

Response to Written Questions by The Honorable John Thune to Vice Chairman Deb Miller

Forward-Looking Issues.

Question 1. What do you view as the most significant challenge facing the Board as it completes implementation of this legislation, and how do you plan to address those challenges?

Implementation of the STB Reauthorization Act of 2015 (the Act) continues to progress well. However, a number of challenges still remain. The most significant is inadequate funding. As I noted in my written testimony, there will be a significant cost resulting from the fact that the Board is now independent from the U.S. Department of Transportation. The Act also directs the Board to issue decisions on rate cases more quickly and conduct investigations, which will require more staff. There are also the costs associated with adding two new Members, continuing to improve our IT infrastructure (where we have made significant progress), and moving/relocating to new offices. As noted in my written testimony, even by conservative estimates, there simply is not enough funding to do all of these things. Accordingly, the Board is going to have to make some tough choices over which functions, including certain aspects of the Act, get priority.

Another challenge to implementing the Act is the inefficient nature of the Board's processes. As I noted in my written testimony, the Board lacks a systematic way of managing our caseload. While the mandated reports on unfinished regulatory proceedings have helped speed up rulemakings, the Board currently has a significant number of non-rulemaking proceedings before it as well. Juggling all of these cases, along with the rulemakings and other requirements of the Act, will require greater organization and discipline.¹ The Board's processes are also currently too stove-piped. As an example, I noted in my written testimony that the Board staff currently briefs all Members on cases individually. This is difficult enough with three Members, but will be cumbersome with five.

While I support the Act's expansion of the Board to five Members, I am concerned that this change will not produce the intended benefits if the Board does not make some internal changes. In particular, the Board needs to improve communication and collaboration between the Members. The Chairman recently sent the just-completed rate methodology study from our consultant (InterVISTAS) to the House and Senate oversight committees, with a letter stating that the report satisfied the Act's requirement that the Board conduct a study on alternatives to the Stand-Alone Cost (SAC) test. This letter was sent without Board Member Begeman's or my knowledge, and it was done contrary to my preference that the Board provide its own analysis of InterVISTAS' conclusions before reporting to Congress. I believe that unilateral actions such as this are contrary to the reason Congress established a multi-Member Board. It eliminates the

¹ See Tri-City Railroad Co.—Petition for Declaratory Order, Finance Docket No. 35915 (STB served Sept. 14, 2016) (Miller separate comment) (urging the Board to apply the same principles for setting deadlines in regulatory proceedings to all proceedings).

counterbalance that the other two Members are supposed to provide and creates confusion among our stakeholders over the direction the agency is taking.

Lastly, from a substantive standpoint, I think the most challenging aspect of the Act will be determining what actions, if any, the Board should take regarding the process for determining rate reasonableness. In my opinion, this is the most important issue that the Board will face in the months ahead. As I have made well-known in my separate expressions in rate cases, I have concerns about continued use of the SAC test. Many shippers have also clearly lost faith in the test, and even railroads, which for the most part see the economic underpinnings of the test as still sound, would be hard-pressed to deny that the cases have become increasingly cumbersome, expensive, and time-consuming.

The report from InterVISTAS did not uncover any “silver bullet” approaches – either in academic literature or from other countries – that could be used in SAC’s place. However, that does not mean that the Board should give up on the idea of an alternative to SAC or looking for ways that the SAC test itself might be improved. The roundtable discussion that the Chairman recently announced will be an important first step – though it is important that it is not the last step – in pursuing this objective. In order to ensure that the Board obtains meaningful feedback on the InterVISTAS report, it will be important that the roundtable represent as wide a range of views as possible. Based on the feedback we receive at the roundtable, the Board will then have to determine how best to proceed.

Question 2. 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?

The greatest challenge facing the railroad industry is the shift in the type of traffic that they haul. The fact that the railroads’ coal business has significantly decreased has been well-publicized, and even if volumes recover, reports suggest that still are unlikely to return to levels close to those of just a few years ago. This loss in coal business though may provide the railroad industry an opportunity in the form of excess capacity, which could be used to grow other lines of business. However, for this to happen, in my view, railroads will need to have a greater customer-oriented focus.

