

### § 1101.3

(1) An *informal complaint* filed under §§ 1130.1, or 1130.2 or a *formal complaint* alleging violation of any provision of the Act or of any regulation or requirement made pursuant to a power granted by such Act, including petitions on special dockets;

(2) An *application* for (i) the granting of any right, privilege, authority, or relief under or from any provision of the Act or of any regulation or requirement made pursuant to a power granted by such Act, or (ii) the consideration of any submission required by law to be made to the Board;

(3) An *investigation* instituted by the Board;

(4) A *rulemaking* proposal instituted by the Board; or

(5) A petition for exemption filed under 49 U.S.C. 10502 requesting the Board to exempt from application all or part of subtitle IV of title 49 of the United States Code any person, class of persons, transaction, or service related to a rail carrier.

[47 FR 49548, Nov. 1, 1982, as amended at 50 FR 30275, July 25, 1985; 64 FR 53267, Oct. 1, 1999; 69 FR 58365, Sept. 30, 2004; 81 FR 8852, Feb. 23, 2016]

#### § 1101.3 Construction.

The rules of construction contained in chapter 1 of title 1 of the United States Code (1 U.S.C. 1 *et seq.*) apply in this chapter. Among other things, they provide that the singular includes the plural, and vice versa; that the masculine includes the feminine; that the word “person” includes corporations, associations, and the like; that “county” includes parish and similar subdivisions; and that “company” includes successors and assigns.

## PART 1102—COMMUNICATIONS

Sec.

1102.1 How addressed.

1102.2 Procedures governing *ex parte* communications.

AUTHORITY: 49 U.S.C. 1321.

#### § 1102.1 How addressed.

All communications should be addressed to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423-0001 unless otherwise

### 49 CFR Ch. X (10-1-25 Edition)

specifically directed by another Board regulation. All communications should designate the docket number and title, if any. The person communicating shall state his address, and the party he represents.

[74 FR 52905, Oct. 15, 2009]

#### § 1102.2 Procedures governing *ex parte* communications.

(a) *Definitions.* (1) “On-the-record proceeding” means any matter described in Sections 556-557 of the Administrative Procedure Act (5 U.S.C. 556-557) or any matter required by the Constitution, statute, Board rule, or by decision in the particular case, that is decided solely on the record made in a Board proceeding.

(2) “Informal rulemaking proceeding” means a proceeding to issue, amend, or repeal rules pursuant to 5 U.S.C. 553 and part 1110 of this chapter.

(3) “Covered proceedings” means on-the-record proceedings and informal rulemaking proceedings following the issuance of a notice of proposed rulemaking.

(4) “Person who intercedes in any proceeding” means any person, partnership, corporation, or association, private or public, outside of the Board which is neither a party nor party’s agent, that volunteers a communication that it has reason to know may advance or adversely affect the interest of a party or party’s agent in any proceeding before the Board.

(5) “*Ex parte* communication” means an oral or written communication that concerns the merits or substantive outcome of a pending proceeding; is made without notice to all parties and without an opportunity for all parties to be present; and could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.

(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;

## Surface Transportation Board

## § 1102.2

(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.

(c) *General prohibitions.* (1) Except to the extent permitted by the rules in this section, no party, counsel, agent of a party, or person who intercedes in any covered proceeding shall engage in any ex parte communication with any Board Member, hearing officer, or Board employee who participates, or who may reasonably be expected to participate, in the decision in the proceeding.

(2) No Board Member, hearing officer, or Board employee who participates, or is reasonably expected to participate, in the decision in a covered proceeding shall invite or knowingly entertain any ex parte communication or engage in any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

(d) *When prohibitions take effect.* In on-the-record proceedings, the prohibitions against ex parte communications apply from the date on which the first filing or Board decision in a proceeding is posted to the public docket by the Board, or when the person responsible for the communication has knowledge that such a filing has been filed, or at any time the Board, by rule or deci-

sion, specifies, whichever occurs first. In informal rulemaking proceedings, except as provided in paragraph (g) of this section, the prohibitions against ex parte communications apply following the issuance of a notice of proposed rulemaking. The prohibitions in covered proceedings continue until the proceeding is no longer subject to administrative reconsideration under 49 U.S.C. 1322(c) or judicial review.

(e) *Procedure required of Board Members and Board staff upon receipt of prohibited ex parte communications.* (1) Any Board Member, hearing officer, or Board employee who receives an ex parte communication not permitted by these regulations must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board. The Section Chief shall promptly place the written material or summary in the correspondence section of the public docket of the proceeding with a designation indicating that it is a prohibited ex parte communication that is not part of the decisional record.

