

**TESTIMONY OF DEB MILLER
VICE CHAIRMAN
SURFACE TRANSPORTATION BOARD**



**BEFORE THE SENATE COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION**

HEARING:

**Freight Rail Reform: Implementation of the Surface
Transportation Board Reauthorization Act of 2015**

**AUGUST 11, 2016
SIOUX FALLS, SD**

Let me begin by thanking the Senate Committee on Commerce, Science, and Transportation, for their efforts in passing the Surface Transportation Board Reauthorization Act of 2015 (Act), as well as Chairman Thune for holding today's hearing. I appreciate the Committee's interest in the freight rail industry and its impact on shippers, and its willingness to take the necessary steps to help the Surface Transportation Board (Board) do its job better.

Prior to passage of the Act, the Board was operating under statutes that had not been revised in almost two decades and many of these provisions clearly needed updating. Under the leadership of Senators Thune and Nelson, the Committee was finally able to devise a bill that both railroads and shippers could support, where prior attempts had failed. The members of the Committee deserve credit for bringing the major stakeholders together to craft provisions most could agree on but that also effect real change. And I am glad to report that the Act is already starting to have a positive impact. The Act has significantly reformed many of the Board's functions in a way that is allowing the agency to streamline its processes and work more effectively. In this testimony, I want to provide my perspective on the progress the Board has made in implementing these reforms as well as my views on what additional steps the agency needs to take going forward.

Reading the Act, one of the primary goals appears to be increasing the transparency and accountability of the Board, an effort that I whole-heartedly support and applaud. The Act achieves this goal in a number of ways. Most notably, it increases the number of Board Members from three to five. The purpose of this change is to allow two members to communicate about pending Board matters without running afoul of the Sunshine Act, which requires that communications involving a majority of the Board (which currently would be two Members) to be publicly disclosed. While I understand that the Sunshine Act is needed to prevent Members from working in secret on important policy issues that impact the public, it also creates a number of difficulties. Since joining the Board, it has indeed been frustrating that I so rarely have an opportunity to communicate with my fellow Members.

As a practical matter, I think more contact between the Members will allow us to develop better working relationships. Today, the Members are essentially silo-ed from one another and

can often go weeks without talking. Being able to communicate more directly with one another should also lead to better-reasoned decisions. Being able to speak directly with the other Members will ensure that we fully understand each other's views, perspectives, and concerns about matters before us. It should also make it easier to resolve disagreements.

Another important change made by Act was to allow the Board to conduct meetings on pending cases in certain situations, which we have taken to calling "Section 5" meetings (as this was enumerated in Section 5 of the Act). In my view, this may be the most far-sighted and thoughtful changes made by the Act. Even with the increase to five Members, there will still be times were it is simply more practical for all the Members to meet jointly. The Act now provides us the ability to do so. We have held a handful of these meetings already and they have been helpful. In fact, I would like to see us take advantage of this opportunity more frequently. By not being able to communicate, the Members have to rely heavily on staff, which I believe oftentimes puts too much of the agency's responsibility in their hands. I think holding more Section 5 meetings would re-empower the Members to set the agency's direction.

Again, I commend the Committee for recognizing the difficulties that the Sunshine Act has presented and crafting clever ways of addressing the problem. I would note that even though these changes are extremely beneficial in reducing the obstacles created by the Sunshine Act, it is my belief that the Board itself needs to take a more sensible approach to the Sunshine Act. While I support the aims of the Sunshine Act, I believe that the Board has been overly conservative in its adherence. For example, because of Sunshine Act concerns, the Board staff currently briefs all three Members on cases individually. This means not only does the staff have to perform the same exercise three times (which, given scheduling issues, can add days if not weeks to the processing time of a case), but it means that the Board Members do not have the benefit of hearing the same presentation or the other Members questions and staff's responses. This holds true not only for pending issues before the Board but also for administrative issues like our budget. I do not believe that the Sunshine Act prohibits joint briefings, so long as the Members are careful not to express their views on a pending matter, even tacitly. At my suggestion, we have held a handful of joint briefings (subject to the restriction about expressing views) and I have found them to be helpful.

