

ENTERED
Office of Proceedings
July 28, 2017
Part of
Public Record

STB Listening Session (EO 13777)

Statement of John M. Scheib

Vice President – Law

Norfolk Southern Corporation

Docket No. EP 738

Good morning. I am John Scheib, Vice President-Law at Norfolk Southern Corp.

Thanks to Chairman Begemen for her leadership in implementing a process to follow the spirit of EO 13777. And thanks to all of you for serving on the Board's Regulatory Reform Task Force.

It is important that the Task Force make recommendations to set an agenda for the agency that is consistent with both:

- the deregulatory message of the Executive Order; and
- the deregulatory direction set by Congress over 35 years ago.

During our time together this morning, I'd like to focus on three main points.

- First, EO 13777 is very different -- and affirmatively deregulatory -- as compared to prior Executive Orders, which means this Task Force is asked to do more than simply repeat some of the unfinished work from Ex Parte 712.
- Second, because EO 13777 directs that "applicable law" should guide (or sometimes stay) the agency's hand in choosing those regulations that ought to be repealed, replaced, or modified, the Task Force should take time to remind itself that the governing statutes for the STB are themselves deregulatory.
- Third, the STB should use this Task Force to correct its course back to the directives of the Staggers Act and the Interstate Commerce Commission Termination Act.

THIS SHOULDN'T BE A REPEAT OF EX PARTE 712

The Board conducted a retrospective analysis of its regulations several years ago in Ex Parte 712, which was initiated in response to the 2011 Executive Order 13563 issued by President Obama. That Executive Order directed agencies to "modify, streamline, expand, or repeal" those regulations that were "outmoded, ineffective, insufficient, or excessively burdensome."

EO 13777 goes much further. It also calls for the creation of a Regulatory Reform Task Force, which is charged with two things: (1) to recommend ways to improve upon the implementation of regulatory reform policies, including EO 13563; and (2) to recommend regulations that ought to be repealed, replaced, or modified "consistent with applicable law." "Applicable law" is an important phrase, and we'll come back to it.

If I were to summarize the difference between the Obama-era Executive Order, and the one we are discussing today, it is this -- the purpose of EO 13563 was to achieve regulatory objectives more efficiently, while the purpose of EO 13777 is to **deregulate**. It says so right in the

preamble – “to lower regulatory burdens on the American people by implementing and enforcing regulatory reform.”

So, Executive Order 13777 should result in much broader more sweeping deregulatory action than was contemplated in Ex Parte 712. The Task Force’s efforts should not be merely Ex Parte 712 redux.

THE “APPLICABLE LAW” FOR THE STB IS DEREGULATORY

This deregulatory focus of EO 13777 should be taken especially seriously by any agency that carries a deregulatory mandate from Congress. EO 13777 expressly directs that “applicable law” should guide (or sometimes stay) the agency’s hand in choosing those regulations that ought to be repealed, replaced, or modified. Of course, the “applicable law” that is this agency’s lodestar is the most extraordinary example of deregulation in this country’s history – the Staggers Rail Act of 1980, which is widely regarded as one of the greatest public policy achievements of the 20th century.

This Task Force should search for ways to reorient the STB back towards its deregulatory lodestar. While good government and achieving regulatory efficiency are always laudable goals and you should never stop striving toward them, I would encourage the members of the Task Force to **think bigger** - to reverse the agency’s backsliding since Staggers and return to the deregulatory vision laid out by Congress nearly four decades ago.

COURSE CORRECTION IS NECESSARY TO GET BACK TO THE DEREGULATORY AIMS OF THE STB’S GOVERNING STATUTES

It is important to get back to the deregulatory principles enacted by Congress. By the 1970s, excessive regulations had taken their toll, and freight railroads were in financial crisis. As the Department of Transportation said at the time: "Railroading has fallen on difficult times" in large part because regulators could not keep up with changes in the marketplace with the development of the interstate highway system and trucking competition. There was insufficient capital to support service and safety. As the decade of the 1970s closed, the regulatory scheme had taken its toll with the ultimate result being widespread bankruptcies of railroads, including all the major railroads in the Northeast. The root cause of the problem was an economic regulatory system that was smothering the industry and that could not keep pace with markets.