Investigations.

Question 3. 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 phase would typically take, and could you explain the policy or factors limiting the time of that phase?

I appreciate the question, given that the concept of the fact-finding phase appears to have created a great deal of angst among our stakeholders. Because the rulemaking is still pending, I need to be careful to not make any statements that could be construed as prejudging the matter. I can say that, in most cases, I think the fact-finding will be so organic and unstructured that one could not easily assign a timeline to it. That being said, the parties to this proceeding have raised some valid reasons why a set time period would be helpful. In considering what the final rules should require, I will keep an open mind to the comments submitted by stakeholders on this issue.

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

Again, I appreciate the question, as this is another aspect of the proposed rules on investigation that seems to have caused consternation among our stakeholders, but must again be careful about commenting too much. Given our limited resources, I think that when the Board uses this authority, it is likely to be on matters where we can have the greatest impact, which will mean matters that by their nature are without a doubt of national or regional significance. That being said, I understand the arguments raised by some parties in our rulemaking for why more guidance is needed on this issue. I will carefully consider those views in deciding on the final rules.

Question 4. 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?

To ensure that the investigative and decision-making functions remain separate, the Board will have to be disciplined about keeping staff that work on each function separate and ensure that they do not communicate about the matter. While I cannot comment directly while the matter remains pending at the Board, no matter what path the Board ultimately chooses, I am comfortable that the Board will be able to properly comply with this mandate in the Act. The Board has a lot of experience separating such functions within the agency. The staff of our Rail Customer and Public Assistance section, which assists stakeholders and practitioners on matters that often turn into formal proceedings, are “walled off” from the rest of the agency. This means that they know not to discuss matters that they work on with anyone outside the section, and the rest of the staff knows not to ask them about such matters. The same restrictions apply when the agency uses Board staff as mediators. In my observation, the staff has taken these restrictions on communications very seriously.

Rate Cases.

Question 5. 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?

I think that the steps needed to improve the administrative handling of rates cases are already being taken. The Board wisely hired a consultant in 2014 to review the workflow process in rate cases, after which time the consultant concluded that there essentially was no process. The consultant therefore issued a long list of recommendations that the Board should implement. During my time as Acting Chairman, I directed the agency to extend our contract with the consultant so that it could advise and assist the agency in the implementation. Although Commissioner Begeman and I have generally not been part of discussions with the consultant, it is my understanding that they have worked with our staff to implement project management practices that did not previously exist. This includes the appointment of a rate case manager; establishment of rate case teams; defined roles and responsibilities for each team member; creation of a detailed schedule; identification and prioritization of significant “calls;” more structured meetings; and a more rigorous quality assurance process.

Ex Parte Communications.

Question 6. Could you provide specific examples of proceedings where ex parte communication was not used but would have provided a great benefit?

I personally feel that ex parte communication would help in most rulemakings that involve complicated policy matters and that have broad, industry-wide implications. A few notable examples of where ex parte meetings would have been particularly useful are the Board’s proceedings involving fuel surcharges, Amtrak on-time performance, and the original proceeding in which modifying the reciprocal switching standards were first proposed.

In the fuel surcharge proceeding,² the Board initiated an ANPRM to determine whether it should eliminate or modify its “safe harbor” program, which provides that if railroads base their changes in the amount of their fuel surcharges on the Highway Diesel Fuel Index, they are safe from legal challenge. Because this is still a pending matter, I cannot comment too specifically, but I do believe that this is a proceeding where ex parte communications would have had significant value.

The rulemaking setting standards for Amtrak on-time performance³ is another example where ex parte communication would have helped, not just in terms of helping educate the Board, but allowing the Board to educate our stakeholders. Based on the comments received in the proceeding, I believe that there was significant confusion from many parties over the Board’s proposal to use end-point arrival times as the threshold for initiating an investigation. Perhaps

² Rail Fuel Surcharges (Safe Harbor), STB Docket No. EP 661 (Sub-No. 2).

