

SURFACE TRANSPORTATION BOARD ISSUES DECISION STATING THAT IT WILL NOT ENGAGE IN "EX PARTE" CONTACTS IN RAIL MERGER PROCEEDINGS

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SURFACE TRANSPORTATION BOARD ISSUES DECISION STATING THAT IT WILL NOT ENGAGE IN "EX PARTE" CONTACTS IN RAIL MERGER PROCEEDINGS

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has issued a decision announcing that it will not engage in "ex parte" contacts in railroad merger proceedings.

Historically, ex parte contacts (off-the-record, private communications between agency personnel and persons outside the agency in a pending case that could influence the outcome of a decision in that case) were prohibited in all Board proceedings. However, a change in the law brought about through passage of the ICC Termination Act of 1995, as reflected in the provisions of section 11324(f) of Title 49, United States Code [49 U.S.C. 11324(f)], permits (but does not require) ex parte communications in certain railroad merger cases.

On November 27, 1996, Fieldston Co., Inc. [Fieldston], a consulting firm, asked the Board to declare its policy as to such ex parte communications, and to announce any rules that would

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apply should the Board decide to allow ex parte contacts in such rail merger cases. In responding to Fieldston's request, the Board determined that any action it might take sanctioning such ex parte contacts would impede efficiency, fairness, and public confidence in its decisional process in such matters.

With regard to efficiency, the Board noted that section 11324 requires that any agency personnel engaging in an ex parte contact must place a copy of that written communication or a summary of the oral communication that took place into the public record. The Board concluded that, once it allowed ex parte communications from any interested parties, it would be flooded with requests for ex parte contacts by all interested parties. The Board further pointed out that:

"[T]he 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."

The Board also found that the requirement for fairness underlying all of its proceedings demands that it give equal access to all members of the public and militates against a process under which the Board would decide issues based on any off-the-record considerations. It noted that, despite the

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language of section 11324, merger cases are adjudications in fact, which require

the Board to decide conflicting claims by competing parties on the public record. Citing court precedent striking down federal agency decisions that appear to have been made on the basis of influences other than the on-the-record merits of the case--even in cases not directly subject to ex parte prohibitions--the Board found that the statutory scheme enacted by Congress requires the Board to make its decisions in all cases on the basis of a complete record, which could be eroded if ex parte contacts were permitted.

In summarizing its position, the Board stated:

“[W]e 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.”

The Board's decision was issued today in Petition of Fieldston Co., Inc. to Establish Procedures Regarding Ex Parte Communications in Railroad Merger Proceedings, STB Ex Parte No. 619.

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