

**SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION:  
QUESTIONS FOR THE RECORD**

**FROM THE NOMINATIONS HEARING  
ON JUNE 24, 2021**

**Written Questions Submitted to Karen Hedlund to be a Member of the Surface  
Transportation Board**

*Submitted by Senator Roger Wicker, Ranking Member*

**Key Priorities**

**Question 1:** Ms. Hedlund, as the newest Member on the STB, what will be your priorities, should you be confirmed?

**Response:**

The Board has received notices of intent to file for approval the first Class I merger transaction since the Board's merger rules were revised in 2001 (Kansas City Southern and Canadian Pacific and Kansas City Southern and Canadian National). The Board is also reviewing the pending acquisition of Pan Am Railways by CSX Transportation, Inc., as well as the acquisition by Watco of several Canadian National lines in Wisconsin and northern Michigan. Merger transactions can be time-consuming, complex, and controversial, and can have a profound impact on the shape of the rail industry and the way in which rail service is provided. As a member of the Board, one of my key priorities will be to ensure that these proposed transactions undergo fair, careful and expeditious consideration, in keeping with the laws and regulations administered by the agency.

Additionally, I am looking forward to working with the Board on several rulemaking proceedings that have important implications for the railroad industry and how rate and other disputes are resolved. These pending proceedings include proposed new procedures to reduce the cost, complexity, and duration of rate reasonableness cases, particularly for smaller disputes. A related proposal submitted to the Board would involve a voluntary arbitration procedure for rate review in smaller cases. Other proceedings involve reviewing the exemption for some commodities which have been exempt from Board regulation for several decades, and a proposed rule to revise the agency's "reciprocal switching" rules.

I am deeply committed to carefully studying the issues and taking account of the view of the Board's stakeholders to ensure that regulatory processes are meaningful, fair and accessible.

The Board will also be playing an increasing role with respect to intercity passenger rail that is part of the interstate rail network. This is an area that I spent considerable attention to during my tenure at the Federal Railroad Administration, and I hope that this experience will benefit the Board in its decision making. However, I recognize there may be difficult issues to be resolved. Many of these issues relate to matters that have recently been submitted to the Board after years of unsuccessful negotiation by the parties, or have otherwise been the subject of several years of litigation. My priority will be to work with the Board, its staff and the parties, to get a full understanding of all the relevant facts and concerns, and reach a resolution in an expeditious manner.

***Submitted by Senator Dan Sullivan***

**Question 1:** Ms. Hedlund, conducting cost-benefit analyses for proposed regulations has been a best-practice undertaken by agencies at the behest of both Democratic and Republican Administrations. Given your extensive experience at the Department of Transportation, can you explain your views on using cost-benefit analyses to improve regulatory outcomes?

**Response:**

In accordance with Executive Order 12866 and Office of Management and Budget Circular A-4, the Federal Railroad Administration performs cost-benefit analysis in connection with issuance of rules and regulations. In my experience, the FRA gave due regard both to how such analysis was undertaken and the results of such inquiry, as a factor in deciding whether to move forward with a particular regulatory initiative. However, it is my understanding that the STB, as an independent economic regulatory agency, is not subject to these directives. I believe that at least to some extent this is something that the Board already undertakes, but I would like to learn more about the agency's existing processes. I also understand that there is a pending proceeding that touches on the issue of having formal cost-benefit analysis in significant STB rulemakings, and I do not want to appear to prejudge the outcome. I believe that my past experience at FRA will be beneficial to the Board in reviewing the pending proceeding.

***Submitted by Senator Lee***

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

**Response:**

Please see my answer to question from Senator Wicker, above, which outlined my key priorities, if confirmed as a Board member.

