

**U.S. Senate Committee on Commerce, Science, and Transportation**  
**Nominations Hearing on September 7, 2022**  
**Questions for the Record – Minority**

**Robert E. Primus to be a Member of the Surface Transportation Board**

**Senator Mike Lee**

**Question 1:** *If confirmed to a new term as a member of the STB, what will be your key priorities?*

**Response:**

My key priority is to help to resolve the current service issues that are plaguing the rail network. The Board is currently requiring BNSF Railway Company, CSX Transportation, Inc., Norfolk Southern Railway Company, and Union Pacific Railroad Company to submit weekly, biweekly, and monthly information and data to the Board in order to track their recovery. To me another important aspect of improving rail service is improving the communications between the railroads and shippers. I have learned how important it is to shippers to have early and clear communication from the railroads in order to plan for any changes in rail service.

**Question 2:** Conducting cost-benefit analyses for proposed regulations has been a practice undertaken by agencies under both Democrat and Republican Administrations.

- *Please explain your views on the use of cost-benefit analysis when considering proposed regulations. Should all STB regulations be considered with a cost-benefit analysis?*
- *If a regulatory cost outweighs the benefit, should that be a determining factor that prevents the STB from moving forward with the regulation?*

**Response:**

I believe that agencies, whether through formal rules or otherwise, should always consider both benefits of proposed rules as well as the associated costs, and that costs should always be an important consideration when determining whether a rule should be adopted. As a Board Member, I understand that the potential effects of Board decisions could result in costs to certain stakeholders while resulting in benefits to others, and often these costs and benefits can be hard to measure or quantify. What is important to me is to use a balanced approach when regulating the industry and consideration of the costs and benefits is important.

**Question 3:** *When the Board considered major regulatory proposals, please explain your approach to deciding such a matter.*

**Response:**

Regulatory proposals can assist our stakeholders in their operational planning by letting them know what is expected of them in their day-to-day operation. My approach is to study the situation; determine whether I see a major problem that the Board should address; if so, listen to the interested parties who are dealing with the problem on the ground; and decide whether that problem can best be fixed by market forces, government intervention, or an appropriate mix of both. It is important to me that we hear from a

broad range of stakeholders in order to allow the Board the opportunity to develop a full record. I am guided by the principles set forth the Rail Transportation Policy codified at 49 U.S.C. § 10101.

***Question 4:*** *When considering regulatory proposals, should the STB prioritize policies that allow market participants to freely compete without STB action? Or is the market more successful when the STB actively guides the market through regulatory action?*

**Response:**

In my regulatory approach, I of course follow the specific statutory directives set out in the Staggers Act and the ICC Termination Act. But in carrying out those directives, I am guided by the Rail Transportation Policy of 49 U.S.C. § 10101. That policy favors market forces over federal intervention “to the maximum extent possible,” but it also directs regulatory intervention in situations where there is an absence of effective competition. I carefully analyze each situation with which I am faced to determine whether there is sufficient competition to warrant a hands-off approach.

***Question 5:*** I would like to learn more about your views on the use of the STB’s rulemaking power:

- *Should the STB promulgate rules if the rulemaking power is not expressly granted by Congress?*

**Response:**

When it is necessary to promulgate rules, I believe the Board should work within its statutory authority to address the matter at hand, as intended by Congress. In situations where there is no express authority for promulgating formal regulations, I am guided by the Rail Transportation Policy in 49 U.S. C. 10101.

- *Can the STB use its rulemaking power to circumvent legal precedents with which it disagrees?*

**Response:**

I do not believe the Board should make it a practice to use its rulemaking power to depart from legal precedents with which it disagrees. Our reasoned body of agency case law, as well as other legal precedent, give industry and stakeholders understanding and certainty as they make plans for their businesses.

- *Can the rules passed by the STB insulate market incumbents from competition?*

**Response:**

The Rail Transportation Policy favors market forces over federal intervention “to the maximum extent possible,” but it also directs regulatory intervention in situations where there is an absence of effective competition. I carefully analyze each situation with which I am faced to determine whether there is sufficient competition to warrant a hands-off approach.

**Question 6:** *Should STB-sponsored private arbitration be encouraged over STB-directed dispute resolution? And what factors would guide your decision-making process in this regard?*

**Response:**

The Board prefers that parties settle their disputes without intervention, but when the parties are not able to reach an agreement, I believe that the Board should act to facilitate an agreement in the most efficient way possible. Additionally, the Board's Rail Customer and Public Assistance program provides an informal venue for the private-sector resolution of shipper-railroad disputes, and also assists Board stakeholders seeking guidance in complying with Board decisions and regulations.

**Question 7:** The STB has long considered the issue of long-term railroad revenue adequacy, even considering proposals related to rate caps and revenue reductions based solely on a railroad earning returns on investment above its capital.

