Written Questions from Chairman John Thune to the Honorable Daniel R. Elliott III

Question 1: What do you view as the most significant challenges facing the Board as it completes implementation of this legislation, and how do you plan to address those challenges?

Answer. Overall, implementation of the STB Reauthorization Act of 2015 is going very well. As I stated at the hearing in South Dakota, I provide monthly updates in addition to the required quarterly updates of the major actions that the Board is undertaking to execute the Act's provisions. These are available online for anyone who wants to track our progress. For the majority of initiatives, we are on track to completing implementation by the deadlines outlined in the Reauthorization Act.

The most significant challenge at the moment will be funding, specifically entering Fiscal Year 2017 as an independent agency at our current level of appropriation, $32,375,000. I assure you that this agency will operate in the most fiscally responsible manner to avoid or limit furloughs while carrying out its regulatory responsibilities. However, we are faced with an office move required by the General Services Administration and the arrival of two additional Board Members and their support staff. While we welcome these changes, I am hopeful that a budget will be passed for the Surface Transportation Board that covers these expenses and the additional costs of independence.

Question 2: What do you view as the greatest opportunities and challenges facing the rail industry over the period of this authorization and in the long-term?

Answer. Based on the latest projections by the U.S. DOT's Bureau of Transportation Statistics, freight tons moving on the nation's transportation network will grow 40 percent in the next three decades. This includes total freight on all modes (rail, truck, vessel, pipeline and air), but the bulk of that freight is expected to move via truck and rail. Considering congestion challenges on our roads and highways, one would expect to see a larger share of the tonnage moving by rail. This presents a great opportunity for growth in rail business. Within that opportunity lies the challenge of building enough capacity to handle this growth.

Intermodal growth, which is closely related to the above, will probably outpace growth in other business areas as long- and mid-haul shipments are transferred from truck to rail. The railroads have invested considerably in this business and will have to continue to do so to grow capacity in order to handle the forecasted volume growth.

Another area of opportunity and challenge is the business and geographic shifts that we are currently seeing. We are all aware of the decline in coal shipments over the last few years as well as the growth and decline of oil shipments by rail. Energy markets especially have proven to be able to create massive shifts and are probably going to continue to be in flux given the global growth in demand for energy. The great challenge for railroads here is having the capability to quickly answer these types of market changes.

Question 3: Understanding the investigative authority rulemaking is an on-going proceeding and you cannot divulge information about the final rule, I have a couple of questions of clarification about the proposed rule.

a. Under the proposed rule, what do you anticipate as the timeline for the initial fact-finding phase? Under the proposed rule, how long do you think a fact-finding phase would typically take, and could you explain the policy or factors limiting the time of that phase?

Answer. Under the proposed rule, my goal in setting timeframes for a fact-finding phase is two-fold: 1) to allow for the administration and logistics of travel, meeting with relevant stakeholders and time to organize and analyze gathered information; 2) to avoid undue delay or uncertainty for the industry in the decision-making process. As you state, the investigative authority rulemaking is an on-going proceeding, and I cannot pre-judge the matter. However, in my view, the timeframe must be as short as possible. As the STB experienced during the service challenges of 2014, time is of the essence if an issue of national or regional significance is occurring on the rail network. The STB must do everything possible to be agile in its assistance to our stakeholders in averting such challenges and to pose no further harm through regulatory intervention, if any is needed.

b. Under the proposed rule, how do you anticipate the agency will determine whether an issue is of national or regional significance?

Answer. An issue of regional or national significance is one where widespread harm is occurring across the rail network nationally or in a region of the United States. Without STB intervention, serious or far-reaching consequences could impair or disable the flow of goods and commerce in the U.S. economy.

The STB prides itself on its open lines of communication with stakeholders—railroads, shippers, congressional offices, trade associations, media outlets, and state and local communities. Due to frequent industry interaction and weekly railroad service data, I have confidence that we will be able to know when an event of regional or national significance is on the horizon.

