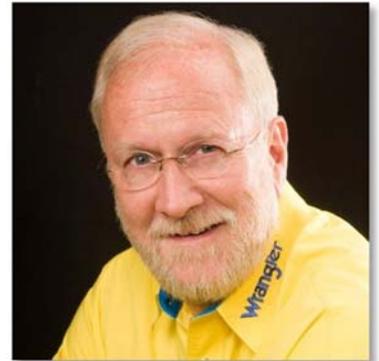


# STB HEARING REPORT

From: Terry Whiteside

Date: February 11, 2016



## Chairman Thune Meets with STB Chairman Dan Elliott for Update on Implementation of S. 808, STB Reauthorization Act of 2015

**Background:** When Chairman Thune's Senate Commerce Committee passed S. 808 in the spring of 2015, one of the major points the Senator made was Congress will keep a keen eye on the implementation of the provisions of the new bill and follow the progress closely. He has also indicated that if, after implementation, certain provisions need tweaking, he would be poised to consider tweaks that might help the transportation industry.

Chairman Thune met this week with STB Chairman Elliott to reinforce his commitment seeking real change at the Board.



Senator Thune's site published this photo showing the meeting

Under S. 808, there are several major changes and several hard deadlines for both implementation and reporting back to the Congress.

These include:

1. **Dispute resolution** – the process must be developed probably first by Ex Parte and then be rule making – and that is of immediate priority to the Congress
2. **Alternative rate and adjudication methodology** – the STB is currently finishing up three major Ex Parte's and these will likely after decision move to proposed rule making
3. **Arbitration procedures** – deadline is December 2016 – to both develop acceptable methodology and expand the pool of arbitrators
4. **Investigative powers** – the process for STB to enter into investigative review without shipper/carrier initiation must be established and completed by December 2016
5. **Development of the complaint database** at the STB and reported quarterly
6. Also a **complaint dashboard** – where in the process are each complaint – must be reported quarterly

7. **Improve structure within STB** for better communication within the agency – must be accomplished during the next year
8. **Administrative independence from the USDOT** – will take some time but must be watched carefully by shippers
9. **Hazmat regulations and develop of shipper hazmat requirements** while transporting on railroads, must have shipper input at STB proceeding
10. **Liability study on different allocation of risk of transportation** – and establishment of liability caps
11. **Addition of two new STB Board members** and possible a replacement for current expiring Board member which now allows the Board members to communicate face to face with each other.



## **Alliance for Rail Competition Hosts Meeting With STB Chairman Elliott**

## **and Board Member Ann Begeman at STB Headquarters**

On February 3, 2016, a dozen people representing ARC and industrial captive rail shipper interests including agricultural interests met at the STB with Dan Elliott, Chairman of the Surface Transportation Board, and then with STB Member Ann Begeman. Dan Elliott was accompanied by Jennie Sheng, his Chief of Staff, and Chris Diamond, his Attorney-Advisor. Ann Begeman was accompanied by James Boles, her legal and policy advisor. The group met with each member separately under STB constraints which do not allow members of the three member Board to meet together because it would constitute a quorum.

The captive shipper group was led by Terry Whiteside, Chairman of Alliance for Rail Competition (ARC), and also included ARC lobbyists Fran Boyd and Rick Meyers, as well as John Cutler, attorney for ARC.

Attending: Mike Scanlan, consultant for captive shippers of oil from ND and PA and formerly was Transportation Manager with PPL. Additionally, Tom Kramer, from Tronox - Rail Strategy Manager, which acquired the Green River WY soda ash operations of FMC Corporation and part of the Glass Producers Transportation Council. Ag interests were represented by Wayne Hurst of ID, who is on the STB's RSTAC (Rail Shippers Transportation Advisory Council); Collin Watters EVP of MWBC; Paul Kanning, northeastern MT farm producer representing MFU (Montana Farmers Union); Robert Newton, OR farmer representing Oregon Wheat Growers League; and Keith Kennedy, Executive Director, Ty Anderson and Casey Madsen, farmers from WY representing Wyoming Wheat Marketing Commission. Other representatives from MT, CO and SD got caught in weather (snow storms) and were unable to make to the Wednesday morning event.

Chairman Dan Elliott and Board member Ann Begeman began their sessions with the shipper attendees by provided brief bios. Dan Elliott is in his second term, after receiving confirmation last summer, and his term will expire in December 2018, subject to the possibility of his holding over in office for up to one year. This group met with Chairman Elliott last year at the Alliance for Rail Competition offices as he was undergoing the confirmation process.

Ann Begeman served on Capitol Hill for many years, mostly on the staff of the Senate Commerce Committee. Ann grew up on a dairy farm in SD. Her STB term has expired (December 31, 2015), but she can remain in office for up to a year, if not replaced or reconfirmed to a new term.

