

BEFORE THE
SURFACE TRANSPORTATION BOARD

PETITION FOR RULEMAKING—
AMENDMENTS TO REGULATIONS GOVERNING
EX PARTE COMMUNICATIONS

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COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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BACKGROUND

On May 16, 2025, the Association of American Railroads (AAR) filed a petition to institute a proceeding to revise and streamline the rules governing ex parte communications set forth in 49 CFR part 1102.¹ The Surface Transportation Board (STB or Board) issued a decision on September 11, 2025, instituting a proceeding.² On April 14, 2026, the Board issued an advance notice of proposed rulemaking (ANPRM), requesting comments on several changes to the ex parte regulations proposed by AAR.³ AAR appreciates the consideration of its petition, and supports moving forward with a rulemaking that would incorporate the changes being considered into the Board's rules on ex parte communications, as discussed below.

COMMENTS

I. Ex Parte Communications in Uncontested Proceedings

In the ANPRM, the Board explains that it does not intend to move forward with AAR's request to revise section 1102.2(b) to explicitly permit ex parte communications in uncontested one-party proceedings.⁴ The Board notes that the change is not necessary, noting that "[t]o be ex parte, a communication must be made 'without notice to all parties and without an opportunity for all parties to be present.'" ⁵ AAR appreciates the Board's acknowledgement that "communications in uncontested one-party proceedings" are not by definition ex parte

¹ Petition of the AAR, *Pet. for Rulemaking—Amendments to Reguls. Governing Ex Parte Commc'ns*, EP 782 (May 16, 2025) (Petition).

² *Pet. for Rulemaking—Amendments to Reguls. Governing Ex Parte Commc'ns*, EP 782, 1 (STB served Sept. 11, 2025).

³ *Pet. for Rulemaking—Amendments to Reguls. Governing Ex Parte Commc'ns*, EP 782 (STB served Apr. 14, 2026) (ANPRM).

⁴ *Id.* at 5.

⁵ *Id.* (citing 49 CFR § 1102.2(a)(5)).

communications.⁶ AAR agrees. However, AAR respectfully submits that the better regulatory practice is to provide this clarification in the regulations governing this topic—which are the primary resource for staff, practitioners, and parties—rather than in a Board decision, which may be less accessible to those unfamiliar with Board proceedings. The Board acknowledged a similar principle with regard to procedural communications, which while permissible, “are not explicitly permitted in part 1102.”⁷ The Board acknowledges that “[s]tating this principle directly in the regulatory text”—not simply in decisional guidance—“could benefit stakeholders” by providing “[c]lear guidelines.”⁸ A similar rationale would support eliminating any ambiguity in the current regulations with regard to one-party proceedings, which are likewise not explicitly addressed. AAR offers that the Board could revise section 1102.2(b), which outlines what types of communication are not prohibited and need not be disclosed. *See* Appendix A (proposing specific edits to the current regulations, specifically proposed 49 CFR § 1102.2(b)(7)). The Board could also explain that in declaratory order proceedings, it will consider such proceeding a one-party proceeding if the reply period passes without any replies in opposition being filed. *See* Appendix A (proposing specific edits to the current regulations, specifically proposed 49 CFR § 1102.2(b)(7)). These changes would establish clear regulatory lines for parties and Board staff, who might be reluctant to communicate with parties, of what is and is not considered an ex parte communication.

⁶ *Id.*

⁷ *Id.* at 7.

⁸ *Id.*

II. Status Requests and Procedural Issues

As noted in its petition, AAR supports the Board adding language to its rules to clarify that “the ban on ex parte communications does not prohibit communications occurring in any proceeding regarding routine, procedural matters.”⁹ AAR reiterates its points from its petition and supports this proposal. Having clear guidelines in the regulations will aid practitioners, especially those less familiar with Board proceedings, in understanding what is permissible or not. Delineating clear lines around communications about routine status and procedural issues will encourage communications and speed up consideration of complex matters. It will also provide Board staff with appropriate guidance for what they can and cannot do. Such outcomes will benefit the Board, its staff, and practitioners in general.