Question 4: As you know, the law requires the Board to separate investigative and decision-making functions of staff to the extent practicable. Understanding that some hiring of investigative staff may depend on appropriations, in the near-term, what protections do you anticipate instituting to separate these functions and ensure due process is preserved?

Answer. Should the current state of the rail network change and an investigation become warranted, I anticipate choosing a team of investigators from current staff that would be walled off from any formal decision-making functions related to the on-going investigation. As an adjudicatory agency, this is not an uncommon practice. For example, our Rail Customer and Public Assistance staff working on informal service complaints are prohibited from working or sharing information with staff on the formal decision-making side so as to avoid any conflicts that could unfairly influence the outcome of a future formal proceeding. I am confident in our ability to keep our investigative and decision-making functions separate, thereby preserving due process.

I have reviewed all comments in the record for the investigations proceeding, and the STB is on target to issue final rules by December 18, 2016.

Question 5: Understanding you may be somewhat limited by the on-going proceeding, could you speak to potential ways you believe the Board could improve its administrative handling of rate cases?

Answer. Improvements to the administrative handling of rate cases have been underway since before passage of the STB Reauthorization Act. In late 2014, I retained outside consultants to help the Board improve and streamline its processing of rate cases, specifically our stand-alone cost (SAC) rate reasonableness cases. We continuously look for ways to improve our processing of Stand-Alone-Cost (SAC) cases, which are among the most important and complicated matters adjudicated at the Board. Over the last year, we have been working on a set of "best practices" process guidelines to make sure that Board staff assigned to rate cases will have in place the most efficient team dynamic and collaboration tools to move the process forward. As one initial step in our best-practices review, we established a formal Rate Case Project Manager position, with the job of ensuring that the decision-making process is running smoothly and that process adjustments are made when necessary (e.g., allocating staff, setting up required meetings, ensuring that quality reviews are completed on time). Additional steps to ensure best practices will continue to be implemented as we move forward.

The agency has also made concerted efforts to engage parties and stakeholders in helping to identify additional process improvements. For example, in a pending case, we recently held an early technical conference with the parties to discuss common evidentiary formatting issues, followed by an order documenting the formatting requirements in that case. In April 2016, Board staff held informal meetings with stakeholders to gather ideas about SAC process improvements. The Board used that feedback to develop the pending proceeding in EP 733, Expediting Rate Cases, which seeks to improve SAC processes in ways that would benefit both parties and the agency. Finally, as indicated in the Board's most recent budget request, another critical factor that impacts rate case process efficiency is the ability to hire additional staff.

I will continue this multi-pronged process improvement effort and am confident that the Board will make beneficial changes.

Question 6: S. 808 required the Board to make a report to Congress with recommendations on alternative rate case methodologies to reform the rate case process. I understand that a paid consultant has developed a draft report. Given that it is a report from the Board, I strongly encourage you to include the Board's views in the report to Congress, and to solicit comments from the public. Could you provide in detail the Board's plans for communication of its views on this matter and on the potential solicitation of public comment?

Answer. I retained independent consultants in late 2014 to conduct a report on alternative rate case methodologies, and I am pleased that the final report was delivered to Congress and released to the public through significant outreach efforts on September 22, 2016. The scope of work required InterVISTAS Consulting LLC to look for alternative methodologies to SAC that

exist or could be developed and that could be used to reduce the time, complexity, and expense historically involved in rate cases; determine whether SAC is sufficient for large rate cases; and whether our simplified methodologies were appropriate alternatives to SAC.

I plan to hold an economic roundtable this fall to discuss the report's issues and conclusions with InterVISTAS and other independent economists, and the Board's own economists. I then intend to hold a public hearing at a reasonable time after the roundtable so that all interested stakeholders can participate in this important discourse. After consideration of stakeholder views from these public fora, the Board will deliberate on a path forward concerning large rate cases. The Board released the report without an overlay of commentary from the STB at this time so as not to delay the public's access to the report and not to deprive the Board of the benefit of public views on the report's findings before commenting.