(2) Any Board Member, hearing officer, or Board employee who is the recipient of such ex parte communication may request a ruling from the Board's Designated Agency Ethics Official as to whether the communication is a prohibited ex parte communication. The Designated Agency Ethics Official shall promptly reply to such requests. The Chief, Section of Administration, Office of Proceedings, shall promptly notify the Chairman of the Board of such ex parte communications sent to the Section Chief. The Designated Agency Ethics Official shall promptly notify the Chairman of all requests for rulings sent to the Designated Agency Ethics Official. The Chairman may require that any communication be placed in the correspondence section of the docket when fairness requires that it be made public, even if it is not a prohibited communication. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

(f) *Sanctions.* (1) The Board may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited *ex parte* communication.

(2) The relief or benefit sought by a party to a covered proceeding may be denied if the party, or his agent knowingly and willfully violates the foregoing rules.

(3) The Board may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Board employee who knowingly and willfully violates the rules in this section.

(g) *Ex parte communications in informal rulemaking proceedings; disclosure requirements.* (1) Notwithstanding paragraph (c) of this section, *ex parte* communications with Board Members 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 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 office with whom the meeting is requested, unless otherwise specified by the Board.

(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 dis-

closure 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 re-submit 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

## Surface Transportation Board

## § 1103.3

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.

[47 FR 49548, Nov. 1, 1982, as amended at 58 FR 42027, Aug. 6, 1993; 74 FR 52905, Oct. 15, 2009; 81 FR 8853, Feb. 23, 2016; 83 FR 9231, Mar. 5, 2018]

### PART 1103—PRACTITIONERS

#### Subpart A—General Information

Sec.

- 1103.1 Register of practitioners.
- 1103.2 Attorneys-at-law—qualifications and requirements to practice before the Board.
- 1103.3 Persons not attorneys-at-law—qualifications and requirements for practice before the Board.
- 1103.4 Initial appearances.
- 1103.5 Discipline.

#### Subpart B—Canons of Ethics

- 1103.10 Introduction.

##### THE PRACTITIONER'S DUTIES AND RESPONSIBILITIES TOWARD THE BOARD

- 1103.11 Standards of ethical conduct in courts of the United States to be observed.
- 1103.12 The practitioner's duty to and attitude toward the Board.
- 1103.13 Attempts to exert political or personal influence on the Board are prohibited.
- 1103.14 Private communications with the Board are prohibited.

##### THE PRACTITIONER'S DUTIES AND RESPONSIBILITIES TOWARD A CLIENT

- 1103.15 The practitioner's duty to clients, generally.
- 1103.16 Adverse influences and conflicting interests.
- 1103.17 Joint association of practitioners and conflicts of opinion.
- 1103.18 Withdrawal from employment.
- 1103.19 Advising upon the merits of a client's cause.
- 1103.20 Practitioner's fees and related practices.
- 1103.21 How far a practitioner may go in supporting a client's cause.
- 1103.22 Restraining clients from improprieties.
- 1103.23 Confidences of a client.

##### THE PRACTITIONER'S DUTIES AND RESPONSIBILITIES REGARDING WITNESSES, OTHER LITIGANTS AND THE PUBLIC

- 1103.24 Use of adverse witnesses.
- 1103.25 Treatment of witnesses, litigants and other counsel.
- 1103.26 Discussion of pending litigation in the public press.
- 1103.27 Candor and fairness in dealing with other litigants.
- 1103.28 Negotiations with opposing party.
- 1103.29 Public communication and solicitation.
- 1103.30 Acceptance of employment.
- 1103.31 Responsibility for litigation.
- 1103.32 Discovery of imposition and deception and duty to report corrupt or dishonest conduct.
- 1103.33 Responsibility when proposing a person for admission to practice before the Board.
- 1103.34 Intermediaries.
- 1103.35 Partnership or professional corporation names and titles.

AUTHORITY: 21 U.S.C. 862; 49 U.S.C. 1303(c), 1321.

SOURCE: 47 FR 49549, Nov. 1, 1982, unless otherwise noted.

#### Subpart A—General Information

##### § 1103.1 Register of practitioners.

The Board maintains a register containing the names of all non-attorneys entitled to practice before it. The register is maintained according to the individual non-attorney practitioner's name and not by corporate or firm name. Corporations and firms are not admitted or recognized as practitioners before the Board.

##### § 1103.2 Attorneys-at-law—qualifications and requirements to practice before the Board.

Any person who is a member in good standing of the bar of the highest court of any State, Commonwealth, possession, territory, or the District of Columbia may represent persons before the Board.

##### § 1103.3 Persons not attorneys-at-law—qualifications and requirements for practice before the Board.

(a) *In general.* Any citizen or resident of the United States, not an attorney-at-law, who files an application for admission to practice, accompanied by the payment of the fee prescribed by rule or order of the Board, and who