Congress responded with the Staggers Rail Act of 1980. The results were extraordinary as railroads were unshackled to compete with other transportation modes under a regime that recognized the unique fixed costs of the industry. Productivity and volume increased, while real rates declined. And, as shown by a recent study by Jerry Ellig and Patrick McLaughlin, safety performance after Staggers improved dramatically not from safety regulation but because railroads were able to begin to invest in their infrastructure.

Seeing these results, Congress has not deviated from the deregulatory path taken in 1980. Congressional action since the Staggers Rail Act of 1980 has doubled down on deregulation in the Interstate Commerce Commission Termination Act, which further expanded the STB's ability to exempt railroads from regulation.

The genius of Congress in enacting Staggers and ICCTA is in recognizing that government regulation was not nimble enough to keep up with the changing market dynamics and competitive pressures facing the railroad industry. That principle is as valid today as it was in the 1970s. Only a deregulated railroad industry can react in time to changing events, whether the creation of the interstate highway system and the rise of truck competition following World War II, the recent development of new technologies in natural gas production that has changed the market for the transportation of coal, or other new forms of competition that are constantly changing and evolving.

Yet, the Task Force must help the STB to stop succumbing to the temptation to regulate. For example, the agency has proposed a rule that Congress has repeatedly considered and rejected – forced access. Congress has been clear and consistent on this point – the Board should intervene in the private marketplace only to remedy abuses. But the Board has proposed a rule that would depart from the law and force a Class I railroad to switch a competitor's traffic even in the absence of anti-competitive conduct. If adopted, this rule would undermine the financial health of the industry, reduce investment, and erode hard-gained operational efficiencies.

To read in comments in this proceeding that forced access is now being called deregulatory is a joke. No one would call it deregulatory if the government were considering telling Coke that it had to use its facilities to produce for Pepsi.

This Task Force should recommend that the STB withdraw this proposed rule and others like it that threaten a return to a failed, activist regulatory philosophy.

But this Task Force shouldn't stop at withdrawing proposed rules that are inconsistent with Staggers and ICCTA.

This Task Force should also take a look at existing regulations that are antiquated or outdated. That examination must begin with revenue adequacy. Profit regulation like the revenue adequacy constraint creates a cloud of uncertainty over the regulated entity. This uncertainty has the potential to stifle innovation, productivity, and competition, while hampering investment. Accordingly, regulatory history has proven this type of regulation is ill-advised as Professor Sappington explained to the Board at the hearing in this proceeding. This Task Force should recommend that the STB modify its proposed rule to follow in the path of other economic regulatory agencies by eliminating revenue adequacy as a basis for regulation.

There are plenty of other areas ripe for exploration. Reporting regulations, such as contract summarizes that serve no regulatory purpose, should be repealed. Environmental regulations should be modified to be streamlined. Jettison the limit price test to which both shippers and

railroads object. It may even be time to examine whether railroads should be exempt from filing anything more than a notice in an abandonment proceeding. And if not, it is certainly time to input cost inputs such as maintenance costs, which has not been updated since the 1970s. The Board should take up NS's request that it exempt more traffic from regulation given the immense amount of competition in the transportation marketplace much of which the STB has chosen to ignore.

This Task Force should be exploring bold actions to further use 49 U.S.C. 10502 in light of the extreme competition in the economy from all sources (modal, intermodal, product, and geographic) that have made regulation “not necessary to carry out the transportation policy of the United States” and where regulation “is not needed to protect shippers from the abuse of market power” precisely because this robust competition exists.

In conclusion, this Task Force is charged with conducting a wider-ranging examination of the Board's regulations than what occurred in EP 712. You have an opportunity to return the agency to regulatory policies that are more in line with what Congress envisioned nearly 40 years ago – a vision that brought the U.S. freight rail industry back from the brink of oblivion and transformed it into the envy of the world.

I hope you will seize it and make bold deregulatory recommendations.

Garrett Urban
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-
garrett.urban@nscorp.com