

**Statement by Ann D. Begeman
Member, Surface Transportation Board**

**before the
Senate Committee on Commerce, Science, and Transportation**

Field Hearing, Carnegie Town Hall, Sioux Falls, SD

***Freight Rail Reform:
Implementation of the Surface Transportation Board Reauthorization Act of 2015***

August 11, 2016

Thank you, Chairman Thune, for inviting me to appear here today along with my colleagues, Chairman Dan Elliott and Vice Chairman Deb Miller. I appreciate your strong interest in the Board's work and your Committee's oversight of our ongoing efforts to implement the STB Reauthorization Act, which you championed. I believe the Board Members and the staff are fully committed to fulfilling the new law's directives, and importantly, meeting its deadlines. I can assure you that I am. And, I am pleased to report that the new law has already produced improvements in how the Board operates.

Since Chairman Elliott's testimony addressed each of the new law's directives and the actions the Board has taken over the past eight months to implement the STB Reauthorization Act, I will not repeat that information, but will offer my own views on the Board's implementation progress to date. In addition, I will offer my thoughts on additional actions that I would like the Board to take to further improve our way of doing business to better serve our stakeholders and the public. First, however, I'd like to briefly mention my background for those here in attendance who may not know that I am also a fellow South Dakotan.

I grew up 20 miles west of here, on a dairy farm south of Humboldt. After graduating from the University of South Dakota, I moved to Washington, D.C., to work for my hometown Senator. I worked as a Senate staffer for over 20 years until my appointment to the Surface Transportation Board five years ago. Much of my work in the Senate focused on transportation policy, including working on the legislation that created the STB in 1996. That background gives me as an STB Board Member a unique perspective. I know how important reliable and affordable rail service is to South Dakota's producers and the state's economy—and, indeed, its importance to shippers and economic prosperity across the country. And, I know how important it is to our stakeholders, Congress, and the Board for our agency to function effectively.

Frankly, I have had many frustrations serving as the Board's minority Member over the past five years. I certainly was aware of the Board's reputation for its sometimes glacial pace long before my appointment. But to experience it first-hand, in a position from which I expected to positively influence that pace through collaboration with my fellow Members—I was in for a big surprise.

While the Chairman serves as the “executive head” of the Board and has many important overall management responsibilities, I strongly disagree with the Chairman’s stated view that he alone is “the person responsible for moving the docket forward.”¹ I believe that all of us must share in that responsibility. All of the Board Members and the very capable staff must and can work together to make the agency more efficient and effective. I want to help improve the functioning of the agency, not embrace the status quo. Thanks to the STB Reauthorization Act, some long overdue progress is starting to be made.

STB Reauthorization Act (Section 5) allows for nonpublic collaborative discussions between a majority of Board Members; Summaries of such discussions must be made publicly available.

First, Board Members can now meet and talk about important pending issues. This has been made possible by Section 5 of the STB Reauthorization Act, which allows for nonpublic collaborative discussions among a majority of Board Members. Prior to that provision’s enactment, we couldn’t talk about pending issues unless it was in an open meeting, such as a hearing like this one, due to constraints imposed by the Sunshine Act. Such restrictions clearly hindered the Board’s productivity.

We held our first “Section 5” meeting in February to discuss the pending data collection rulemaking to require Class I railroads to publicly file various weekly reports on their service performance in United States Rail Service Issues—Performance Data Reporting, Docket No. EP 724 (Sub-No. 4). That meeting ultimately led to the inclusion of additional targeted data reporting in our supplemental proposed rulemaking than what was first under consideration. I won’t comment further on that important rulemaking because it is pending, but I do want to thank you, Chairman Thune, for your interest in the rail service data collection, and want to note that a number of agricultural and other interests have provided helpful comments in response to our proposal. I am very hopeful that we will issue a final rule before the end of the year.

We have also held Section 5 meetings to discuss the Reauthorization Act’s requirements concerning both arbitration and investigations and how best to implement those directives. In addition, we have made use of the new authority to meet and discuss the petition for rulemaking to adopt revised competitive switching rules in Docket No. EP 711, which the Board recently acted on.

