

An Update on Rail Safety: Supplementary report submitted by the New Democratic Party

While we concur with the majority report and recommendations, the level and depth of concerns with rail safety felt across the country demands a more comprehensive response. There was broad agreement by Committee members that while Transport Canada has taken some action to address deficiencies, additional expedited action is necessary on the part of the government to restore confidence in the rail safety regime. This is particularly the case given the substantial increase in dangerous cargo, including crude oil.

As is evident from the report, the public risks and costs that may arise from failed regulation or enforcement of rail safety demands an expedited public review and potential significant overhaul. Based on testimony and submitted briefs, it is starkly evident that the circumstances behind the Lac-Mégantic rail disaster are triggering concern about the potential for similarly dire risks to other communities, if not addressed. The regulation of dangerous rail traffic should no longer be left to a conversation between rail companies and transport authorities. Communities and rail workers alike are demanding a greater voice.

Municipalities, communities, rail workers, regulatory experts, rail inspectors and the TSB have all called for deeper reforms to the rail safety regulatory regime. Concerns range from perceived overreliance on industry-developed operating rules, to allowing exceptions to rules, to overreliance on self-regulation, to weak whistleblower protections, to limits on liability for catastrophic incidents. Legal experts and communities alike share concern that the degree of reliance on self-regulation (SMS) in the rail sector has created a situation of regulatory capture. Regrettably, the Committee failed to hear testimony from key witnesses expressing these deeper concerns, including community organizations and legal experts. Testimony by community organizations and legal experts could have strengthened our examination of the Self-Management System (SMS), and other identified regulatory gaps or deficiencies.

It will be therefore be imperative that the government directly engage these views during its review of the Railway Safety Act.

It is notable that high on the list of concerns raised by the Federation of Canadian Municipalities (FCM) and communities located along rail lines were the lack of duty to actually consult those parties in making, auditing and enforcing the SMS, rail regulations, rules and exceptions.

Concern was similarly expressed about the lack of disclosure of real-time, detailed information on dangerous rail cargo, risk assessments, SMS reports and government enforcement actions. There was recognition that information access should be subject to valid requests for exclusion of confidential business information (BCI), consistent with processes established pursuant to other federal laws.

Regulatory capture was a cross cutting concern of legal experts, communities, rail workers and government inspectors. Concerns ranged from over-reliance on the Self-Management System (SMS), to paper audits of the SMS replacing regulation, inspection and enforcement. These concerns mirror those of the Auditor General of Canada who in his fall 2013 report recommended that Transport Canada take action to address significant weaknesses in its oversight of safety management systems.

Director of the Canadian Center for Policy Alternatives, Bruce Campbell, asserted that regulatory capture exists where regulation is systematically directed to benefit the private interest of the regulated industry at the expense of the public interest. This occurs where the industry is able to shape the regulations towards their interests. It may be noted that current law for the most part does not require consultation with potentially impacted communities on rules or exemptions. He asserts that the SMS system and limited consultation on regulations has created this a climate for regulatory capture for the rail industry. In the absence of strong government oversight the companies are in effect self- regulating.

Professor Mark Winfield in his submission observed similar problems with a substantial shift in redirecting government resources away from regulation and enforcement towards implementing a Self- Management System (SMS). He recommended that imposing statutory duties of care for rail company officers and directors could provide a more effective trigger for implementing internal company environmental and safety management systems, as has been the practice for other industrial sectors, thereby freeing up government officers to inspect and enforce. He also recommended introduction of a general offence provision under the Act and a reconsideration of the reliance on company developed safety rules.

Toronto based Rail Safety First expressed the view that “SMS has demonstrably failed to protect the public interest” and called for increased budget for rail inspectors to provide on- site verification of compliance, independent risk analyses of dangerous goods by rail and increased enforcement of rail speed.

At Lac-Mégantic the Convoi-Citoyen called for fundamental changes to rail regulations to make protection of community safety the primary objective rather than rail company profits. Similarly, the Coalition des Citoyens expressed concern that that previous federal governments and the current administration have neglected their primary duty, to ensure the health and safety of the Canadian public. They complained of a laissez faire approach to deregulation and self-management of the rail transportation. In the opinion of this Lac Mégantic based citizen group, the major deregulation of Canada’s rail transportation industry, begun under Paul Martin’s Liberals and increased under Stephen Harper’s Conservatives, has significantly threatened the health and safety of Canadians. They suggest that while tangible evidence of this is the Lac-Mégantic tragedy, we cannot overlook the recent derailments in other cities that could have claimed many victims.

For these reasons there have been calls for an independent public inquiry into the tragedy of July 6, 2013 into all the circumstances and roles in this tragedy.

The Auditor General of Canada sounded the alarm in 2013 regarding Transport Canada's major shortcomings in applying and following up on rail safety management systems and highlighted the overly close relationship between private rail companies and Transport Canada's regulatory agency.

Recommendations:

That Transport Canada in its review of the Railway Safety Act, and related Dangerous Goods Act, examine the decision to adopt a self- management regime for rail safety.

That in support of this review, the government commission independent legal and technical analyses with a focus on ensuring that the primary objective of the rail safety regime is ensuring public safety.

That intervenor funding be provided to enable the constructive participation by concerned communities, including their access to legal and technical experts.

That rail companies be required to provide expanded access to information to concerned or interested communities on risk assessments, SMS reports, emergency response plans and enforcement and compliance policies for rail safety.

That municipalities and communities be provided notice and opportunity to comment on any proposed rules or exceptions to rules.