

Chairman Daniel R. Elliott III
Surface Transportation Board
Hearing Testimony
Carnegie Town Hall Building
Sioux Falls, South Dakota
August 11, 2016

IMPLEMENTATION OF THE SURFACE TRANSPORTATION BOARD
REAUTHORIZATION ACT OF 2015

Good afternoon, I am Dan Elliott, Chairman of the Surface Transportation Board.

Chairman Thune, Ranking Member Nelson, Members of the Committee, and esteemed guests, I appreciate your invitation to testify at this hearing to provide an update on our agency's accomplishments in implementing the Surface Transportation Board (STB) Reauthorization Act of 2015. I want to reiterate my thanks to you, Chairman Thune, for your deep interest in freight railroad issues both in South Dakota and throughout the nation, and your work with the Surface Transportation Board on rail service issues, and for this Committee's thoughtful oversight of the STB.

As a result of the Reauthorization Act, the Board has achieved greater transparency and efficiency, which directly benefits the stakeholders that we serve. As you know, the STB has been providing voluntary monthly and required quarterly written updates to our congressional oversight committees and to our stakeholders, tracking our steady progress in meeting the mandates of the Act. I would like to thank Chairman Thune in particular for the enhanced reporting provided by the Reauthorization Act. As you may have seen, we have issued a number of major decisions in the first six months of this year. Significant credit for this development is due to the reporting established by the Reauthorization Act and the support it provides to our continuing timeliness improvements.

This hearing will allow me to provide further information, and to elaborate on our efforts in response to any questions that you may have.

The Reauthorization Act made the STB a wholly independent federal agency, terminating our administrative affiliation with the U.S. Department of Transportation. The Act also changed the agency and some of our processes in other significant ways. Most notably, the Act

- Increased the Board's membership from three to five Board Members;
- Directed the Board to adjust its existing voluntary arbitration procedures, including increasing the maximum damage awards;
- Shortened timelines applicable to large rate case proceedings, including limits on the time allowed for discovery and for development of the evidentiary record;
- Instructed us to initiate a proceeding to find ways to expedite major rate case proceedings;
- Allowed a majority of Board Members to meet directly in private to discuss agency matters, subject to certain requirements; and
- Bestowed authority on the Board to initiate investigations of railroad issues of regional or national significance.

The Act enhances our authorities and creates new responsibilities. Our first year working under reauthorization has been one of implementation. We are making steady progress in all of the major actions that the Board is undertaking to execute these enhanced responsibilities. To date, the Board has implemented the Act in a timely fashion and intends to continue to do so. Some of the highlights of implementation are as follows:

Arbitration.

On May 12, 2016, the Board issued a notice of proposed rulemaking amending our procedures for the arbitration of disputes before the Board to conform to the statutory requirements in Section 13 of the Reauthorization Act. We are expanding our rules to encompass rate proceedings and raising the cap on damages to \$25 million in rate matters and \$2

million in other matters. The comment period closed on July 1, 2016. I have reviewed the thoughtful opening and reply comments we received and I am working on the changes we need to make to our proposed rules, as a result of those comments. We are on track to deliver final rules by the end of September.

Investigative Authority.

Section 12 of the Reauthorization gave our agency new power to investigate nationally or regionally significant railroad issues on our own initiative. On May 16, 2016, we issued a notice of proposed rulemaking to establish procedures for these investigations. Our rules contemplate a three-stage process consisting of:

- (1) preliminary fact-finding,
- (2) Board-initiated investigations, and
- (3) formal Board proceedings.

In fashioning our rules, we are working to ensure that we have incorporated appropriate protections for due process, separation of fact-finding versus adjudication and, very importantly, timely resolution of cases. We received opening comments on July 15, 2016, and I eagerly await what stakeholders have to say in reply comments, which are due by August 12, 2016. In determining what changes we need to make in the final rules, I will take into account the valuable input that stakeholders provide through the comments. With our new authority, the Board is better equipped than it has been in the past to explore and resolve significant railroad issues, such as the service problems that emerged in late 2013 and lasted through 2014.

Rate Cases.

I have heard our stakeholders when they express their concerns about the complexity and expense of bringing a SAC case. During my first term, the Board initiated several reforms, including adopting rules that (1) clarified certain revenue allocation issues in large rate cases, (2) raised the award caps for smaller rate cases, and (3) changed the interest rate for damage awards. The Reauthorization Act directs us to build on these efforts.

First, Section 11 of the Act instructed us to look for ways to expedite rate cases by examining procedures available in court litigation. In preparing for this proceeding, we held

informal meetings with attorneys, consultants, and stakeholders that have the most experience with these cases. On June 15, the Board released an advance notice of proposed rulemaking to implement this element of the Reauthorization Act. We proposed several measures, such as standardizing discovery requests and evidentiary submissions, limiting the scope of certain filings, and enhanced technical meetings between the parties and STB staff. The ANPRM raises numerous topics and suggests methods to expedite rate reasonableness cases, especially stand-alone cost rate (SAC) cases. First round comments were due August 1, 2016, and reply comments are due by August 29, 2016.