Vice Chairman Deb Miller, the third member of the STB, was away and unable to meet with the group due to a scheduling conflict. It should be noted that two new members of the STB are to be added as the Board expands to five members, per

passage of S. 808, the STB Reauthorization Act of 2015, which ARC fully supported and which took effect in December, 2015. This general wisdom on this suggests that the two additional members will be added after the Presidential elections meaning in 2017.

Shipper representatives discussed their concerns during the two meetings. These concerns included the following:

1. Rail service concerns have largely receded (though performance reporting should continue) due primarily to rail traffic slowdown affecting all of the nation's railroads, but rail rates remain high.
2. Negotiation of future rail contracts are difficult as the railroads are the ones controlling the movement when one is captive. The railroads traditionally do not want to negotiate to the shippers needs and adopt a take it or leave it attitude if the shipper pushes for negotiations. Both utilities and manufacturers concurred in this sentiment.
3. Railroads that are willing to enter contracts at all, demand high rates and show little responsiveness to shipper and/or farm producer needs.
4. Some 80% of the MT wheat crop is exported. All areas of the wheat belt suggested that high rail rates and a strong dollar continue to undermine the competitiveness of US wheat in Asian markets.
5. Major railroads refuse to reduce rates on agricultural commodities, even when rail equipment is idle and small rate reductions would produce thousands of new shipments. Rail fuel costs are way down but rail rates and rail costs to shippers have not been reduced.
6. Major railroads want to focus on unit train and shuttle shipments of 100 cars or more. Such services remain important, but pulse crops like peas, beans and lentils are becoming economic mainstays for Great Plains farm producers, and these crops must move in smaller volumes. Pulse crop shippers are not getting the elevator services and rail services they need.
7. Captive rail shippers paying excessive rail rates lack effective regulatory recourse, and therefore lack bargaining leverage in negotiations with monopoly railroads. The STB's current tests of rail rate reasonableness – SAC, SSAC, and Three-Benchmark – are too expensive and take too long (especially SAC and SSAC), and can be neutralized by well-funded railroads.

Dan Elliott and Ann Begeman expressed interest in and a desire to address these and other concerns. Shipper representatives commended current STB members as

less pro-railroad than past STB members, and expressed the hope that pending and future proceedings will bring positive and needed changes.

Terry Whiteside asked about next steps in current STB proceedings in which captive shipper groups have participated. (Examples include EP 724, on service issues and service performance reporting; EP 711, on competitive access remedies; EP 665 (Sub-No.1), on regulation of rail rates on grain; and EP 722, on revenue adequacy, and while STB members cannot discuss the substance of pending proceedings, questions about the progress being made and possible timetables for action may be asked.) Both STB members noted that S. 808 requires the STB to implement regulations for new arbitration procedures, and for the Board's new power to investigate rail issues on its own initiative, by December 2016 and periodic reports of progress. These required rulemaking proceedings will have to commence soon if these deadlines are to be met. Those action face congressionally mandated deadlines and will add to the heavy workload by the STB and shippers during calendar year 2016.

Shipper representatives commented that arbitration is unlikely to be very useful until new, more effective rate reasonableness tests are adopted. This is because arbitrators must consider STB standards of rate reasonableness and the railroad's need for differential pricing. S. 808 also requires, by December 2016, a report to Congress on current and alternative rail rate case remedies, as well as quarterly reports on progress in proceedings now pending before the STB.

When questioned about the new S808 provisions, allowing the Board members to meet together and discuss cases, Chairman Elliot said that the Board members are for the first time meeting on Monday, February 8, 2016 to discuss the service performance reporting proceeding. Further action may therefore be expected soon in EP 724. He indicated this will be the first meeting under the new S808 rules. Both

participants of this meeting and the RSTAC (Rail Shippers Transportation Advisory Council) meeting the previous week urged the Board to initiate open and cooperative dialogue among the Board members. The Chairman indicated that the Board will publish a summary of the discussion occurring at each of these meetings after the meeting.

The Chairman was not able to provide timetables for action in other proceedings. He also could not discuss likely outcomes. However, he suggested that the STB recognizes the need to move forward, and not just on the new proceedings on arbitration and investigations mandated in S. 808. The quarterly reports on pending proceedings required by S. 808, the first of which appears due before the end of February, may provide additional information.

On arbitration, shipper representatives pointed out that, while Congress was unwilling to make participation in arbitration mandatory, there are members of Congress who expressed a willingness to follow-up with further legislation to “tweak” S. 808, if necessary.

The meetings ran from about 8:45am to around 1pm, and were friendly and helpful, even if the STB members could not answer all questions.

Board member Ann Begeman also expressed her desire to initiate these ‘full Board’ meeting to discuss actions to be taken by the Board. She pointed out that some of the STB proceeding have languished for up to 4 years so far.

Ms. Begeman did not give any indication of her future plans this year re: Board membership but the group expressed appreciation for her work and urged her to stay on.

Each Board member expressed a sincere thanks to all of the participants for taking the time to come to DC, take time from their meetings and meeting with them.