³ On-Time Performance Under Sect. 213 of the Passenger Rail Investment and Improvement Act of 2008, STB Docket No. EP 726.

had the Board Members been permitted to engage in face-to-face dialogue with the stakeholders, they would have better understood the Members thinking, and the Members would have been more aware of the stakeholders' perception that using end-point arrival times implied a lack of concern about late arrivals at intermediate stops.

Finally, I think meetings would have been helpful in the docket in which the Board considered the National Industrial Transportation League's proposal rules for increasing use of reciprocal switching.⁴ While the Board did hold two hearings there, in my opinion, conducting individual ex parte meeting with the parties, rather than directing them to submit multiple rounds of filings, would have been more useful. That being said, I am pleased that the Board is holding such meetings in the new docket on reciprocal switching.

Question 7. During the hearing, in discussing ex parte communications, Chairman Elliott mentioned the trade-off between the right to a fair hearing and more efficient communication. If ex parte communication rules are loosened, could you provide more detail on potential measures to reinforce principles such as the right to a fair hearing, impartiality, and transparency?

I should clarify here that while I have advocated that the Board eliminate its prohibition on ex parte communications, I do not advocate that such communications be utilized in every regulatory proceeding, nor that any of the protections that would be required to protect parties' rights to due process be ignored. There will certainly be proceedings where the value of ex parte communications would be limited and thus not worth pursuing. But if ex parte meetings are held, the Board should of course implement procedures to ensure that they are transparent and conducted in a fair manner. The measures that the Board can take include: having an attorney-advisor from the Board at the meeting to monitor the conversation and to cut-off any discussion that may be improper; disclosing the date, time, and participants present for all meetings; placing written summaries of the meetings in the public record of the agency proceeding (as well as any materials shared by stakeholders); and providing an opportunity for parties to provide comments in response to the meeting summaries. As I noted in my written testimony, I would actually like to see the Board increase transparency by conducting more of its work in public through actions like voting conferences, public work sessions, and workshops.

Cumulative Burden

Question 8. 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.

⁴ Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711.

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?

The Board frequently engages with the Federal Railroad Administration (FRA), but it is generally at the staff level. Our governmental affairs office meets with representatives from the FRA on a monthly basis; a member of the FRA participates in two of the Board's advisory committees; and our Office of Environmental Analysis works closely with the FRA staff on environmental reviews for railroad construction projects. However, there has been no coordinated effort to discuss the cumulative effects of regulatory efforts. It should be noted the STB and FRA have different statutory mandates, and as a result, the actions taken by one may not necessarily have bearing on the other. However, I can see value in making sure that each agency is kept apprised of the actions of the other, and I will discuss the idea of increasing discussions with the FRA with my fellow Board Members.

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?

I appreciate this question, as the spurt of Board activity in recent months has been the subject of much recent conversation. In the Board's decision proposing to revise our reciprocal switching proposal, I expressed my philosophy on this issue:

The Board's regulatory mission is set out in the Rail Transportation Policy (RTP) at 49 U.S.C. § 10101. Two important but competing goals in the RTP are to promote an efficient, competitive, safe and cost-effective rail network by enabling railroads to earn adequate revenues that foster reinvestment in their networks, attract outside capital, and provide reliable service, while at the same time working to ensure that effective competition exists between railroads and that rates are reasonable where there is a lack of effective competition. As in all major rulemakings the Board undertakes, my goal here has been to develop a proposal for reciprocal switching that properly satisfies both of these goals.

So long as the Board adheres to the guidance set forth in the RTP, ensures that it develops comprehensive evidentiary records, is careful and thoughtful in its deliberations, and reaches decisions that are well-reasoned and based on sound evidence, I believe that the Board's actions – even when considered together – will strike the appropriate balance.