When these meetings are held, the Board’s General Counsel is required to be in attendance, and our meetings must be disclosed. I want to make clear that we can’t meet together in secrecy, but instead, the Reauthorization Act promotes transparency by requiring that a summary be prepared and made public two days after a meeting, unless the meeting relates to an ongoing proceeding, and then it is made public on the date of the final Board decision.

I think it is very important that the Section 5 summaries be as informative as possible. Currently, meeting summaries have been posted regarding our discussions concerning the formal

¹ Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry., NOR 42130, (STB served June 20, 2014) (Elliott separate expression).

investigations rulemaking (April 5, 2016), and discussions concerning the voluntary and binding arbitration rulemaking (March 23, 2016). I hope that once a few more of the meeting summaries are made public, the Board will receive feedback regarding their adequacy. I expect we will continue to make good use of the new collaborative discussion authority and, again, want to thank you and your Committee for allowing us to do so.

STB Reauthorization Act (Section 15) requires quarterly progress reports on unfinished regulatory proceedings.

A second, key provision of the Reauthorization Act that has been a game-changer from my perspective is the requirement for deadlines and quarterly reporting of pending rulemakings. While the Chairman determines the dates that are established in the report, for the first time, I know that deadlines exist and the target dates for Board action. This information is not only helpful to Board stakeholders, but it is absolutely essential to me in trying to fulfill my responsibilities.

Several rulemaking proceedings identified in the quarterly report started before I joined the Board. One of those very dusty items has recently been acted on and is now off the Board's plate. A couple of other older proceedings have also received the Board's attention recently, which I believe is due largely to the prompting of the new law's quarterly reporting directive. I thank you and the Committee for imposing this helpful, practical requirement.

STB Reauthorization Act (Section 13) requires the Board to establish a voluntary and binding arbitration process for rate and practice complaints.

The new law also requires the Board to establish a voluntary, binding arbitration process for rate and practice complaints. This directive has already resulted in the Board issuing a notice of proposed rulemaking on May 12, 2016, to alter our existing arbitration regulations, last updated in May 2013. We updated those regulations three years ago in an effort to make them more useful to stakeholders, but did not have authority then to include rate complaints among the issues that could be arbitrated. We also had a different process for selecting an arbitrator, so we need to amend the process to comply with the one established in the new law.

The Board wants to do whatever it reasonably can to make arbitration a viable and effective litigation alternative. Comments on the NPRM were filed in June and July, and the Board intends to issue new final rules before the one-year anniversary of the STB Reauthorization Act's enactment, as directed.

Another litigation alternative that deserves mentioning is the Board's existing Rail Customer and Public Assistance (RCPA) Program in which anyone can seek informal assistance from a group of Board staff regarding a wide range of matters, including getting clarification about the Board's jurisdiction and procedures. The RCPA Program also helps with informal dispute resolution through mediation. The RCPA Program really stands out in my view as an agency success story, and the more we can do to spread the word of its existence and the RCPA staff's

willingness to help, the better. In my opinion, RCPA epitomizes one of your main themes of the STB Reauthorization Act, i.e., to head off problems between rail customers and carriers whenever possible, and to quickly resolve them when they do occur. That is the RCPA Program.

STB Reauthorization Act (Section 12) allows the Board to initiate investigations on its own initiative, rather than only on complaint. Such investigations must be of regional or national significance.

Mr. Chairman, I am hopeful that the Board's new investigative authority provided by the Reauthorization Act proves very useful, should it be needed, to help the Board in its work to oversee the national rail network. It will be essential for the agency to use it wisely. The Board issued a proposed rulemaking in May, and the last round of comments are due tomorrow, August 12, 2016. I cannot say much more on it since it is pending, other than that the Board intends to issue final rules by the December deadline. I do, however, want to acknowledge the service crisis of late 2013 and 2014, which I think prompted your Committee to include the investigative provision in the Reauthorization Act.

