

Joint Written Testimony of
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Surface Transportation Board

before the

House Committee on Transportation and Infrastructure
Subcommittee on Railroads, Pipelines, and Hazardous Materials

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OVERSIGHT OF THE
SURFACE TRANSPORTATION BOARD REAUTHORIZATION ACT OF 2015

Good morning, Chairman Denham, Ranking Member Capuano, and distinguished Members of the Subcommittee. Thank you for holding today's oversight hearing on the Surface Transportation Board Reauthorization Act of 2015 and for inviting us to provide an update on the Surface Transportation Board's (STB or Board) efforts to implement the Act. Before diving in on today's important topic, we want to first thank Chairman Denham, Chairman Shuster, and your staff, for inviting Katherine Bourdon to detail to your Subcommittee, which we know has been a wonderful learning experience for her. We also hope her service has been helpful to the Subcommittee.

As you know, the STB Reauthorization Act of 2015 was the Board's first reauthorization since its creation over two decades ago. It established the Board as a fully independent agency, enhanced the Board's authority and created new Board responsibilities. The Board Members and Board staff have been fully committed to implementing the mandates of the Act in a timely manner, and we have been accomplishing the Act's directives. We can also report that its implementation has already produced improvements in how we operate. Today, we will

highlight the specific actions the Board has taken to implement the Act and discuss some of our remaining challenges, along with other matters that may be of interest.

Quarterly Reports

Because of the STB Reauthorization Act, the Board has achieved greater efficiency, accountability, and transparency, which directly benefits the public and the stakeholders that we serve. In addition to providing quarterly reports on our rate case review metrics, formal and informal service complaints, and unfinished regulatory proceedings, as required by the Act, the Board has provided written updates to our congressional oversight committees, which tracked the progress made in meeting the Act's directives, along with various other updates. All of these reports and letters are publicly available on the STB Reauthorization Act page of our website to enable all interested stakeholders to be informed about our work.

Arbitration

In September 2016, following a notice of proposed rulemaking, the Board issued final rules amending our procedures for arbitrating disputes before the Board to conform to the statutory requirements of Section 13 of the Reauthorization Act. Among other things, we expanded our existing rules to encompass rate proceedings and set a cap on damages of \$25 million in rate matters and \$2 million in other matters.

Investigative Authority

Section 12 of the Reauthorization Act gave our agency new power to investigate nationally or regionally significant railroad issues on our own initiative. After moving through notice-and-

comment rulemaking, we issued final rules in December 2016. The final rules contemplate a three-stage process consisting of: (1) preliminary fact-finding; (2) Board-initiated investigations; and (3) formal Board proceeding. In developing these rules, we wanted to ensure that appropriate protections for due process, separation of fact-finding and decision-making functions, and perhaps most importantly, timely resolution of investigations were incorporated. With this new authority, the Board has an additional tool to aid it in carrying out its mission.

Rate Reasonableness Cases

Since coming to the Board, we have both expressed our separate reservations and concerns about the Board's rate review processes, particularly with the costly and time consuming stand-alone cost methodology, also known as "SAC." The Reauthorization Act addresses some of those shared concerns. With respect to rate cases, the Act: (1) shortened the timeline for SAC cases; (2) directed the Board to initiate a proceeding to assess procedures used in court litigation that may help in expediting rate cases before the Board; (3) required the Board to maintain one or more streamlined processes for cases in which the SAC test is too costly; and (4) required that the Board submit a report on our rate case methodologies.

On March 9, 2016, the Board issued final rules amending our regulations to comply with the shortened rate case procedural schedule set forth in Section 11(b) of the Act. As further directed by Section 11 of the Act, the Board looked for ways to expedite rate cases by examining procedures available in court litigation. Board staff held informal meetings with stakeholders and practitioners who have experience litigating rate cases before the Board. In June 2016, the Board issued an advance notice of proposed rulemaking (ANPR) in Expediting Rate Cases, EP 733, introducing several measures, such as standardizing discovery requests and evidentiary

submissions, limiting the scope of certain filings, and having increased technical meetings between the parties and STB staff. The Board proposed rules in March 2017, and in November 2017, issued final rules implementing changes to the rate review process to help expedite cases.

In addition, Section 15 of the Act instructed the Board to submit a report examining the sufficiency of our rate case methodologies and any potential alternatives to those methodologies. The Board commissioned a report in late 2014 by an outside consultant, InterVISTAS Consulting LLC, for an independent assessment of the SAC methodology and possible alternatives. The Board delivered that report, which is available on the Board's website, in September 2016 and held a roundtable of distinguished economists to discuss potential alternatives to our rate review methodologies.

Although the Board currently maintains streamlined processes for smaller cases as directed under the Act, the Board believes that additional work is needed to provide a more accessible and affordable process. To that end, the Board issued an ANPR in Expanding Access to Rate Relief, EP 665 (Sub-No. 2), to explore a new rate review process for small shippers. In addition, the Board has created an internal Rate Reform Task Force, which was established in January, to develop recommendations to reform and streamline the Board's rate methodology for large cases, and to improve rate review options for smaller cases. The Task Force is comprised of eight Board staff, bringing together considerable economic and legal experience and expertise to this very challenging undertaking. In carrying out its mission, the Task Force will be reaching out to stakeholders to obtain input and ideas on these complex issues. Informal discussions can

help the Board obtain a more thorough understanding of the interests of stakeholders and perhaps provide additional ideas regarding new rate review methodologies.