**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?

**Response:**

As noted above, in my response to Senator Sullivan’s question pertaining to cost-benefit analysis, I have previous experience with this phase of the regulatory process and grant-making process from my tenure at FRA as Deputy Administrator and Chief Counsel. With respect to the STB, I understand that there is a pending proceeding on the issue of the STB formally adopting cost-benefit analysis as a component of significant rulemakings, and I believe that my past experience will be very valuable to the Board, as it considers this proceeding. In applying cost-benefit analysis it is critical to determine what costs and what benefits should be measured, and how they should be measured. Recently, APTA and AASHTO sponsored development of a guide to assist cities, metropolitan agencies, state DOTs, and federal agencies in using more robust and useful economic benefit evaluations for proposed passenger rail projects. See “Framework for Assessing the Business Case ROI for Intercity Passenger Rail Corridor Investments,” June 2021. [https://rail.transportation.org/aashto-rail-resouce-center/arrc-resources/Additional or different costs and benefits may be appropriate for evaluating regulations, depending on the scope and purpose of the regulations. For example, costs and benefits of regulations that impact market behavior should take into account a broad range of costs as well as benefits. Those that relate solely to regulatory process may be more narrowly defined. In my experience at USDOT, benefit-cost analysis was generally considered a critical factor in evaluating proposed projects and regulations, but there may have been circumstances where other policy factors were deemed determinative or where the costs were insignificant and/or benefits were difficult to measure or speculative.](https://rail.transportation.org/aashto-rail-resouce-center/arrc-resources/Additional%20or%20different%20costs%20and%20benefits%20may%20be%20appropriate%20for%20evaluating%20regulations,%20depending%20on%20the%20scope%20and%20purpose%20of%20the%20regulations.%20For%20example,%20costs%20and%20benefits%20of%20regulations%20that%20impact%20market%20behavior%20should%20take%20into%20account%20a%20broad%20range%20of%20costs%20as%20well%20as%20benefits.%20Those%20that%20relate%20solely%20to%20regulatory%20process%20may%20be%20more%20narrowly%20defined.%20In%20my%20experience%20at%20USDOT,%20benefit-cost%20analysis%20was%20generally%20considered%20a%20critical%20factor%20in%20evaluating%20proposed%20projects%20and%20regulations,%20but%20there%20may%20have%20been%20circumstances%20where%20other%20policy%20factors%20were%20deemed%20determinative%20or%20where%20the%20costs%20were%20insignificant%20and/or%20benefits%20were%20difficult%20to%20measure%20or%20speculative.)

- If a regulatory cost outweighs the benefit, should that be a determining factor that prevents the STB from moving forward with the regulation?

**Response:**

Please see answer to previous question.

**Question 3:** 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:**

The Rail Transportation Policy (RTP), codified at 49 U.S.C. 10101, sets forth Congressional policy objectives which inform the STB's regulatory processes and initiatives. The RTP includes tenets that the Board allow market forces to work freely, as well as tenets that call for fair and expeditious regulatory decisions when regulation is required. As the Board has noted, there is some degree of tension in the principles of the RTP, but, if confirmed, I will commit to upholding these core policies. I would also note that the Board has expressed a preference for private resolution of disputes rather than regulatory outcomes, and has implemented measures for alternative dispute resolution including both mediation and arbitration.

Given the changes and developments in the rail industry, I believe that it is very important to look closely at issues related to competition, and examine the Board's statutes and regulations to make sure that the agency is promoting and fostering the goals of the Rail Transportation Policy.

**Question 4:** 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:**

Generally, the STB promulgates rules pursuant to its rulemaking power granted by Congress. The Board may also draw upon its statutory authority to promulgate rules that are not expressly mandated by Congress, as long as these regulatory initiatives are fully consistent with the Rail Transportation Policy and other statutory imperatives. For example, both the STB and its predecessor, the ICC, have utilized broad statutory exemption authority, codified at 49 U.S.C. 10502, to issue rules that streamline and expedite agency licensing procedures.

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

**Response:**

I believe that the STB, like other agencies, should, as a general matter, respect legal precedents, arising from court and administrative proceedings.

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

**Response:**

In enacting its rules, the Board, must consider the provisions of the Rail Transportation Policy that give high priority to maintaining competition, and to reduce barriers to entry into the rail industry. I can commit to you that I will look very closely at competition

issues and work with my fellow Board members to make sure that we have the right policies and procedures to advance the RTP.