The Board requests comments on what types of communications should be considered “routine” or “procedural.” AAR suggests, as noted in its petition, that other independent agencies such as the Federal Communications Commission (FCC) and the Federal Energy Regulatory Commission (FERC) have similar regulations clarifying permissible communications, and the Board could follow those. FCC distinguishes between communications “directed to the merits or outcome of a proceeding” and those that are “inquiries concerning compliance with procedural requirements if the procedural matter is not an area of controversy in the proceeding, ... and inquiries relating solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken.”¹⁰ FERC regulations also distinguish “communication relevant to the merits of a contested on-the-record proceeding”

⁹ *Id.* at 7.

¹⁰ 47 CFR § 1.1202(a)

and those communications that are not “relevant to the merits,” such as “[p]rocedural inquiries, such as a request for information relating solely to the status of a proceeding”¹¹ Following these examples, the Board could add regulatory language clarifying that routine, procedural communications not directed to the merits or outcome of or an area of controversy in the proceeding are permissible and provide examples. *See* Appendix A (proposing specific edits to the current regulations, specifically proposed 49 CFR § 1102.2(b)(8)).

III. Technical and Clarifying Communications

As noted in the petition, AAR supports the Board “revis[ing] its rules to clarify that communications with Board staff concerning submitted evidence and compliance with orders seeking additional information are permissible, subject to the disclosure requirements in 49 CFR § 1102.2(g)(4). (Pet. at 7.)”¹² Specifically, AAR is strongly supportive of the Board’s increased utilization of technical conferences as suggested in the ANPRM.¹³ AAR also believes that developing a process for practitioners to ask Board staff, and vice versa, clarifying questions about technical evidence, without the back-and-forth of written decisions and responsive filings, would save time and resources for practitioners and the Board. AAR agrees that these ex parte communications could be documented in a manner that would provide the necessary transparency, while ensuring there is no inappropriateness in the communications. *See* Appendix A (proposing specific edits to the current regulations, specifically proposed 49

¹¹ 18 CFR § 385.2201(c)(4)-(5).

¹² ANPRM at 8.

¹³ *Id.*

CFR § 1102.2(g)-(h)). The Board would not be treading new ground here. The FCC, for example, provides that communications about the clarification or adduction of evidence are exempt from their regulations, subject to certain limitations. And if such clarifying communications result in any new information, then it is subject to the permit-but-disclose requirements. See, e.g., 47 C.F.R. § 1.1204(a)(10) (addressing presentations requested by the Commission or staff for the clarification or adduction of evidence, and requiring that “any new oral information elicited from such request shall promptly be served by the person making the presentation on the other parties to the proceeding”).

The ANPRM requests ideas regarding a potential definition of “technical and clarifying.”¹⁴ Typically, clarifying questions seek information rather than an answer that would contain an argument or state an opinion. Clarifying and technical questions could be limited to helping understand items such as the scope of information requests and the mechanics of empirical data, cost-benefit analyses, and economic analyses. The Board could adopt in its rules that answers to clarifying and technical questions should not contain communications regarding the merits, substance, or outcome of a pending proceeding or issue in a proceeding. See Appendix A (proposing specific edits to the current regulations, specifically proposed 49 CFR § 1102.2(h)).

IV. Communications Between Board Staff and Practitioners

AAR supports the Board’s consideration of amending the existing regulations regarding communications with Board staff. Specifically, the Board should “revise 49 CFR 1102.2(g)(1) to

¹⁴ ANPRM at 9.

authorize ex parte communications between the public and Board staff in informal rulemaking proceedings, subject to the same requirements that govern communications with Board Members. (Pet. 12.)”¹⁵ This change will enhance the informal rulemaking proceedings, promote efficiency, and improve decision-making, as the staff are generally very familiar with the proceedings’ details and nuances and may possess specialized or technical knowledge that may facilitate the Board’s proceedings.¹⁶ See Appendix A (proposing specific edits to the current regulations, specifically proposed 49 CFR § 1102.2(g)).

