



Office of the Chairman

Surface Transportation Board
Washington, D.C. 20423-0001

March 4, 2016

The Honorable John Thune
Chairman
Senate Committee on Commerce, Science,
and Transportation
United States Senate
Washington, DC 20510

The Honorable Bill Nelson
Ranking Member
Senate Committee on Commerce, Science,
and Transportation
United States Senate
Washington, DC 20510

The Honorable Deb Fischer
Chairman
Subcommittee on Surface Transportation
and Merchant Marine Infrastructure,
Safety, and Security
United States Senate
Washington, DC 20510

The Honorable Cory A. Booker
Ranking Member
Subcommittee on Surface Transportation
and Merchant Marine Infrastructure,
Safety, and Security
United States Senate
Washington, DC 20510

Dear Chairman Thune, Ranking Member Nelson, Subcommittee Chairman Fischer, and Subcommittee Ranking Member Booker:

Thank you for your letter dated February 1, 2016, which addressed implementation of the Surface Transportation Board Reauthorization Act of 2015, Public Law 114-110, ("Reauthorization Act" or "Act"), and a potential merger of Canadian Pacific Railway ("CP") and Norfolk Southern Corporation ("NS"). We appreciate your continued oversight of the Surface Transportation Board ("STB" or "Board") and your attention to developments in the rail industry subject to our jurisdiction.

To date, your Committee has received three updates from Chairman Elliott, including implementation status reports for January and February, and the first quarterly report on unfinished regulatory proceedings before the agency. As detailed in Chairman Elliott's updates, we are making progress on implementing the key initiatives of the Act, and our letter today will provide further detail on each of these items.

Investigative Authority. In implementing the agency's new investigative authority, an interoffice team has been established that is developing the framework for conducting investigations in accordance with the Act, while taking into account due process concerns and approaches to separate the investigative and decision-making functions. This ongoing work will culminate in

the issuance of a notice of proposed rulemaking and subsequent final rules, which we intend to complete by the end of this year. Also, a new section will be added to our FY 2016 Annual Report to Congress that describes any investigations that have been initiated, as required by the new law.

Rate Cases. The Board is also working to implement the Act's provisions related to improving the way rate reasonableness cases are processed. We plan to issue a final Board decision this month revising our regulations to match the procedural schedule laid out in the Act. The Board is also considering approaches on how to process rate cases more quickly in accordance with the new timelines, including how best to build a record on procedures for expediting court litigation that could potentially be used in rate cases, pursuant to Section 11 of the Reauthorization Act. Ideas under consideration include seeking comments from stakeholders that have experience in litigation matters, conducting a hearing, or instituting a rulemaking. We will initiate a proceeding by June 2016 in accordance with the Act.

In addition, preparation is underway to ensure the Board's first quarterly report on pending rate cases is prepared and ready to post after the end of the first quarter, with posting planned for April 1. The rate case review metrics report currently includes two pending rate cases, and two cases in which a party has sought reconsideration of a prior decision.

Prior to receiving the directives under the Reauthorization Act, the Board had already recognized the need to improve our rate case processing. In 2014, the Board hired a consultant to analyze the Board's rate case decision-making process and provide recommendations on ways in which it could be expedited and its accuracy improved. Implementation of this work continues today. Even with these improvements, additional reforms may be needed to ensure the newly required timeframes are met, and so, as noted, we are exploring additional measures to reduce time from the process. Please be assured we will keep you updated as we make progress in this important area.

Arbitration. You may recall that the Board issued new regulations in May 2013 designed to increase the use of mediation and arbitration to resolve matters before the Board. We are now reviewing those regulations with the intention of proposing modifications consistent with the requirements of the Reauthorization Act and our common goal of ensuring informal dispute resolution mechanisms that are useful to stakeholders. In that effort, we intend to issue a notice of proposed rulemaking, receive comments, and then issue final rules during the third quarter of 2016.