Another requirement the Committee recognized was necessary to improve transparency and accountability is for the Board to start submitting quarterly reports on various matters. The most significant of these reports is the one that requires the Board to give status updates on its unfinished regulatory proceedings (i.e., rulemakings), including expected dates for next action. Since joining the Board, the number of proceedings that the agency has opened but not completed has troubled me. Many of these rulemakings appear to have been initiated without any sense of the ultimate goal, or timelines for when they would be completed. The Committee's vision to create a reporting requirement was extremely pragmatic. Absent the reporting requirements of the Act, I strongly suspect that many of these proceedings would still be in a state of regulatory limbo. Only after having to provide Congress with a report on when action would be taken was there any discussion given to deadlines and prioritization of proceedings. I think the positive results of the report are already being seen, as the Board has taken action on a number of rulemakings that had been pending for years and is on pace to move forward on several others. The only downside has been that the effort to move forward on all these proceedings simultaneously has placed a considerable strain on staff and likely on the parties as well.

As I recently noted in my separate comment in our competitive (reciprocal) switching proceeding,¹ I want the Board to apply some of the same principles of the Act's reporting requirement for regulatory proceedings to our other proceedings. This would give stakeholders more information regarding the status of their cases. One of the most common criticisms I hear from our stakeholders is that the Board is too much of a black box – once a proceeding is started, there is no way to know where it stands or what progress has been made. The Board might rule in three months or three years, but a stakeholder has no idea which it is likely to be. Although the Board needs to be careful about sharing too much information that could compromise its internal deliberations, stakeholders should be given some idea of where their matters stand when

¹ Petition for Rulemaking to Adopt Revised Competitive Switching, Docket EP 711, et al., (STB served July 27, 2016) (Miller comment).

possible, particularly when important business decisions are at stake. As one of the goals of the Act was to improve transparency, this is one action the Board could take.

In addition, I think the Board could increase transparency on our own, as well as enhance our understanding of the issues before us, through greater use of ex parte meetings.² These are meetings with stakeholders to discuss their positions on pending Board matters. Although such meetings are permitted by law (subject to certain disclosure requirements), the agency many years ago imposed its own rule that prohibits all ex parte communications. At my and Commissioner Begeman's urging, the Board has waived this prohibition in two proceedings, including our Notice of Proposed Rulemaking on competitive (reciprocal) switching – though the meetings will not occur until this fall. In the other proceeding, which involves new data reporting requirements on the railroads, ex parte meetings were conducted between stakeholders and Board staff. I know that our staff found these meetings extremely helpful and I have heard positive reaction from the stakeholders as well. I think ex parte meetings are extremely useful. They allow the Members to delve more deeply into the issues than simply reading the pleadings will ever provide. The ability to ask questions and clarify misunderstandings would be very helpful. In my meetings with stakeholders, they also express a desire for more interaction with the Board. For this reason, I urge the Board to simply repeal our rule that prohibits these meetings, rather than waiving them on a case-by-case basis.

In terms of increasing transparency and accountability, I also believe that the Board should explore ways to conduct more of its work in public. This could include voting conferences or public work sessions, in which staff would provide briefings and reports to the Members on key cases. I will note that I am glad that the Board, at my suggestion, just this week announced that it would be hold a workshop in which staff will give a presentation and answer questions from stakeholders on a particularly technical proposal that the agency is making involving its Uniform Rail Costing System.³ I think this workshop will help stakeholders better

² United States Rail Service Issues—Performance Data Reporting, Docket EP 724 (Sub-No. 4) (STB served Nov. 9, 2015) (Miller concurrence).

³ Review of the General Purpose Costing System, Docket EP 431 (Sub-No. 4) (STB served Aug. 4, 2016).

understand the proposal, which in turn will ensure that the Board then receives more meaningful comments.

Another area where the Committee recognized that changes were needed involves the Board's rate case processes. The Act imposed three specific requirements on the Board. First, it required the Board to initiate a proceeding to assess whether procedures that are used to expedite litigation in civil court could be used in our rate cases. Second, it reduced the timeline for processing rate cases under our Stand-Alone Cost (SAC) methodology, most notably, by limiting the amount of time for the Board to reach a final decision after the close of the record from nine months to six months. Lastly, the Act required the Board to study whether there are other viable alternatives to the SAC methodology and report our findings to this Committee, and the House Committee on Transportation and Infrastructure.

