



Transportation Law Focus

Changes Coming to the U.S. Surface Transportation Board

By Tom Wilcox, Principal, GKG Law

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The United States Surface Transportation Board (STB) has had a very interesting tenure over the past two years, and it is about to enter newer and potentially more interesting territory. On January 1, 2019, the Board was composed of a single member, Chairman Ann Begeman, after the term of Vice Chairman Deb Miller expired on December 31, 2018. The reduction of membership was ironic given that in 2015 Congress amended the law to *expand* the size of the Board from three members to five. However, gridlock and partisanship in Congress prevented the full complement from being nominated and confirmed.

After her brief solo stint, Chairman Begeman was joined by two new members, Republican Patrick Fuchs and Democrat Martin Oberman, who were sworn in on January 17 and January 22, 2019 respectively. Fuchs, 31, was an already experienced Washington hand, having been employed by the Office of Management and Budget and by the Senate Commerce Committee under the tutelage of Chairman John Thune. Oberman, 75, is a career trial attorney from Chicago, who has also served as an alderman for the city's 43rd Ward and as chairman of METRA, Chicago's commuter train entity. The addition of Fuchs and Oberman, combined with the directness and energy of Begeman, transformed the agency in many respects. The trio has developed a very proactive and interactive relationship that encourages stakeholder interaction with them individually and with staff. Begeman has also introduced discipline and accountability in the Board's processing of cases and regulatory proceedings. Perhaps the most notorious outcome of the current Board lineup has been the extraordinarily long and comprehensive public hearings and oral arguments, in which all three Board members have actively and aggressively questioned railroad and shipper witnesses for extended periods.

Under Begeman, the Board has initiated several proceedings to address key issues identified by rail shippers, such as the need to fix the Board's rate reasonableness review standards and procedures, and the practices of railroads concerning the assessment of demurrage and accessorial charges. Some of the key proceedings are pending and on the verge of final decision. However, the Board's current dynamic and ways in which it operates overall is about to change, as two new members – Michele Schultz and Robert Primus – are expected to finally be sworn in to bring the Board to its full complement of five members. Schultz, a Republican, was nominated to the Board in March 2018 and vetted, but has been waiting in the wings. Because there was not yet a Democrat nominee, the full Senate never voted on her nomination, per current practice on Capitol Hill. Schultz has served as deputy general counsel for the Southeastern Pennsylvania Transportation Authority, a large public transportation agency popularly known as SEPTA. Primus, a Democrat, is a career Congressional staffer. While it is not readily apparent that he has experience or knowledge of the freight rail industry, he has served on the congressional staff of two lawmakers well-known in the railroad community: Sen. Frank R. Lautenberg (D-N.J.) and Rep. Michael Capuano (D-Mass.). Primus currently serves as chief of staff to second-term Rep. Nanette Diaz

Barragan (D-Calif.). On August 6, 2020, the Senate Commerce, Science and Transportation Committee held a confirmation hearing to consider Primus's nomination, and it's expected that he and Schultz will be confirmed and officially take their seats on the Board soon. However, no specific date has been set and the status quo will continue.

The expansion of the Board at this time raises a number of interesting issues. First, Chairman Begeman's second term at the Board expires at the end of 2020, and there is no indication that she intends to exercise her right to remain for a "holdover" year while her replacement is found. Thus, the addition of two new members at a time when the Board has several major proceedings before it that the Chairman would like to complete before her departure might be slowed or stalled while the new members are brought up to speed. It is also unknown how the policy views of the two new members will mesh with the current members, or not. Chairman Begeman's departure could also mean that the tenure of the full five-member Board will be short-lived, since it has already been demonstrated that finding and confirming new Board members can take a very long time. Among other things, this would mean that the Board would be composed of two Democrats and two Republicans.

Second, the outcome of the upcoming presidential election will greatly affect the STB's operations because the chairman selection comes from the party of the president. As currently configured, one would expect that Fuchs would be named chairman if President Trump is reelected and that Oberman would be named chairman if Joe Biden is elected. Each would bring a very different approach and mindset to the role. This important element of the Board remains uncertain.

Finally, the internal dynamic and interaction of the Board members should change significantly once more than three members are in place. Under the so-called sunshine laws, a majority of the Board may now hold a meeting on official agency business that is "not open to public observation" only if the meeting attendees are disclosed and a summary of the meeting is posted on the STB's website. Since with a three-member Board any one-on-one meeting to discuss agency matters would constitute a majority, such meetings may not take place without being subject to the disclosure requirements. This rule has substantially chilled and even prevented Board members from directly communicating with each other, leaving such communication to be through staff. Consequently, for many years agency staff have played a significant role in setting policy and decisions in formal proceedings. Once the full complement of five members is reached, members will be freer to communicate directly about official agency business and pending matters.

About the Author

GKG Law Principal Tom Wilcox has 30 years of broad regulatory, transactional and litigation expertise in practically all modes of transportation, specializing in the area of representing users of freight railroad transportation. *Chambers USA* has consistently ranked Tom as one of the top leading lawyers nationwide who represent shippers in rail transportation matters. Further, Tom was selected by peers for inclusion in *The Best Lawyers in America*® 2020 and 2021 in the field of Transportation Law, and was named to the 2020 Washington, DC "Super Lawyers" list for Transportation/Maritime. He has represented clients on matters before all Federal agencies with jurisdiction over transportation and transportation-related issues, including the Surface Transportation Board (STB), the U.S. Department of Transportation, the Federal Railroad Administration, the Pipeline & Hazardous Materials Safety Administration, and the Environmental Protection Agency.