Reports on Formal and Informal Service Complaints. Board staff has created a standard reporting document for the quarterly reports on formal and informal service complaints, and the rate case review metrics, and is currently compiling information for the reports. For formal service complaints, the Board staff is identifying formal proceedings that involve service issues. For informal service complaints, the Board will draw information from the database maintained by the agency's section of Rail Customer and Public Assistance (RCPA). Because the success of the RCPA program is dependent upon maintaining the confidentiality of those seeking assistance, the Board will only provide identifying information for those informal complaints in which the parties have given written consent to do so, as permitted under the Act.

Board Member Communications. Finally, we note that in February, we held our first meeting pursuant to the Board's new collaborative discussion authority, as established by the Act. The Board had a productive discussion on the pending data collection rulemaking, *United States Rail Service Issues—Performance Data Reporting*, EP 724 (Sub-No. 4). We plan to have more meetings in the near future on pending matters, including a meeting on the Board's proposed rulemaking and policy statement on *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, EP 726, and *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, EP 728.

In summary, the Board is actively moving forward on implementation of the Act's mandates. The Board's website also includes a webpage which summarizes the provisions of the Reauthorization Act and tracks the implementation progress.

Turning to the potential merger between CP and NS, we appreciate your comments regarding the importance of the Board's 2001 merger rules. We note that while CP filed a petition for declaratory order on March 2, 2016, regarding a hypothetical voting trust, there is no proceeding before the Board seeking approval of a proposed merger. However, we must nevertheless exercise caution and avoid prejudging issues that could arise if a merger application were submitted to this agency.

In the event that a merger application is presented to the Board, it would be subject to rigorous regulatory review. Among other things, the 2001 merger rules instruct major merger applicants¹ to show that a proposed merger is in the public interest by demonstrating that public benefits, such as improved service and enhanced competition, outweigh potential negative effects, such as service disruptions and harm that cannot be mitigated. They also require applicants to address whether claimed benefits can be achieved by means other than a merger. *Major Rail Consolidation Procedures*, 5 STB 539 (2001) ("*Merger Rules*"). No major consolidation proposals have been submitted since the adoption of the *Merger Rules*.

The *Merger Rules* require applicants to address a number of factors, including: public benefits, potential harms, cumulative impacts of the merger and crossover effects on the rail industry, downstream impacts (including additional consolidations), transnational issues and National defense implications, and impacts on railway labor. As part of this showing, the applicant must submit specific financial data and market analyses.

Because the merger review process would also trigger the requirements of the National Environmental Policy Act ("NEPA"), the applicants must also address the environmental impact of any merger, and the Board may impose mitigation measures if it approves a transaction. Applicants are also required to submit a Safety Integration Plan and a Service Assurance Plan to address potential adverse service effects during merger implementation. The Service Assurance Plan must include information about proposed operational integration, training, information technology systems, customer service, freight and passenger operations coordination, yard and

¹ A "major" transaction is a control or merger involving two or more Class I railroads. A Class I railroad is one whose annual operating revenue exceeded \$475,754,803 in 2014.

terminal operations management, service disruption contingency plans, and numerous other technical issues. Finally, as part of any major merger, applicants would be subject to formal STB oversight for at least five years following the merger.

Further because the Board stated in the *Merger Rules* that it would “take a much more cautious approach” with regard to the use of voting trusts in proposed major mergers, the Board would conduct a more formal review of such voting trusts, including a public comment period. In addition to its focus on whether a voting trust insulates the merger partners from unlawful pre-approval control, the Board announced in *Merger Rules* that it would also consider a new factor in assessing voting trusts in major mergers: whether the use of the trust would be consistent with the public interest. Therefore, in addressing a CP voting trust arrangement with NS in connection with a request for merger approval, the Board would consider issues related both to unlawful pre-approval control and the public interest.

Again, thank you for your interest in our work implementing the Reauthorization Act and for sharing your views on the potential merger of CP and NS. We hope this information is helpful to you. Please do not hesitate to contact us if you have any questions.

Sincerely,



Daniel R. Elliott III
Chairman



Deb Miller
Vice Chairman



Ann D. Begeman
Commissioner