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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 699

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ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

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**COMMENTS OF NATIONAL RAILROAD  
PASSENGER CORPORATION (AMTRAK)**

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The National Railroad Passenger Corporation (“Amtrak”) submits these comments in response to the Notice of Proposed Rulemaking in Assessment of Mediation and Arbitration Procedures, EP 699 (STB served Mar. 28, 2012), 77 Fed. Reg. 19,591 (Apr. 2, 2012) (“the Proposed Rule”). The Proposed Rule would amend 49 CFR Parts 1108 and 1109 to, among other things, (1) mandate the arbitration of certain categories of disputes between certain parties; (2) permit the Board to compel the mediation of certain categories of disputes; and (3) establish new procedures for ADR processes.

Amtrak appreciates the Board’s intent to increase the use of mediation and arbitration to resolve matters that are, or would otherwise come, before the Board. However, Amtrak believes that certain proposed provisions regarding the Board arbitration program, and the applicability of those provisions to Amtrak and the disputes in which Amtrak would typically be involved, should be clarified.

Under the Proposed Rule, Amtrak would not be subject to the mandatory binding arbitration program set forth in Proposed Rule § 1108.3, but would only be a participant in arbitration with its consent. Proposed § 1108.3(a)(1) provides that the “Board shall assign to arbitration all arbitration program-eligible matters arising in a docketed

proceeding where all parties to the matter are participants in the Board's arbitration program..." Participation in the arbitration program is limited to Class I and Class II rail carriers who do not opt out, and Class III carriers who opt in. Shippers and "other parties" "may participate in arbitration-program eligible arbitrations on a case-by-case basis..." Proposed Rule § 1108.3(b)(3). Where not all parties are participants in the arbitration program, or where none of the parties are participants, the consent of such non-participants is required before the Board may assign the matter to arbitration. Proposed Rule § 1108.3(a)(4). Therefore, Amtrak would not be considered a "participant in the Board's arbitration program" absent its consent.

However, the Proposed Rule provides that the Board's arbitration procedures are *available* (as opposed to mandatory) "for use in the resolution of all matters arbitrated before the Board," with certain specific exceptions. Proposed Rule § 1108.2(b). Presumably the Board intended to permit Amtrak to consent to participate, on a voluntary basis, in the arbitration of disputes before the Board. However, certain other provisions may not clearly effectuate that intent.

*First*, current § 1108.2(a) (which the Proposed Rule would leave intact) states that the provisions of Part 1108 "are intended to provide a means for the binding, voluntary arbitration of certain disputes subject to the statutory jurisdiction of the STB..." Proposed Rule § 1108(f) defines "statutory jurisdiction" to mean "the jurisdiction conferred on the STB by the Interstate Commerce Act," which Act is defined in § 1108(d) as "the Interstate Commerce Act as amended by the ICC Termination Act of 1995." However, disputes involving Amtrak as a party may arise under the jurisdiction

granted to the Board under other statutory authority.<sup>1</sup> Thus, § 1108.2 should be revised to clarify that the voluntary arbitration procedures apply to disputes involving Amtrak that may arise under the statutory jurisdiction of the Board, regardless of the source of that jurisdiction.

*Second*, Proposed Rule § 1108.3(d) states that “Nothing in the Board’s regulations shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers.” As noted above, to the extent Amtrak is a voluntary participation in the Board’s arbitration program, the arbitrated dispute may involve a party with whom Amtrak has an agreement that includes an arbitration clause (for example, an arbitration clause in an Operating Agreement between Amtrak and a rail carrier). The Proposed Rule should clarify that the Board’s regulations do not preempt or supersede new or existing arbitration clauses contained in agreements between any participating parties.

*Third*, both the current and proposed § 1108.4(a)(1) provide that an arbitrator may grant monetary damages “to the extent available under the Interstate Commerce Act...” As discussed above, the Board also has authority to award damages to Amtrak in disputes that do not arise under the Interstate Commerce Act (*e.g.*, 49 USC § 24308(f)). The Proposed Rule should be clarified to acknowledge that, to the extent that Amtrak is a

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<sup>1</sup> For example, 49 USC § 24308 (a) – (e) grants the STB jurisdiction to hear and decide disputes regarding Amtrak’s use of the facilities and services of a rail carrier; the operation of Amtrak trains over a rail carrier’s facilities during emergencies; Amtrak’s right to preference over freight transportation; and Amtrak’s right to operate additional trains or to operate at accelerated speeds. 49 USC § 24308(f) confers jurisdiction on the Board to investigate delays and failures to achieve minimum standards by rail carriers, and to award damages and other relief in certain circumstances.

voluntary participant in the Board's arbitration program, it may be awarded damages regardless of the statutory source of the Board's jurisdiction.

Respectfully submitted,

NATIONAL RAILROAD PASSENGER  
CORPORATION (AMTRAK)



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