Also on the subject of rate cases, I note that on March 9, 2016, we issued final rules amending our regulations to comply with the rate case procedural schedule set forth in Section 11(b) of the Act. Second, we are working on our report on the sufficiency of STB rate case methodologies and alternatives, as required under Section 15 of the Act, which we intend to complete by December of this year. I hired independent outside experts InterVISTAS in 2014 to look at our current SAC methodology and our other rate reasonableness methodologies. We asked them to do a global search for potential other methodologies that are superior to SAC that could be used in the U.S. freight rail context. In particular, we directed them to look at alternatives that are likely to reduce the time, complexity, and expense of rate cases, and the scope of the search included regulation of other network industries in the U.S., as well as the approaches used by regulators around the world. InterVISTAS is putting the final touches on their report, and I look forward to delivering that to you and our stakeholders before the end of this year. My intent is to hold a hearing (or hearings) to discuss the report shortly thereafter in conjunction with our Section 11 Expediting Rate Cases proceeding and our grain rate case rulemaking.

Third, last year we also engaged the services of outside experts to help the agency look for process efficiencies in our rate reasonableness cases. We are taking much of what we learned and dovetailing that with our STB Reauthorization Expediting Rate Cases proceeding, as well as the shorter timelines laid out in Section 11(b).

Last, but certainly not least, the Board is close to a proposal on our grain rate case rulemaking. I am acutely aware that the Board's rate complaint procedures need to be more accessible to grain shippers, and smaller shippers generally, and provide effective protection against unreasonable rates. I have heard the frustrations of farmers and elevators. Later this month, I hope to unveil a proposed new rate case methodology that is intended to be streamlined and small and that addresses the concerns I have heard from the agricultural community.

Collaborative Discussions.

Section 5 of the Act granted the Board the ability to hold non-public collaborative discussions related to agency matters. In my view, these Section 5 meetings have really given the agency greater flexibility and opportunity to discuss complex proceedings and issues that are before the Board. I have used this tool on several occasions already to have discussions on issues such as proposed rules for railroad performance data reporting, new arbitration rules, and rules for our new investigative authority, and it has proved to be very effective. My hope is to continue to have more Section 5 meetings in the coming weeks and months to further discuss Reauthorization Act initiatives like arbitration, investigations, and expedited rate case proceedings.

Because of the importance of the Reauthorization Act to our agency and our stakeholders, we have created a specific webpage on our website to disseminate information about the Act and our progress in meeting its requirements. You can find copies of monthly and quarterly status reports that we have submitted to our congressional oversight committees, including reports on formal and informal rail service complaints, pending and completed rate cases, and unfinished regulatory proceedings. We also post summaries of non-public collaborative discussions on this page.

Before closing my testimony, I would like to briefly comment on two matters, which I believe are of significant interest to the Committee. The first is that on July 27th, we proposed regulations that would allow a shipper to seek rail service from another railroad. By doing so – in response to a petition filed by The National Industrial Transportation League – we are attempting to breathe life into a statutory remedy that was enacted by Congress, but which has

been virtually dormant due to precedent established by our predecessor, the Interstate Commerce Commission. Our proposed rules mirror the language of the statute, which allows us to grant reciprocal switching when it is practicable and in the public interest or necessary for competitive rail service. My approach has always been to apply an even, balanced hand when regulating, and I look forward to reviewing comments on our proposal and meeting directly with stakeholders.

The second matter pertains to our jurisdiction over Amtrak under Passenger Rail Investment and Improvement Act of 2008 (PRIIA). On July 28, we issued two decisions. In the first, we decided to analyze on time performance (OTP) by looking at arrival and departure at all stations along a passenger train's route, as opposed to only the train's end point performance. After reviewing comments that we received in response to a proposed rule, issued in December 2015, we believe that "all stations OTP" is a superior metric that is more responsive to the traveling public. In the second decision, we decided to withdraw a proposed policy statement on the meaning of the term "preference" for purposes of cases under PRIIA. Comments revealed strikingly divergent viewpoints as to how preference should be defined, so we decided to examine the term on a case-by-case basis.

In closing, I want to thank you for this opportunity to speak about the Board and its progress in implementing the STB Reauthorization Act. Our stakeholders have waited 20 years for the Board to be reauthorized, and there is no doubt that freight rail transportation will benefit from the innovative provisions of this law. Behind this reauthorization is a message of transparency and increased efficiency. That is what I will deliver to the public.

I am happy to answer any questions you might have.

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