Question 7: As the Board and the Federal Railroad Administration propose and finalize statutorily-required and discretionary rules on railroad stakeholders, I have a couple of broader questions.

a. Has the Board engaged, or considered engaging, in any interagency effort to assess cumulative regulatory burden or the cumulative effects of regulation on railroad investment, operations, and customers?

Answer. No, the Board has not specifically engaged in interagency efforts to assess cumulative regulatory effects of regulation on railroad investment, operations, and customers. However, Board staff regularly meet with FRA and other Department of Transportation staff to keep each other abreast of current developments and regulatory efforts underway at each entity. The majority of the STB's regulatory proposals currently underway are either statutorily required or were instituted as a result of industry and congressional urging due to long-standing issues arising under the economic regulation of the railroads as opposed to safety regulation. I welcome all opportunities to interact and engage with our colleagues at the Federal Railroad Administration, and would be happy to discuss this topic further with the staff of the Senate Commerce Committee.

b. How does the STB ensure balanced regulation—providing shippers with meaningful access to regulatory remedies while allowing rail carriers to earn adequate revenues and reinvest in infrastructure—when proposals are considered together, as opposed to individually?

Answer. Balanced regulation is paramount in every action the Board takes. The various provisions in the U.S. federal Rail Transportation Policy, 49 U.S.C. 10101, point to the importance of allowing rail carriers to earn adequate revenues to reinvest in their privately-owned networks, while ensuring that shippers have real access to rail service and regulatory relief. As such, I fully understand the importance of considering all of our proposals together.

The focus of my second term as STB chairman has been to proceed on regulatory matters and address transportation and STB efficiency/administrative issues that have remained open before

the agency, in some cases, for years. It is a busy time at the STB, and I am cognizant of the number of issues we are placing before our stakeholders. The issues we are working through—competitive switching, revenue adequacy, commodity exemptions, expanding rate case access and methodology review, to name a few—are complex and need clarification or settlement. The only way to provide the regulatory certainty that the rail transportation industry deserves is to address these issues through a transparent, public process whereby stakeholders comment on STB proposals, and the Board takes action based on public input. And it is important to keep in perspective that our proposals are not final actions. They can morph and develop based on comments received, or depending on input from the comments, can be tabled. However, if the Board were instead to merely take no action, the agency would risk stagnation – something for which the Board has been sharply criticized for in the past. As balanced regulators, we see the larger picture and remain acutely aware that our proposals must be considered together.

Written Questions from The Honorable Steve Daines to the Honorable Daniel R. Elliott III

Chairman Elliott, the ability for Montana farmers and others to efficiently move their goods to market is critical to the economic viability of our state and for the livelihood of thousands of Montana families. In the past, there have been capacity concerns on our freight railroads. Through investment and collaboration, freight railroads in Montana have been able to meet the demand for capacity and keep our agricultural products in addition to energy products moving safely. In working with the Montana Grain Growers Association (MGGA), they have raised the questions below about the implementation of S. 808, Surface Transportation Board Reauthorization Act of 2015.

Question 1: Regarding Section 11, can the Surface Transportation Board (STB) build a simple rate case model which contains enough detail to consider all the moving parts of a dynamic grain market?

Answer. During my tenure, I have focused considerable attention on improving the transparency and timeliness of STB decision-making. In particular, I have implemented several initiatives to improve our processes for reviewing the reasonableness of railroad rates in complaint proceedings. Despite improvements, I have been concerned that rate relief has not been readily available to grain shippers because even our streamlined processes are too complex or too costly for the smallest of rate disputes. Therefore, in December of 2013, I initiated a rulemaking proceeding specifically focused on grain-shipping stakeholders in order to find ways to make our rate review regulations more accessible and more viable for obtaining meaningful relief. After receiving public comment, the agency issued an advance notice of proposed rulemaking in August of 2016, which proposed a new method to judge rate reasonableness for small shippers, including grain shippers. The proposal includes a number of innovative ideas to simplify all facets of these cases from discovery through the parties' evidentiary presentations.