Revising the existing regulations to allow for meetings with Board staff may also save time and resources of the Board Members. The Board expressed concern regarding multiple staff meetings in the ANPRM. The Board could address that concern by providing that each party could hold one meeting with all staff, not multiple separate meetings with individual staffers. The same disclosure requirements would apply for Board staff meetings. See Appendix A (proposing specific edits to the current regulations, specifically proposed 49 CFR § 1102.2(g)).

V. Expand the Timeframe for Ex Parte Meetings

AAR supports the Board’s consideration of expanding the timeframe in which it allows ex parte meetings in informal rulemaking proceedings. As the Board notes, it could revise its rules to set a different end date for ex parte meetings in informal rulemaking proceedings, which “has the potential to improve the Board’s rulemaking processes by providing needed

¹⁵ ANPRM at 9 (referencing AAR’s May 16, 2025 petition).

¹⁶ See *Id.*

flexibility, and by promoting more informed decision-making during rulemaking proceedings.”¹⁷

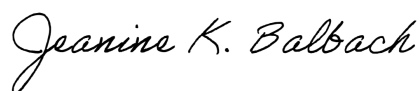
AAR supports this change. AAR proposes that the Board could simply add one line to an order setting forth the ex parte end date, just as the Board does now for comment and reply due dates. See Appendix A (proposing specific edits to the current regulations, specifically proposed 49 CFR § 1102.2 (g)(1)). This change would provide the greatest transparency on timing and clarify for all parties, including those less familiar with Board practice, about when they can meet with the Board to discuss their views.

¹⁷ See *Id.* at 10.

CONCLUSION

AAR appreciates the opportunity to provide comments on the regulatory changes regarding ex parte communications under consideration by the Board and supports the Board's effort to provide clarity about and streamline agency processes. Implementing these changes will remove unnecessarily strict regulations governing ex parte communications and facilitate informed decision-making while saving time and resources for participants in Board proceedings and the Board itself.

Respectfully submitted,

A handwritten signature in black ink that reads "Jeanine K. Balbach". The script is cursive and fluid.

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**Appendix A – Association of American Railroads’ Suggested Edits to Regulations
Governing Ex Parte Communications (49 CFR part 1102)**

* * *

(b) ~~Ex parte~~ Communications that are not prohibited and need not be disclosed.

- 1) Any communication that the Board formally rules may be made on an ex parte basis;
- 2) Any communication occurring in informal rulemaking proceedings prior to the issuance of a notice of proposed rulemaking;
- 3) Any communication of facts or contention which has general significance for a regulated industry if the communicator cannot reasonably be expected to have known that the facts or contentions are material to a substantive issue in a pending covered proceeding in which it is interested;
- 4) Any communication by means of the news media that in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publication with respect to pending covered proceedings;
- 5) Any communications related solely to the preparation of documents necessary for the Board's implementation of the National Environmental Policy Act and related environmental laws, pursuant to part 1105 of this chapter;
- 6) Any communication concerning judicial review of a matter that has already been decided by the Board made between parties to the litigation and the Board or Board staff who are involved in that litigation.
- 7) Any communication occurring in a one-party proceeding. The Board may determine that a one-party proceeding is likely to involve future parties and may always decline to entertain communications in such proceedings in the interest of fairness. In certain proceedings, such as declaratory order proceedings, the Board will wait to determine whether a proceeding is a one-party proceeding until after the period for comment passes.
- 8) Any routine, procedural communication not directed to the merits or outcome of a proceeding or an area of controversy in a proceeding. Examples of such permissible communications include communications relating solely to the status of a proceeding, inquiries as to the approximate time that action in a proceeding may be taken, communications regarding scheduling, and communications concerning compliance with procedural requirements.