- *Is it appropriate for the STB to impose rate caps or revenue reductions based solely on the railroad earning returns on investment above its capital? If so, why?*
- *Is imposing rate caps, price controls, or revenue reductions consistent with the deregulatory goals that Congress set forth in the Staggers Rail Act?*
- *Is there a negative relationship between the imposition of rate caps, price controls, or revenue reductions with railroad investments and innovation?*

**Response:**

I believe the Board should act within its statutory authority to provide rate relief to qualified shippers. Under § 10101(6), the Board's policy is "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." The Board's regulatory approach is to ensure rates to captive shippers are consistent with those that would emerge were effective competition available, which I believe is consistent with the deregulatory goals set forth in the Staggers Rail Act. I do not believe there is a negative relationship between the effort to maintain such consistent rates with railroad investments and innovation.

**Question 8:** The STB is often tasked with making decisions or authorizing certain actions when it is determined that the action or decision is in the "public interest."

- *What is the "public interest"? What criteria should be considered in determining the "public interest"?*
- *Are there any limits to the STB's determination of what constitutes "public interest"?*
- *Could a determination of what is or is not in the "public interest" be based on factors that are outside the jurisdiction of the STB?*

**Response:**

The "public interest" is a broad, yet not limitless consideration in the Board's decisions. In certain parts of our statutory authority, the concept of "public interest" is defined. For example, with respect to abandonments of rail lines, the statute requires that the Board's assessment of the public convenience and necessity must consider whether the abandonment would have a serious, adverse impact on rural and community development. In other areas where public interest is not expressly defined, I adhere to the principles laid out in the Rail Transportation Policy.

***Question 9:*** How do you reconcile or balance Amtrak's access to the freight rail network with the importance of a safe, efficient, and reliable freight rail service?

**Response:**

I believe that the network can support safe, efficient, and reliable freight service while also supporting the same for Amtrak. I will continue to encourage both sides to work together to accomplish the appropriate dialog, scheduling, and planning that will allow both to provide the service the network requires and deserves. Under 49 U.S.C. § 24308(c), Amtrak has the right to preference over freight traffic, and under the Passenger Rail Inv. & Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, the Board has the responsibility to adjudicate issues of on-time performance.

***Question 10:*** The STB often conducts environmental reviews in proceedings, including the carrying out the requirements of the National Environmental Policy Act (NEPA).

- *What are the bounds (if any) of the effects of a major federal action that the STB should consider under NEPA?*

**Response:**

When the STB conducts environmental reviews, it is bound by the NEPA statute, the CEQ implementing regulations, the STB's environmental regulations at 49 C.F.R. Part 1105, and the case law interpreting NEPA. These four elements define what effects the STB must examine under NEPA.

- *Should the STB consider "reasonably foreseeable" effects that are outside the agency's jurisdiction and control? If so, why? And if not, why not?*

**Response:**

As the STB recently explained in the Uinta Basin rail construction case (Uinta) (Docket No. FD 36284), under Supreme Court precedent, agencies are generally not required to examine environmental effects that result from actions that are outside an agency's jurisdiction and control. See Department of Transp. v. Public Citizen, 541 U.S. 752 (2004) (Public Citizen). However, agencies may examine other effects such as cumulative effects, which are effects of other past, present, and reasonably foreseeable future actions that may be outside the agencies' jurisdiction but affect the same resources as the action before an agency.

- *Should the STB propose NEPA alternatives that are outside the agency's jurisdiction?*

**Response:**

The purpose and need of the applicant often defines the scope of the alternatives that the Board considers in its environmental reviews. Therefore, the alternatives considered will typically be within the STB's jurisdiction.

- *Is considering whether an effect is “reasonably foreseeable” analogous to considering “proximate cause” in tort law? Do you believe there is any difference between “proximate cause” and “reasonable foreseeability”?*

**Response:**

Reasonable foreseeability is part of, and subsumed in, the proximate cause analysis. Proximate cause also takes into account other considerations such as the nature and length of the causal chain. In Uinta, the STB relied on the Supreme Court’s decision in Public Citizen, finding that agencies are required to examine environmental effects only where there is a reasonably close causal relationship between the environmental effect and the alleged cause, analogous to the doctrine of proximate cause from tort law. See Public Citizen, 541 U.S. at 767 (citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983)).

- *NEPA uses the terms “environmental impacts” and “environmental effects,” but it does not use the term “direct effect” or an “indirect effect” in the statute. How do you approach the decision on whether to consider “indirect” or “direct” effects in a decision before the STB?*

**Response:**

Under the current CEQ regulations, agencies are required to look at both “direct” and “indirect” effects, as well as “cumulative” effects. The STB must comply with the applicable CEQ regulations in conducting its environmental reviews.