I must say that the service crisis was probably the most important and difficult matter the Board has faced during my time at the agency. It was very difficult for shippers, for railroads, and for the Board. But I believe the Board worked to meet the difficult challenges in a responsible way. Board Members and staff held countless meetings with rail officials and affected shippers. We held hearings in Washington, D.C., and in Fargo, N.D., to allow interested stakeholders to report on service problems, to hear from rail industry executives on their plans to fix the problems, and to explore additional options to improve service.

It was during the April hearing that witnesses from South Dakota and neighboring states alerted us to a very real danger that fertilizer would not be delivered in time for spring planting. I recall asking the agricultural witnesses if fertilizer wasn't delivered, despite the best of efforts of the carriers, "Is there a Plan B, a Plan C?" The answers were pretty grim, including one grower who indicated his alternative was not growing a crop, stating that "There is no plan B, no Plan C, no Plan D."

A few days after that hearing, the Board directed Canadian Pacific Railway Company and BNSF Railway Company to each report their plans to ensure delivery of fertilizer shipments for spring planting and to provide weekly status reports for a six-week period. While I don't suggest that the Board's action be credited with saving that crop year's spring planting, I do think we helped focus needed attention on the critical importance of the fertilizer deliveries.

Following the April hearing, I met with a group of staff on a weekly basis in an attempt to monitor service to determine whether it was improving. My strong preference was to give the rail carriers time to fix their problems, but with close Board oversight, rather than thinking government intervention or micromanagement could resolve things. But as I continued to witness the ever-growing backlog of rail car deliveries in the Midwest, particularly in North Dakota, South Dakota, Minnesota, and Montana, I thought we had no choice but to ratchet up our focus. At my urging, the Board directed CP and BNSF to publicly file their plans to resolve

their backlogs of grain car orders, as well to provide us weekly status reports pertaining to grain car service, beginning in June 2014. Our attention to the service problems also led to the weekly rail service performance reporting, beginning in October 2014. And, as already mentioned, the Board is considering a proposed rulemaking to make service data reporting permanent.

Although that service crisis is behind us, I have not forgotten and will not forget the many difficulties experienced during that time, nor the lessons learned. That experience helps inform almost every decision that I make as a Board Member. The Board must be ever vigilant in overseeing the rail network, and the Board's new investigative authority targeted toward matters of national or regional significance could help the Board address looming trouble, should it be found necessary.

STB Reauthorization Act (Sections 11 and 15) establishes procedures for rate cases (directing the Board to maintain one or more simplified and expedited rate review methods; requiring expedited handling of rate cases and shortened rate review timelines, and instructing the Board to assess procedures available in litigation before courts that could be applicable to expedite rate cases.

Finally, I want to call attention to the Reauthorization Act's provisions that address the Board's rate case procedures. The new law directs the Board to resolve cases more quickly and provides shortened timelines for rate cases brought under the Stand-Alone Cost methodology, also known as SAC. It also requires us to maintain one or more streamlined processes for cases in which the SAC test is too costly—and it is costly. And, the Reauthorization Act also directs the Board to initiate a proceeding to assess procedures used in court litigation that may help in expediting rate cases before the Board.

During my service at the Board, I have often voiced my serious reservations and concerns about the Board's rate review processes, particularly SAC, so I welcomed Congress's attention to these important matters. The SAC process is too costly, too time consuming, and too unpredictable. And, based on what I have heard repeatedly from agriculture industry representatives, they do not believe that any of the Board's current rate reasonableness methodologies—Three Benchmark, Simplified SAC, or SAC— provide meaningful access for the agricultural community. Their concerns prompted me to urge the Board to open the current proceeding in Docket No. EP 665 (Sub-No. 1), Rail Transportation of Grain, Rate Regulation Review.

