Does STB Deserve Court Deference?

The Surface Transportation Board (STB) and other independent regulatory agencies operate as a fourth branch of government, exercising quasi-judicial and quasi-legislative powers.

Although the Constitution prohibits delegation of legislative powers, the Supreme Court in 1825 distinguished "important subjects" from "mere details," ruling that regulatory agencies may "fill up the details." In 1989, the Court added that "Congress simply cannot do its job absent an ability to delegate power." Such delegation has created 242 volumes of federal regulations to supplement 41 volumes of U.S. statutes.

As for the STB, although its members are Senate-confirmed, rail regulators do not answer to the electorate, are insulated from Executive Branch recall and receive largely superficial congressional oversight. Only once in 24 years (2015) has Congress revised, through reauthorization, the STB's size, statutory powers and mission. Also often overlooked is filling STB seats through White House nomination and Senate confirmation. Beginning in 2002, the STB functioned for 54 weeks with but a single member; and since 2015, two of its five seats have been vacant.

While the 1906 Hepburn Act and 1946 Administrative Procedure Act allow judicial review of STB rulemakings and decisions, two Supreme Court doctrines, taken from the names of underlying cases, instruct lower courts to afford agency actions what Cato Institute libertarian scholar William Yeatman calls "obsequious deference."

The 1984 Chevron Doctrine instructs courts to grant "deference" to agency interpretations of ambiguous statutory language. This deference gives the STB relatively unchecked latitude in determining "public interest" and "rate reasonableness," terms Congress only vaguely defined. Federal Railroad Administration decisions are also afforded the same deference.

The 1997 Auer Doctrine instructs courts to grant "deference" to an agency's interpretation of its own regulations, much as a baseball batter might call his own balls and strikes.

"Is that a recipe for stability and predictability in the law, or is that a recipe for the opposite?" asked Supreme Court Justice Neil Gorsuch. Chief Justice John Roberts said overturning such deference could be a consequential check on "the danger posed by the growing power of the administrative state."

Although the Chevron and Auer doctrines instruct courts to defer to "expert" regulatory agencies, there is suspicion as to how expert the STB really is.

No nominee since 1954 has had a shipper background; none in modern history has had a background in railroad operations, marketing or rate-making; political connections assured confirmation of one lacking a high school diploma; and another's resume said he trained the President's dogs.

While nominees culled from the professional staffs of House and Senate rail oversight committees have knowledge on rail issues at a high level, their expertise arises from reading statutes and congressional testimony, and receiving lobbyist and stakeholder briefings.

And as rail regulators frequently serve but single terms that are staggered, there is constant churning of decision makers as complex issues evolve, inducing reliance on STB professional staff. Notably, many senior staff were hired from railroads; or depart, along with some regulators, for railroad jobs, or as rail consultants or rail outside legal counsel—facts upsetting to shippers.

Yet how "expert" is the federal judiciary? Justice Stephen Breyer cites millions of regulations so complex that to repeal deference doctrines means "instead of paying attention to people who know," judges would decide.

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Still, conservative Heritage Foundation scholar Elizabeth Slattery says deference "turns on its head the Court's foundational declaration in Marbury v. Madison (1803) that it is 'emphatically the province and duty of the judicial department to say what the law is.'" Defenders of deference say it encourages more innovative regulatory approaches.

Consider that had it not been for the Chevron Doctrine, the year-2000 STB-imposed 15-month merger moratorium that derailed the proposed BNSF-CN merger may have fared differently on appeal, as the moratorium lacked explicit statutory authority. In fact, the statute arguably encouraged rail mergers.

While a threat to the delegation of powers doctrine is remote, unfriendly visits by Congress or the Supreme Court to the Chevron and Auer deference doctrines appear probable in 2020. It's an issue with broad, consequential and enduring potential impact on rail regulatory outcomes, and surely worth studying and digesting so as to be prepared to influence the debate.

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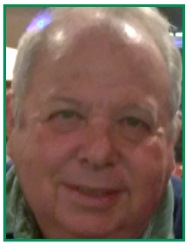

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