I commend the Committee for including these requirements in the Act. In regard to the first two requirements, which are both aimed at speeding up rate cases, this past spring the Board conducted informal meetings with stakeholders to get their thoughts on ways this could be done. Our staff has reported that these meetings were very successful. Not only were stakeholders appreciative of the opportunity to provide input, but they offered a number of interesting and practical ideas on ways to streamline rate cases – many of which had not occurred to us. The Board then took these ideas and packaged them into a series of proposed reforms, which has now been put out for public comment.⁴ The success of these meetings reinforces my belief that more face-to-face interaction with our stakeholders is beneficial.

The Board also continues working to implement a number of internal changes to our workflow process in rate cases. In FY 2014, the Board hired an outside consultant to perform a review of our process in these cases and to look for ways to make it more efficient. The consultant finished its assessment and provided recommendations in FY 2015. With the help of

⁴ Dispute Resolution Procedures Under the Fixing America's Surface Transportation Board Transp. Act of 2015, Docket EP 734 (STB served July 28, 2016).

the consultant, the staff has begun employing a number of these recommendations in the two rate cases currently pending.

Although these reforms will hopefully result in quicker processing of rate cases, as I have now noted in the three rate case decisions in which I have participated, I still have significant concerns with the SAC methodology itself. My concerns are both practical and substantive. From a practical perspective, the SAC test has morphed over the last 30 years into an overly complicated analysis that imposes significant costs on the shipper and railroad.⁵ From a substantive perspective, I am concerned that the test requires a shipper to compare the hypothetical costs of building a “new” railroad against the real world “historic” costs of an existing system.⁶ It was for these reasons that I was enthusiastic that the Act required the Board to conduct a review to determine if there are other approaches that could be used.

Prior to my joining the Board, it had engaged an outside consultant (different from the one reviewing our workflow process) to explore academic literature and other regulatory schemes to see if there were other approaches that had potential application to U.S. rail industry. It was my hope that the report would have been completed by now, particularly as a nearly completed draft was presented to me several months ago. More importantly though, I have advocated that the Board release the report and allow our stakeholders an opportunity to provide feedback, perhaps at a hearing.⁷ My hope is that the Board will do so well in advance of the December 2016 deadline for our report to the Committees, so that we can incorporate not only the consultant’s report, but other approaches that may arise out of stakeholder feedback. However, despite my continued requests, I have received no indication of the direction the agency intends to proceed. Given that we are only four months from having to submit our report, the window for obtaining stakeholder feedback seems to be closing. If the intent is to

⁵ Sunbelt v. Norfolk Southern, Docket NOR 42130 (STB served June 20, 2014) (Miller concurrence).

⁶ E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. Co., Docket NOR 42125 (STB served Dec. 23, 2015) (Miller concurrence).

⁷ Sunbelt v. Norfolk Southern, Docket NOR 42130 (STB served June 30, 2016) (Miller concurrence).

satisfy the requirement of the Act by simply forward the consultant's report to the Committee, I find that unfortunate. Even if we conclude that alternatives to SAC are not in fact feasible, the only way that shippers can regain faith in SAC is if they believe the Board has truly exhausted all other options.

The two other important changes to the Board's processes made by the Act are empowering the Board to conduct investigations and requiring changes to the arbitration process. I think that both of these changes are positive, particularly the investigative function. In order for the Board to properly carry out its regulatory mission, I think it is important that we have the ability to proactively go out and make inquiries, rather than simply rely on the parties to present issues to us. The investigative function will allow us to now do so. As for arbitration, I am a strong supporter of alternative dispute resolution and it is my hope that the changes the Board implements pursuant to the Act will help them overcome their reluctance to using arbitration.

Perhaps the biggest change mandated by the Act, at least from an administrative standpoint, was to make the Board independent from the U.S. Department of Transportation (DOT). Prior to the Act, the Board was decisionally-independent, but administratively housed under the DOT. This meant that the Board had to rely on DOT to perform a number of administrative and information technology (IT) functions, such as human resource services, procurement, payroll, auditing, and Internet access. By becoming independent, the Board will have to now assume these functions.