My objective in that proceeding is to ensure the Board's rate complaint procedures are accessible to grain shippers and provide effective protection against unreasonable freight rail transportation rates. After all, the Board has a statutory responsibility to ensure that any captive shipper—including a grain shipper—has access to rate review if the shipper wishes to pursue it. I am very hopeful the Board will soon move the ball forward on this important proceeding. Since opening that proceeding at the end of 2013, the Board has received over 20 written comments and suggestions, in addition to oral testimony received at a public hearing on June 10, 2015, when we met to hear interested stakeholders' views on whether the Board's rate complaint procedures are accessible for grain shippers. In my view, this proceeding is also responsive to the

Reauthorization Act's directive for the Board to maintain one or more streamlined rate review processes for cases in which the SAC test is too costly.

With respect to assessing court litigation strategies, the Board initiated a proceeding on June 15, 2016. That proceeding, which was a directive of the Reauthorization Act, also invites ideas on ways to expedite SAC cases in particular. Before this proceeding began, the Board gathered information by informally meeting with stakeholders. Board staff met with 22 participants over the course of a month. These meetings were extremely helpful to the Board in preparing for this proceeding. And although I can't touch on substance, as it's a pending matter, I'll note that last week the Board received a number of comments in response to the Board's Advanced Notice of Proposed Rulemaking that appear to provide very constructive feedback.

I do want to mention that some actions have already been taken to improve the rate case process for pending cases, following on the heels of two very complicated and time consuming SAC cases. The Chairman has appointed a rate case project manager to help ensure rate cases do not get delayed. Other actions include the Board's recognition of the value of instructing parties on basic procedures for the format and submission of evidence (see Consumers²), the importance of holding technical conferences between Board staff and the parties (held initially at my urging), and the need to require supplements when presented with mismatched evidence (see TPI³). It is my strong hope that we will build on these improvements with the conclusion of the rate review directives of the Reauthorization Act.

Looking beyond the STB Reauthorization Act, there will always be more we can do to improve the functioning of the Board. If I had to point to the one thing that could provide the most bang for the buck (although it doesn't cost anything nor require Congressional action), it would be to change this Board's extreme ex parte communication regulations, which prevent Members and staff from discussing the merits of pending matters with any stakeholders or outside experts. I strongly believe that the Board needs to move into the 21st Century and embrace more interactive, timely, and responsive decision-making.

I am pleased to report that the Board has taken a couple of steps to make some changes on a case-by-case basis. The first action taken was last November when the Board waived the prohibition on ex parte communications to permit interested parties to meet with Board staff to discuss the proposed rules on railroad performance data reporting, and summaries of those meetings were posted on the agency's website. Although I would have preferred to have included the Board Members in that waiver, it certainly was a positive first step at opening up some needed dialogue on a pending rulemaking.

The second action was recently announced in the new proceeding on competitive switching, Docket No. EP 711 (Sub-No.1). There, the Board acknowledged that it would be beneficial for Board Members themselves to hear directly from stakeholders on the issues in that proceeding

² Consumers Energy Co. v. CSX Transp., Inc., NOR 42142 (STB served July 15, 2015).

³ Total Petrochemicals & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121 (STB served May 18, 2015); Total Petrochemicals & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121 (STB served July 24, 2015).

and to be able to ask follow-up questions. Special procedures will be followed to ensure that the public has a complete record of the evidence and arguments that the Board will consider in its decision-making and to maintain both fairness and accessibility. The Board will disclose the substance of each meeting by posting a summary of the arguments, information, and data presented to the Board Member at each meeting (including the names/titles of attendees of the meeting) and a copy of any handout given or presented to the Board Member.

I hope this is only the beginning of the Board's efforts to alter its ex parte restrictions. It would be a definite benefit to the Board and the public for Members and staff to meet and hear directly from stakeholders during rulemaking and other proceedings so that we can establish the most informed policies and make the most informed decisions. We need to loosen the Board's ex parte shackles, and we can do so while being transparent about any non-public meeting.

Again, Chairman Thune, thank you for your efforts to reauthorize our agency and hold the Board more accountable to shippers, rail carriers, and the public. Because of you and your Committee's efforts, the agency can no longer operate under a "business as usual" mentality. I would be happy to answer any questions.