

Written Questions from Chairman John Thune to the Honorable Ann Begeman

Forward-Looking Issues.

Question 1. What do you view as the greatest opportunities and challenges facing the rail industry over the period of this authorization and in the long-term?

Answer. The industry is in the midst of responding to a large number of significant regulatory changes—both final and proposed rules—including those by the Federal Railroad Administration (FRA), the Pipeline and Hazardous Materials Safety Administration, the Environmental Protection Agency, and the Surface Transportation Board (STB or Board). For example, rail carriers are working to meet requirements for oil tank cars and locomotive engines, while responding to proposed changes to braking systems and crew sizes. The carriers are also adjusting to plummeting coal volume demand that is not likely to rebound. These and other challenges are coupled with the massive expense and significant technical demands associated with the creation, installation, testing, and day-to-day implementation of Positive Train Control.

Over my objection, the Board has also recently proposed altering several long-standing regulations that could greatly affect freight rail operations in the long term.¹ These proposals include new competitive switching rules (that are so vague as to invite more questions than answers) and regulating commodities that have been exempt from agency regulation for over 30 years. If merely pushed forward to final rules, the agency will impose the most significant regulatory changes since implementing the Staggers Act.

Maintaining successful rail operations, despite the ultimate requirements and impacts of all these regulatory changes combined, will be the greatest challenge facing the rail industry through 2020 and beyond. While I do not subscribe to a view that any regulation is too much regulation, I firmly believe that we, as regulators, must be very thoughtful and informed in our approach to regulatory change. And we simply must listen to stakeholders—including the rail industry—to ensure that what may be good regulatory intentions do not result in unintended harm to carriers and their shippers.

Investigations.

Question 2. Understanding the investigative authority rulemaking is an on-going proceeding and you cannot divulge information about the final rule, I have a couple questions of clarification about the proposed rule.

- a. Under the proposed rule, what do you anticipate as the timeline for the initial fact-finding phase? Under the proposed rule, how long do you think a fact-finding**

¹ EP 711(Sub-No. 1), Reciprocal Switching, (STB served July 27, 2016) (Begeman dissenting in part) and EP 704, Review of Commodity, Boxcar, And Tofc/Cofc Exemptions, (STB served Mar. 23, 2016) (Begeman dissenting)

phase would typically take, and could you explain the policy or factors limiting the time of that phase?

Answer. The statute clearly states that the Board may only commence an investigation on its own initiative to investigate issues that are of “national or regional significance.” In my view, that investigative criteria demands that the initial fact-finding be carried out expeditiously (i.e., limited to no more than a 45 to 60-day period). It is important that the Board and its staff be held accountable at each phase of this new investigative process. Defined time frames would help ensure that investigations do not drag-on. Therefore, I hope the Board will embrace a limited initial fact-finding period so that it can then respond swiftly to any identified issues of national or regional significance.

b. Under the proposed rule, how [do] you anticipate the agency will determine whether an issue is of national or regional significance?

Answer. In identifying issues of national or regional significance, the Board could look for issues impacting operations at congested rail hubs, or issues that could disrupt services at moments of peak demand (e.g., disruptions that could impact propane delivery before winter or fertilizer delivery before planting). In addition to following regional and national news reports, the Board should closely monitor any trends shown through the weekly data reporting of the Class I carriers, information provided to the Board’s Office of Public Assistance, Government Affairs, and Compliance on monthly calls with the carriers, any trends shared on the Rail Customer and Public Assistance Program’s call log, and information obtained from the Rail-Shipper Transportation Council and the Rail Energy Transportation Advisory Committee, and from meetings attended throughout the year by Board Members or staff.

Question 3. As you know, the law requires the Board to separate investigative and decision-making functions of staff to the extent practicable. Understanding that some hiring of investigative staff may depend on appropriations, in the near-term, what protections do you anticipate instituting to separate these functions and ensure due process is preserved?

Answer. Although the statute provides that the Board Chairman is responsible for administering the Board, I believe a Chairman should invite his or her colleagues’ input on how best to fulfill the Board’s obligations, including agency budgeting, staffing, and other determinations that could significantly affect the Board’s overall productivity. With regard to how the Board will keep separate the staff investigative and decision-making functions, the Board’s budget should be allocated in a manner that keeps the two functions separate as a matter of course. Should the Board find that circumstances have arisen requiring an overlap of staff duties for the fair and timely resolution of a particular matter—which I think would be a limited exception—I believe the Board would have to be transparent and inform the affected parties and the House and Senate Committees of jurisdiction.

Rate Cases.

Question 4. Understanding you may be somewhat limited by the on-going proceeding, could you speak to potential ways you believe the Board could improve its administrative handling of rate cases?

Answer. I am a strong advocate for the Board's use of technical conferences, compliance orders, and other administrative tools to work with parties to ensure the successful submission of complete cases. The Board could interact much more with the parties to communicate expectations – especially when it comes to addressing novel issues presented in the pleadings. The Board could also do more to limit the scope of contested issues between the parties and do so early in a case. Sometimes complainants and defendants go too far on novel evidentiary issues or obscure technical points that greatly expand the scope or impact of the case, yet the Board remains silent. The Board should actively manage rate cases to ensure that they will be handled within the time frame mandated by Congress, and should avoid asking parties for supplemental filings (imposing time and expense on the parties) and then choosing not to make a finding about the information sought.²

Ex Parte Communications.