Board Composition and Collaborative Discussions

Another important aspect of the Act relates to the Board's membership and the Members' ability to have collaborative discussions. Section 4 increased the Board's membership from three to five, and Section 5 permits a majority of Board Members to hold non-public collaborative discussions regarding agency matters, subject to disclosure requirements. Both of these provisions allow for greater collaboration between the Board Members.

With respect to the Board's composition, the President has submitted two nominees to the Senate for consideration. We look forward to the confirmation of the nominees and the chance to work more collaboratively with each of our Member colleagues, as permitted under the Reauthorization Act. Once there are more than three Board Members, Members will be able to have permissible one-on-one discussions about Board work, as envisioned under the Act. We also hope to reach some resolution on a few significant pending rulemakings.

Regarding the collaborative discussions permitted by the Act, it is our shared view that these Member meetings, which we refer to as "Section 5 meetings," have really given the Board a much-needed, common-sense tool by allowing Members to directly discuss important proceedings and issues that are before the Board. Prior to the Act, we could not discuss the merits of pending issues with each other due to constraints imposed by the Sunshine Act. Such restrictions hindered the Board's efficiency.

Since passage of the Act, we have held Section 5 meetings on many occasions, and they have proven to be very effective. While we cannot resolve matters in these meetings, we can discuss ideas. When these meetings are held, the Board's General Counsel is required to be in attendance, and our meetings must be disclosed. We do not meet in secrecy, but instead, the STB Reauthorization Act promotes transparency by requiring that a meeting summary be prepared and made public two days after a meeting, unless the meeting relates to an ongoing proceeding. In that case, the summary is made public on the date of the final Board decision. For example, we held Section 5 meetings to discuss the Reauthorization Act's requirements concerning both arbitration and investigations and how best to implement those directives. In addition, we have made use of the new authority in several other proceedings, which has been helpful to Members' and staff's time management.

Full Independence

The Reauthorization Act made the STB a fully independent federal agency, ending our prior administrative affiliation with the U.S. Department of Transportation (DOT). Where our Information Technology and Financial Services were previously considered administratively housed within DOT, we are now responsible for our own IT infrastructure and independent financial controls and records. Implementation has not been without its challenges. We want to commend DOT for the guidance and the continued support it has provided to the Board during the agency's transition to independence. Although the transition to becoming an independent agency has often times been a difficult and resource-intensive endeavor, we believe that, in the long-run, this change will improve the Board's administrative functions.

While we are pleased to report that we have made significant progress on adopting processes and systems necessary for the successful functioning of an independent federal agency, there are still areas where we have work to do. For example, the Board has been working hard during the past months to address the cybersecurity issues and recommendations noted in the Fiscal Year 2017 FISMA audit, which was completed last October by the DOT Inspector General (IG). This was the agency's first FISMA audit as an independent agency, which the IG conducted at our request under contract. The Board has established a remediation plan, which has been shared with the IG's office, and has hired an Information Security System Manager. The IT staff is working hard to address the IG's recommendations and make needed remediation, prioritizing the most critical areas.

Just last week, the full House passed H.R. 4921, the STB Information Security Improvement Act, which was reported by your full Committee. We appreciate your strong interest in and support of the Board's work to make needed improvements in this area. The Board's effort to address cyber security vulnerabilities is well underway, and, as the legislation recognizes, it is an involved, long-term process, but one in which the Board must continue to make steady progress. We want to assure this Subcommittee that improving our information security is a top Board priority.

In addition to implementation efforts, of course, the Board has been handling its day-to-day case load and addressing other matters. For example, the Board actively monitors the rail network, paying close attention to service issues, a number of which have arisen during the past year, such

as those that arose last year with CSX Transportation, Inc. (CSX) after it began implementing a new operating plan. The Board has kept its oversight committees fully informed of our actions concerning CSX and its metrics have shown a marked improvement. Recently, we have seen some rail service challenges among several other Class I railroads. Last month, we sent letters to all Class I railroads asking for their service outlook for the remainder of 2018. As with CSX last year, we have asked certain railroads to participate in individual weekly calls with staff from our Rail Customer and Public Assistance (RCPA) office to help the Board monitor those carriers' service levels and progress. The Board Members and Board staff are committed to helping the railroads resolve their service issues as quickly as possible for their customers. And, as always, RCPA staff is available to assist shippers and stakeholders resolve any service problems on a case-by-case basis.

Finally, we want to mention one additional recent Board initiative intended to further improve our way of doing business and to better serve our stakeholders and the public. In February, the Board updated its long-standing rules on ex parte communications to enhance the Board's ability to make informed decisions through increased stakeholder communications. The modified regulations will permit greater communication in informal rulemaking proceedings. This new rule is a fundamental change in the Board's prior approach that severely restricted one-on-one stakeholder communications with the Board during rulemaking proceedings. We strongly believe that this rule change will help the Board obtain a more thorough understanding of stakeholders' positions about Board proposals, enabling us to establish better final rules.

In closing, we thank the Subcommittee for your efforts to reauthorize the agency and for your continued strong interest and oversight of the Board and its work. As a result, the Board is more transparent and accountable to shippers, rail carriers, and the public. Thank you. We would be happy to answer any questions.

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