**Question 5:** 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:**

I am aware that it has been the Board's stated position for many years to facilitate private-sector resolution of disputes, rather than litigated, regulatory outcomes. I fully support mediation and other forms of alternative dispute resolution. In recent years, I believe that the agency has increasingly channeled regulatory disputes into its formal mediation program, working in partnership with the Federal Mediation and Conciliation Service, and that many of these mediations have been successful.

I support these initiatives, which are in addition to the work done on an informal basis by the Board's Rail Customer and Public Assistance program to resolve disputes.

**Question 6:** 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?

**Response:**

The tenets of the Rail Transportation Policy, which dictate that competition and the demand for service should establish reasonable rates for rail transportation and additionally that reasonable rates should be maintained where there is an absence of effective competition. I can commit to studying issues related to revenue adequacy and the implications for the Board's rate reasonableness jurisdiction.

- Is imposing rate caps, price controls, or revenue reductions consistent with the deregulatory goals that Congress set forth in the Staggers Rail Act?

**Response:**

As noted in my response above, the Rail Transportation Policy instructs that competition and demand for services should be the forces that establish rates. The Staggers Act is

generally regarded as ushering in an era of pricing freedom driven by market forces and the Act eliminated rate caps and price controls of the previous regulatory era.

- Is there a negative relationship between the imposition of rate caps, price controls, or revenue reductions with railroad investments and innovation?

**Response:**

The Staggers Act was enacted, in part, to facilitate increased railroad investment and innovation in the industry that had been inhibited by certain aspects of the prior regulatory framework.

**Question 7:** 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”?

**Response:**

The public interest is, in part, defined by particular provisions of STB’s governing statutes. For example, in the statute pertaining to rail line abandonments, the Board’s assessment of public convenience and necessity must consider whether the abandonment would have a serious, adverse impact on rural and community development. Where the public interest is not expressly defined, I believe that the Board should refer back to the goals set forth in the Rail Transportation Policy.

- Are there any limits to the STB’s determination of what constitutes “public interest”?

**Response:**

As noted above, the public interest is often defined by specific STB governing statutes and otherwise informed by the tenets of the Rail Transportation Policy.

- 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:**

I believe that when weighing the “public interest” in matters before the Board, the agency should be primarily guided by specific statutory criteria and the tenets of the Rail Transportation Policy. However, I believe that in certain situations, consideration of matters of safety and environmental values, which are not—strictly speaking—within STB jurisdiction may bear on the question of the public interest and be incorporated into the Board’s analysis.

**Question 8:** 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:**

This is an issue that I dealt with at the Federal Railroad Administration in helping to negotiate Service Outcome Agreements required to implement passenger rail grants that involved infrastructure improvements to host freight lines. This is also an issue that will be directly before the Board in several pending matters, and I look forward to learning more about how such interests can be reconciled under that regulatory framework administered by the STB.

**Question 9:** 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:**

The STB's environmental reviews are conducted by the STB's Office of Environmental Analysis (OEA). OEA prepares environmental documentation in rail constructions, abandonments, and certain acquisitions and other proceedings to satisfy the STB's obligations under NEPA. OEA then makes environmental recommendations to the Board for consideration in decisions for which environmental review is required.

Under NEPA, agencies are required to examine the reasonably foreseeable environment effects that would be caused by a proposed major federal action.

- 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:**

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). Where appropriate, agencies may also examine 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:**

Courts have found that alternatives that agencies should consider are driven by the purpose and need of the applicant and therefore, alternatives are generally options that would be within the agency'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:**

Under Public Citizen, 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)). Reasonable foreseeability is part of, and subsumed in, the proximate cause analysis.

However, as used in tort law, proximate cause addresses what has happened in the past. NEPA looks at what could happen in the future. The role of NEPA is not to remedy past harms but to prevent harms from happening in the future.

- 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 would you approach the decision on whether to consider “indirect” or “direct” effects in a decision before the STB?

**Response:**

Under the previous Council on Environmental Quality (CEQ) NEPA implementing regulations, agencies were required to look at both “indirect” and “direct” effects. The current CEQ regulations only require agencies to look at environmental “effects.” I understand the CEQ regulations are currently under review by CEQ.