

Senator Nelson's amendment to August 29, 2017 GOAC minutes:

This response is to Senator Cronin and Representative Tieszen's questions from Alex & Dick Huff, and others as indicated.

I have received your email containing questions regarding my September 10 memo about railroad issues to be considered by GOAC. Because it had been asked that the memo be brief, some details were not addressed. In accordance with your request I am providing supplemental information.

You question the qualifications of constituents who are experts or otherwise have information about these rail issues. These folks include the previous owners of Dakota Southern, along with a person having a connection to Dakota Southern who for obvious reasons cannot be named here. Lyndell Petersen, the MRC Rail Authority member representing your county, is another source. There are also experts and agencies who are not constituents and thus were not mentioned in my memo, again for the purpose of brevity. They are identified below.

On the issue of State Rail Board and DOT failures to safeguard public assets and public funds, consider what caused GOAC to become involved in the Spring of 2016. That was the inexcusable situation when, after millions of dollars of public funds had been spent to upgrade the track west of Mitchell, Dakota Southern did not maintain the track as required by its lease. This was no small thing. The neglect and degradation of this public asset went on for some three years, some segments of track were driven into the ground, train speed was reduced to a crawl in some areas, and the Rail Board and DOT remained oblivious until the entire affair had become an embarrassment. I will address the safety aspect of this failure shortly.

At the moment the primary question about stewardship of public funds involves revenues as reported by operators of track owned by the State. You may remember that in 2015 Legislative Audit discovered that these revenue figures, which are the sole basis for payments to the State and hence the public, were being accepted without question. Auditor General Martin Guindon recommended that these figures be verified. Lyndell Petersen, in his role as a member of a local rail authority, noted that DOT was not providing the authority with any detail as to verification of these revenues. Mr. Petersen contacted you for assistance, but he reports you were "indifferent" and "unconcerned" about the issue in spite of Mr. Guindon's findings. Mr. Petersen then took his request to the GOAC as a whole. (Sources: Legislative Audit and Lyndell Petersen)

Again in spite of Mr. Guindon's report, and in spite of clear language in the leases requiring that operators of State track must make audit related figures available, efforts to obtain the revenue data have been blocked by DOT. In your email you ask about the existence of documents or other evidence related to the various rail issues. I believe the best course of action by GOAC is to ask Mr. Guindon to audit the revenue figures of the rail operators, and in so doing ascertain if there are any documents that support assertions by DOT, Dakota Southern and perhaps other operators. I certainly would like to see evidence that justifies DOT's refusal to audit these operators.

While Legislative Audit is looking into the revenues, we should also ask for a review of Dakota Southern's recent lease of a portion of the MRC main line to a third party. If it is discovered that Dakota Southern executed this lease without the prior approval of both the MRC Authority and of the State, as appears to be the case, then Dakota Southern has violated its lease. In addition we should ask Legislative Audit to look into that third party itself, which is a newly formed company that happens to have the same Kansas City address as Dakota Southern's alleged parent. It appears that the operator of the MRC line has subleased a segment of public track to himself, and GOAC and the public are justified in asking why. (Sources: Federal Railroad Administration and SD Secretary of State)

There is also a need to have Legislative Audit review cases of operators being late with payments to the State. In his August 21 written response to GOAC, Secretary Bergquist confirmed that there have been multiple examples of short line operators not making payments when due. Lease language sets a specific due date, and an operator may not even invoke force majeure as an excuse for not paying on time. The lease also specifies a penalty for late payment, but I am not aware of the penalty being applied. This is yet another example of the need for an independent audit, to insure that the public interest is protected. (Source: Planning and Development District III)

Mr. Petersen's opinion of these events is that they do not pass the smell test. I agree, and will add similar concerns about the Napa-Platte line. Information provided by Secretary Bergquist indicates there may be car storage revenue earned on that line, prior to the Rail Board's cancellation of the Napa-Platte Rail Authority's lease, that should have been shared with the Authority but was not. This another example of the need to ask Legislative Audit to ascertain if public funds have been properly accounted for.

