel. The railroads stand to gain a further advantage and benefit through the cumulative effect of such communications. Since railroads are highly likely to be the only parties in seemingly uncontested proceedings, the effect will be to confer an advantage on railroads in other matters coming before the Board.

Any exception for uncontested proceedings should be very narrowly drawn and applied. To the extent such communications occur, there should be full disclosure and documentation, and such interactions should go through RCPA to the maximum extent possible.

B. Class I Merger Proceedings

FRCA concurs with the Board's intention not to seek further input on whether to modify the ex parte communications restrictions in Class I merger proceedings. *Id.* at 5-7. The Board's reasons for not doing so, including the observation that exceptions can best be made on a case-by-case basis, *id.* at 6, are no less applicable to other areas where the Board is considering relaxing those same restrictions. Non-merger proceedings may

draw less public attention and involvement, but the Board remains obligated to act in the public interest. Customer, consumer, and other public interest parties may be less active in non-merger proceedings, but that does not make those other proceedings unimportant or suggest that the agency should proceed with less transparency.

C. Status Requests and Procedural Issues

The first area where the Notice considers further action is the AAR proposal to have the regulations state that status requests and procedural communications are not restricted. Notice at 7-8. FRCA has no inherent objection to adding language to the Board's regulations clarifying that discussions regarding "routine, procedural matters" and status inquiries do not constitute *ex parte* communications because they do not involve the merits. *Id.*

However, the AAR has not presented any evidence that any confusion exists as to the point, especially among the AAR and its members. Nor should there be any in light of the Board's previous issuance in EP 739, *Ex Parte Commc'ns in Informal Rulemaking Proc.*, EP 739 (STB served Feb. 28, 2018), at 6, cited in the Notice at 7, less than a decade ago.

If the Board should decide that further specificity is required, the Board should also state that such inquiries are to be directed through OPAGAC/RCPA, which is experienced in distinguishing permissible communications from others. Nothing suggests that RCPA is in any way inadequate for this purpose. Having RCPA as the point of contact provides a valuable safeguard.

D. Technical and Clarifying Communications with Board Staff

The Notice next turns to the AAR’s proposal to allow technical and clarifying communications with decisional staff. Notice at 8-9. The Board correctly observes that this proposal presents issues “related to fairness, due process, and impartiality, and acknowledges that even where questions are strictly technical and clarifying in nature, the answer might have implications for the outcome of the case.” *Id.* at 8.

The Notice then suggests that these problems might be limited and there may be benefits, but the distinction between technical clarifications and substance may be in the eye of the beholder, and there has been no demonstration that RCPA is incapable of performing this function and serving as a conduit.

Again, there is value in having RCPA serve as the gatekeeper and not allowing or encouraging ongoing bypass, which can provide an advantage to the party initiating the communication. It is also unclear what sort of disclosure requirements will be applied to keep the parties on equal footing. Furthermore, there are, as discussed *infra*, alternatives, such as technical conferences, conference calls/Teams, or even emails that allow representatives from opposing parties to monitor and participate in these discussions in real time, rather than rely on after-the-fact disclosures.

E. Ex Parte Meetings in Informal Rulemakings—Role of Board Staff

Those same concerns attach with greater force to the AAR proposal to allow substantive ex parte communications with decisional Board staff. Notice at 8-9. The proposal as stated seems likely to favor the parties with the most directly at stake

(namely, the railroads) and the most resources available to bring to bear (again, the railroads).²

If discussions with decisional staff are to occur, they should be allowed only on a case-by-case basis, not as a general rule, with as much advance notice, transparency during the communication, and disclosure afterwards as possible. The Board should also explain why individual presentations by only one side at a time are superior to sessions, such as technical conferences, that allow opposing parties to appear at the same time.

In the words of then-attorney Louis Brandeis, “[s]unlight is the best of disinfectants; electric light the most efficient policeman.” To the extent meetings with decisional staff are deemed useful, the Board should first make greater use of technical conferences and the like, where all parties are present, to promote transparency and fairness. Joint sessions may also be a more efficient use of staff and Member time. With the use of technology such as Teams and conference calls, these communications should be done in a way that limits the ability of one side, especially the side with superior resources, to obtain a procedural or substantive advantage. The presumption should remain that communications through RCPA are efficient and adequate.