Question 5. Could you provide specific examples of proceedings where ex parte communication was not used but would have provided a great benefit?

Answer. The Board needs to embrace more interactive, timely, and responsive decision-making. In order to do so, this agency's extreme interpretation of its ex parte communication regulations must be changed. It would be a definite benefit to the Board and the public for Board Members and staff to meet and hear directly from stakeholders during rulemaking proceedings so that we can establish the most informed policies. If the Board were to more broadly engage with its stakeholders, it would be important to do so in a transparent manner by disclosing any contacts with individuals or groups and thereby avoid any appearance of bias or impropriety. Other agencies that balance adjudications and regulations have managed to strike an appropriate balance when it comes to ex parte contacts. The Board could and should do the same, and while I am pleased that we have taken a few recent steps in this direction, I think we should do so routinely.

With respect to proceedings in which a waiver of the ex parte communications would have been helpful, one example is EP 704, Review of Commodity, Boxcar, and Tofc/Cofc Exemptions. The record in this proceeding was created over half a decade ago, before two of the three current Board Members were even appointed (and my five-year term since expired). For this Board to take informed action, we should have asked interested stakeholders to update the docket and allow an opportunity for Board Members to hear first-hand from stakeholders. Doing so would

² See Total Petrochems. & Refining USA, Inc. v. CSX Transp., Inc., NOR 42121, (STB served Sept. 14, 2016) (Begeman dissenting in part)

have helped Board Members to better determine whether changes were necessary, rather than relying on a stale record and a staff analysis that would have been as relevant five years ago as when the majority issued its March 2016 proposal repealing certain exemptions and inviting comment on all exemptions. I believe an ex parte waiver could still be beneficial and better position each Board Member in preparation for the recently announced January 2017 “next action” in this proceeding.

Another ongoing proceeding that still could benefit from an ex parte communication waiver is the grain rate proceeding (EP-665). The Board started this proceeding at my urging back in 2013. Since then, the Board has sought multiple rounds of comments, held a hearing, and created a substantial record. Yet after all of that time and effort, the Board has proposed only the outlines of an approach, through an Advanced Notice of Proposed Rulemaking, which will now require the stakeholders to consider, analyze, and again participate in multiple rounds of additional comment. These new rounds of comment are necessary since the Board is using its formal rulemaking process without “ex parte” contact and therefore has limited opportunities for stakeholder interaction. But if the Board could have pulled in stakeholders from the beginning (with the requisite transparency) and gotten the specific information the Board needed about the market, the rate challenges faced by grain shippers, and the solutions proposed by the stakeholders, then this whole process may have been made much more efficient for the Board, the stakeholders, and the public.

Question 6. As the Board and the Federal Railroad Administration propose and finalize statutorily-required and discretionary rules on railroad stakeholders, I have a couple of broader questions.

- a. Has the Board engaged, or considered engaging, in any interagency effort to assess cumulative regulatory burden or the cumulative effects of regulation on railroad investment, operations, and customers?**
- b. How does the STB ensure balanced regulation – providing shippers with meaningful access to regulatory remedies while allowing rail carriers to earn adequate revenues and reinvest in infrastructure – when proposals are considered together, as opposed to individually?**

Answer. A. I am unaware of any interagency effort to assess cumulative regulatory burdens or the cumulative effects of regulation on railroad investment, operations, and customers. However, I would certainly embrace coordination with the FRA to perform cumulative regulatory analysis and thereby help to ensure that a fair regulatory balance is achieved. Of course, the Board would first have to propose a discernable regulatory scheme that can be reasonably assessed. For example, as I noted in my dissent on the Competitive Switching proposal, the majority proposed a program that lacked a number of important details. The Board instead committed only to exploring certain matters through the rulemaking process and then establishing other key specifics through the course of individual adjudications. In the near term, that approach may enable the Board to avoid defending the likely true costs and impacts of its

Competitive Switching proposal. Such an improvised approach makes the assessment of cumulative regulatory burden, the anticipation of cumulative effects on railroad investment, operations, and customers, and ensuring balanced regulation all but impossible.

Answer. B. Generally, I don't believe the Board, as a whole, has made any real attempt to ensure a "balanced" regulatory agenda. In fact, even when the Board initiated a regulatory review in 2011 to determine whether any of the Board's regulations are "ineffective, insufficient, or excessively burdensome, and how to modify, streamline, expand, or repeal them..." it failed to take any meaningful action as a result. Despite considerable stakeholder input, the Board merely replaced obsolete references and corrected spelling and other regulatory errors.³ Certainly a broader view of the Board's regulatory activity is warranted, especially with the industry shouldering the significant challenges posed by so many federal agencies in so many different ways as I noted in my response to Question 1.

³ See No. EP 712, IMPROVING REGULATION AND REGULATORY REVIEW (STB Served Feb. 18, 2016) (Begeman commenting)