Another concern about public funds involves DOT engaging a Washington, D.C. law firm to initiate action against the Napa-Platte Authority. In verbal responses to GOAC Secretary Bergquist indicated he could not provide the cost to South Dakota taxpayers because the litigation is ongoing. That is not true. Even worse is that the cost to taxpayers, however much it is, was completely unnecessary. The Napa-Platte Authority would have accommodated the State's position, but the Rail Board would not consider this no-cost alternative so the public paid the price. (Sources: Surface Transportation Board Docket Numbers AB 1253 and FD 36096)

Pursuing failure of the Rail Board and DOT in fulfilling their responsibility for management of public assets, consider that one of Mike Williams' companies tore out approximately one eighth of a mile of State track just east of Tyndall. Reportedly this track material was used to enable storage of rail cars to the east. The action may constitute a trespass, so given your career experience I invite your close involvement in investigating this situation. Probably the first question is: Did anyone with the State give approval for the track to be torn out, and if so who? The ugly possibility that Mr. Williams has exposed the State to a reversionary rights case will need to be considered as well. Because the Rail Board removed the local rail authority from its role in representing the public, and because neither the Rail Board nor DOT seem to be interested in addressing this destruction of State track, it appears that all the public has to turn to is GOAC.

As to the question about transferring some car storage revenue to a Mike Williams operation in Idaho, you and I are in agreement about there being a lack of detail. In fact, I don't know if anyone in South Dakota can make sense of that proposal. This is yet another case for which I believe GOAC should enlist the aid of Legislative Audit.

You asked about public safety, and certainly that subject is a top priority. There are several aspects to this issue as well.

Prior to our August meeting Alex Huff sent a letter detailing the findings of DOT's own outside expert, which had performed an inspection of the MRC line. Because all members of GOAC received that letter, I will just point out that the consultant identified track maintenance failures on the part of the operator, DOT failed to implement the consultant's recommendations, and a serious derailment occurred exactly at one of the problem areas highlighted in the consultant's report. The ramifications for public safety are obvious. (Source: Stone Consulting, Inc.)

Another serious public safety issue involves liquified petroleum gas being transported and stored on the MRC line. I recognize there are no State hazmat regulations, but the State's lease does require that the operator observe and comply with federal and other laws and regulations. GOAC has reason to question the failure of the Rail Board and DOT to exercise proper oversight of the MRC operator. A few weeks ago the Federal Railroad Administration did an inspection, and wrote twelve (12) violations against Dakota Southern for failure to comply with hazmat handling regulations as defined in Title 49 CFR 174.14(a). (Source: FRA Hazmat Safety Inspector Scott Cassidy)

The safety problem doesn't end there. Recently the FRA also wrote a violation against Dakota Southern for failure to certify locomotive engineers, and an additional violation for failure to certify conductors, in accordance with Title 49 CFR Parts 240 and 242. (Source: FRA Operating Practices Safety Inspector Ray Lindsey)

When we talk about danger to the public, consider that Dakota Southern was handling LPG in violation of federal regulations, across track with maintenance defects, with crews that had not been properly certified.

While on the subject of the FRA, I should alert GOAC to a possible misconception about track inspections. The FRA inspects track solely in accordance with the speed designated by the railroad, and does not involve itself in contractual obligations between the State and its operators. Thus, if a railroad has a 10 mph limit on a certain segment of track, FRA inspects that track only for compliance with the lower standards applicable for 10 mph. An FRA inspection cannot be used to determine if an operator is in compliance with a lease requirement related to maintenance standards.

I will close with a concept that Mr. Petersen asked me to advance. If, after reviewing the preponderance of these failures and violations you still cannot grasp the seriousness of the threat to the public interest, please let me know and I will not burden you with further details. However, if you now agree we are faced with a real problem, I welcome your

assistance and involvement. There is a remedy, and all of us on GOAC can work with and assist the Rail Board and DOT in implementing it.