² While some shippers may be larger than some Class I railroads, the shippers’ interest in rail transportation is derivative of and thus secondary to their main business. Railroading is a railroad’s primary business, while a shipper uses rail only to carry out some other activity.

F. Timing for Ex Parte Meetings in Informal Rulemakings

The Board notes that there are issues with setting the end date for ex parte meetings both early and late and proposes instead to set the end date on a case by case basis. Notice at 9-10.

The Board's consideration of timing only hints at larger issues regarding the interaction of written submissions and ex parte filings. Those problems include the potential that parties may save some information (perhaps what is best or most sensitive) only for ex parte meetings and otherwise seek to exploit the meetings for maximum advantage, particularly compared to those that are not able to participate in meetings in the same way or to the same extent. Those able to engage in meetings will do so regularly and will accumulate "repeat player" advantages by doing so, all the more so if they also enjoy access in "uncontested" proceedings.

The availability of meetings will likely cause written submissions, which can be scrutinized with care by other parties, to become less important, as parties will rely on ex parte communications to convey subtleties in their positions or responses to other parties. This practice will inure to the railroads' advantage, especially as they will be the predominate repeat players in those direct interactions.

The Board also needs to consider that allowing ex parte communications will trigger an arms race, at least among those parties (again, predominately railroads) with the interest and resources to do so. Increased ex parte participation will not necessarily increase efficiency and improve decision-making and may well have the opposite effect.

The direct interactions will consume time of staff and/or Members, especially to

the extent the direct presentations do not displace written submissions (and displacement carries additional risks, as noted). Time spent in meetings and reviewing disclosure summaries for accuracy will be time that is not available for other purposes. A particularly contested matter might generate more than 72 meetings, *e.g.*, twelve railroads, individual shippers, or associations meeting with each member (currently three, but potentially five) and separately with staff as a whole. Each meeting will require its own disclosure. As one party engages in meetings, others will be pressured to do so to avoid being placed at a disadvantage. Moreover, staff and Board members will need to scrutinize not only written submissions, but also their notes³ and other materials from the *ex parte* communications, particularly as failure to address a point made in the meetings may become a basis for seeking judicial review.

The Notice partially recognizes these concerns in addressing timing considerations, *e.g.*, “[i]f the end date is extended beyond the deadline for replies, parties may attempt to have the last word in informal rulemaking proceedings by withholding information in their public comments and presenting it to the Board in an *ex parte* meeting after the reply period has ended.” Notice at 10. The broader issue is that having *ex parte* meetings will allow parties, especially the railroads with their superior resources, to present their written positions with less transparency and disclosure, putting other parties at a disadvantage in seeking to respond. As noted, the effect will be cumulative, as the railroads make more *ex parte* presentations over time and cultivate more rapport

³ The notes and other materials may well become the subject of FOIA requests.

with the staff. Written filings provide full, closed text presentations and do far more to achieve transparency, maintain fairness and order, and put all parties on a level playing field.

The additional communications carry ample potential to render rulemakings and other proceedings more cumbersome and complicated, making it harder, not easier, for the Board to issue rulemaking and other decisions. Such delays and burdens will insure to the benefit of the railroads, particularly to the extent the proceedings seek to redress the excessive exercise and exploitation of the railroads' market power. The AAR's proposed changes might be neutral in effect if all things were equal, but the reality is that things are anything but equal.⁴

For these reasons, FRCA continues to have deep misgivings about the proposals presented in the ANPR. There has also been no showing that the existing procedures are inadequate, and the proposed changes have the potential to make things worse, not better. The proceeding should be discontinued without proceeding to a notice of proposed rulemaking.

⁴ The AAR's proposal to incorporate more procedures in rulemakings stands in contrast to its desire to streamline environmental review in EP 779, *Permitting Reform—Environmental Review Process*.

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