In the long-run, I hope this will improve the Board's administrative functions. Although I appreciate the work that DOT performed on the Board's behalf over the years (and that we have agreed to have them continue providing in certain instances), it is simply more useful for the Board to control these functions itself. We understand our needs and priorities better than an outside entity could, and I think that this will translate into greater administrative efficiency. Getting to the point that we can stand on our own though will require work and money. Right now, the Board is not equipped with the manpower or resources to take on a number of these functions. Our staff has performed admirably since the Act was passed to devise plans for us to do so, but it will take time. In addition, there will be a significant cost resulting from this

independence. According to an estimate that the Board staff conducted prior to passage of the Act, it is conservatively estimated that the annual cost for assuming these functions will be \$2.4 million.⁸

In addition to the costs of becoming independent, there are significant costs associated with some of the Board's new responsibilities. For example, the cost simply of adding two new Members (salaries, office space, staff) is estimated to be about \$1 million annually.⁹ There will also be costs for implementing our new investigative functions, reporting requirements, and rate case improvements. It also must be noted that the Board is in the midst of overhauling its IT infrastructure and will need funding to ensure that we can complete it. Accordingly, I am concerned that the total sum of these costs will likely exceed the amounts authorized in the Act. In addition, the Board's lease expires in February 2017, at which point the agency will either have to relocate to new office space, or reduce the footprint at its existing location by having its offices retrofitted (which would also require the Board to temporarily move to a "swing" space). Either way, there will be a substantial cost resulting from this process. Although it will be a one-time cost, if the Board does not receive funding for it in the next Fiscal Year, the money for the move/retrofit will have to come from money that is normally dedicated to our regulatory functions.

In conclusion, although implementation of the Act is still in its early stages, I think so far it has had a truly positive impact. However, there are additional steps that are within the Board's control that I hope we will take to ensure that the spirit of the Act is fully achieved. I believe that the reason the Board's major stakeholders and members of Congress overwhelmingly supported the Act's passage was that they shared the view that the Board needs to become more effective in carrying out its duties by changing the manner in which it does business. I personally believe that the Act should be seen as an opportunity for the Board to seriously rethink our processes and long-held practices which may be obsolete or inefficient.

⁸ Chairman Elliott letter to Senators Thune, Nelson, Collins, and Reed, Dec. 15, 2015, attached Chart I.

⁹ Chairman Elliott letter to Senators Thune, Nelson, Collins, and Reed, Dec. 15, 2015, attached Chart II.

One of these long-held practices is the very limited involvement of the Vice Chairman and Commissioner in developing policies and practices of the Board. Since joining the Board, I have been struck by how little involvement the other two Members have in these matters. As I noted earlier, the Members are limited in their communication on substantive issues, but those restrictions have oftentimes been expanded to non-substantive issues as well. While the Members have recently begun to hold meetings to discuss such matters, there are still too many instances where there is no collaboration or no input is sought, or if it is, it is done as an afterthought.

Another long-held practice that the Board needs to re-think is the manner in which it processes cases. One of my frustrations with the Board has been the lack of any systematic way of managing our caseload. Little effort is given to track how long matters have been pending and, as a result, decisions tend to sit for too long. Little thought is also given to how pending matters should be prioritized and, as a result, decisions are issued in no particular order, rather than based on their importance or duration. The reporting requirement for unfinished regulatory proceedings mandated by the Act has helped in this regard, but I believe that there is more the Board could do. During my time as Acting Chairman, I began two initiatives to try to address these problems: setting target dates for the completion of all pending matters in our formal proceedings and creating a set of internal performance metrics to measure how the Board is performing in terms of managing its docket. It was my hope that these initiatives would be continued, but they were not. This is unfortunate, as I believe that they would help the Board manage its workload better and issue decisions more timely, which would benefit our stakeholders.

These issues aside, Senators Thune and Nelson and the entire Committee drafted and passed an excellent bill and I think the Board has done an excellent job in carrying out the goals of the Act. I particularly want to express my gratitude and appreciation for the job the Board's staff has done over these last several months. The Board already had a substantial workload prior to passage of the Act, and that workload increased greatly once the Act was passed. I am pleased to say that our staff has risen to the occasion.

Again, I also want to thank the Committee for the interest they have shown in the work of the Board and the opportunity to testify today about the positive effect the Act has had. The Act has wisely addressed the need for the Board to be more transparent and accountable by allowing the Board Members to communicate more easily and by providing progress reports on its workload. I also appreciate the requirements under the Act for the Board to examine ways to improve our rate case processes and methodologies, which are long overdue. The addition of investigative power and changes to the arbitration process will also be beneficial, as they will give the Board additional means of resolving issues between railroads and shippers. Lastly, once the Board is able to complete the steps necessary to become fully independent, the Board will be able to carry out its administrative duties much more efficiently. The cumulative effect of these changes will only continue to result in positive developments for our stakeholders.