Question 2: How will you balance a looming rate case deadline against missing data which would be relevant in your decision?

Answer. In March of 2016, the Board issued final rules to align its deadlines for processing stand-alone cost (SAC) rate reasonableness cases with the deadlines established under the STB Reauthorization Act. The rules compress the timeline for these cases. Under the new timeline, the Board will have approximately five months from the parties' filing of closing briefs until a decision is due. I believe that this creates a tight timeline, but the Board issued an advance notice of proposed rulemaking in June aimed at expediting rate cases, including potential changes in methodology to allow us to meet the new timeline. Also, as part of my efforts to improve the Board's processing of cases, I have reviewed our internal procedures to make sure that our staff are coordinating their efforts, adhering to schedules, and working efficiently on our caseload. We have made great strides in these internal efforts, and I believe that these process improvements will also help to minimize the likelihood of encountering the kind of scenario that you describe.

Question 3. Regarding Section 12, is there a danger of unintended growth of the STB, since it now has investigative powers? How will you guard against this?

Answer. I believe that Section 12 of the Reauthorization Act greatly enhances the Board's ability to carry out its mission and provides the agency with an important tool, going forward. While I certainly understand and share your concern regarding "unintended growth," I believe that a key aspect of Section 12 is that it carries its own limiting principle: our investigative power can only be deployed for matters of "national" or "regional" significance. As I view this important limitation, it clearly means that the agency must be cautious and circumspect in invoking this authority. Proper subjects for investigation must reach beyond a single shipper or single event and affect the nation as a whole or an identifiable region, such as the South or the Midwest. Even before taking this qualification into account, it is not my intention that the agency initiate investigations without a substantial basis for doing so, and I believe that the rules we proposed in May 2016, as modified based on comments received, will prevent us from doing so. Under the proposal, investigations would involve several distinct phases and there will be checks and balances to protect against unwarranted uses of the statute. Finally, I note that the Reauthorization Act did not modify Congressional policy for the agency, as enacted in the Rail Transportation Policy – our animating principles strongly caution against overzealous regulatory intervention and strongly promote competition and market forces. We understand that the rail industry has greatly benefited from successive waves of deregulation, starting in the late 1970s and continuing into the mid-1990s. I do not view the Board's investigative authority as a mandate to turn back the clock.

Question 4: Regarding Section 13, proving market dominance as a prerequisite to arbitration may be an expensive and protracted proceeding. Do you have streamlined procedures to allow for this? Would grain producers be considered a "relevant party" to an arbitration? Is the STB working on a plan to actively encourage participation in the full arbitration program?

Answer. During my tenure, I have consistently expressed my preference for private-sector resolution of disputes, as opposed to government intervention and regulatory outcomes. In my view, the private sector is far more likely to produce a win-win outcome, as opposed to a win-lose outcome that typically results from litigation. To this end, I have revised and updated our rules for arbitration and mediation, and I have promoted these programs as alternatives to litigation before the agency. In outreach to stakeholders in public settings, I have encouraged greater use of arbitration and mediation. I have also steered our stakeholders to the resources of our Rail Customer and Public Assistance program, which works informally to resolve disputes. Although we have conducted several mediations and RCPA has had many successes in its efforts, the Board's formal arbitration program is under-utilized. The response to the opportunity to "opt in" for arbitration of certain kinds of disputes was more limited than we expected. Grain producers generally speaking would have full access to our arbitration program.

In May of 2016, we issued proposed rules to align our existing arbitration program with the requirements of the Reauthorization Act. As part of this rulemaking, we specifically sought comment on how to address the "market dominance" threshold for purposes of using arbitration in rate cases. We asked whether arbitration in rate matters should be made available only where

the parties agree that the threshold has been met, and for other approaches to confronting this question.