* * *

(g) Ex parte communications in informal rulemaking proceedings; disclosure requirements.

- 1) Notwithstanding paragraph (c) of this section, ex parte communications with Board Members and Board staff in informal rulemaking proceedings are permitted after the issuance of a notice of proposed rulemaking ~~and until 20 days before the deadline for reply comments set forth in the notice of proposed rulemaking, unless otherwise specified by the Board in procedural orders governing the proceeding.~~ The Board will establish an end date for ex parte meetings in informal rulemaking proceedings on a case-by-case basis and will announce the end date in the notice of proposed rulemaking. ~~The Board may delegate its participation in such ex parte communications to Board staff.~~ All such ex parte communications must be disclosed in accordance with paragraph (g)(4) of this section. Any person who engages in such ex parte communications must comply with any schedule and additional instructions provided by the Board in the proceeding. Communications that do not comply with this section or with the schedule and instructions established in the proceeding are not permitted and are subject to the procedures and sanctions in paragraphs (e) and (f) of this section.
- 2) To schedule ex parte meetings permitted under paragraph (g)(1) of this section, parties should contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance or the Board Member and/or staff office with whom the meeting is requested, unless otherwise specified by the Board. Unless otherwise indicated, Board staff will hold only one meeting per party with all relevant staff members in attendance rather than multiple meetings with individual staff members.
- 3) Parties seeking to present confidential information during an ex parte communication must inform the Board of the confidentiality of the information at the time of the presentation and must comply with the disclosure requirements in paragraph (g)(4)(iv) of this section.
- 4) The following disclosure requirements apply to ex parte communications permitted under paragraph (g)(1) of this section:
 - i. Any person who engages in ex parte communications in an informal rulemaking proceeding shall submit to the Board Member office or ~~delegated~~ Board staff with whom the meeting was held a memorandum that states the date and location of the communication; lists the names and titles of all persons who attended (including via phone or video) or otherwise participated in the meeting during which the ex parte communication occurred; and summarizes the data and arguments presented during the ex parte communication. Any written or electronic material shown or given to Board Members or Board staff during the meeting must be attached to the memorandum.
 - ii. Memoranda must be sufficiently detailed to describe the substance of the presentation. Board Members or Board staff may ask presenters to resubmit memoranda that are not sufficiently detailed.

- iii. If a single meeting includes presentations from multiple parties, counsel, or persons, a single summary may be submitted so long as all presenters agree to the form and content of the summary.
- iv. If a memorandum, including any attachments, contains information that the presenter asserts is confidential, the presenter must submit a public version and a confidential version of the memorandum. If there is no existing protective order governing the proceeding, the presenter must, at the same time the presenter submits its public and redacted memoranda, file a request with the Board seeking such an order pursuant to § 1104.14 of this chapter.
- v. Memoranda must be submitted to the Board in the manner prescribed no later than two business days after the ex parte communication.
- vi. Ex parte memoranda submitted under this section will be posted on the Board's website in the docket for the informal rulemaking proceeding within five days of submission. If a presenter has requested confidential treatment for all or part of a memorandum, only the public version will appear on the Board's website. Persons seeking access to the confidential version must do so pursuant to the protective order governing the proceeding.

(h) Ex parte communications in other proceedings that may occur subject to disclosure requirements.

- 1) Notwithstanding paragraph (c) of this section, ex parte communications with Board staff are permitted to resolve or clarify technical issues relating to submitted evidence or compliance with orders seeking additional information. Examples of such permissible communications include communications relating to workpapers, the scope of informational requests, or questions regarding empirical data. Such communications shall not address the merits, substance, or outcome of a pending proceeding or issue in a proceeding. The disclosure requirements of 1102.2(g)(4) apply for any such communications.