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Surface Transportation Board
Attn: Docket No. EP 734
395 E Street Southwest
Washington, DC 20423-0001

To Whom It May Concern:

The California Department of Transportation (Caltrans) respectfully submits the enclosed comments on the Surface Transportation Board's Notice of Proposed Rulemaking issued on August 3, 2016, titled "Dispute Resolution Procedures Under the Fixing America's Surface Transportation Act of 2015."

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Bruce Roberts".

BRUCE ROBERTS, Chief
Division of Rail and Mass Transportation

Enclosure

California Department of Transportation's Comments Regarding Federal Surface Transportation Board's Notice of Proposed Rulemaking on Dispute Resolution Procedures

August 31, 2016

In general, it's the California Department of Transportation (Caltrans) position that the proposed rulemaking does not meet the intent and requirements of the Fixing America's Surface Transportation (FAST) Act of 2015.

1. The proposed rule would not establish binding dispute resolution procedures for disputes brought before the Surface Transportation Board (Board).
 - o When a State or Amtrak requests the Board to conduct dispute resolution under United States Code, Title 49, Section 24712(c), Congress intended the decision of the Board to be binding on the parties.
 - o The proposed rule adds a new Section 1109.5 which would apply the existing mediation procedures under Code of Federal Regulations Section 1109 and also allows a party to request informal Board assistance in securing outside professional mediation services in the absence of a complaint proceeding before the Board.
 - o As experience with the implementation of PRIIA 209 and the Federal Mediation and Conciliation Service (FMCS) have demonstrated, it is critical that parties have recourse to an efficient mechanism to definitively resolve disputes. Non-binding mediation, or informal Board assistance in securing outside professional mediation, as proposed under this rule, is unlikely to be productive.
2. The Board should adopt binding arbitration as the dispute resolution procedure for disputes brought under Section 24712.
 - o Dispute resolution should be conducted as binding arbitration either before the Board, or before a third-party arbitrator with the Board exercising limited review.
 - o If the Board plans to use third parties for dispute resolution, the Board should issue a supplemental NPRM addressing the following:
 - A. Selection process for the proposed arbitrator;
 - B. Payment for arbitration services if third-party; and
 - C. Rules of practice for arbitration.
3. Dispute resolution should be mandatory.
 - o Upon request from one party, we believe that the Board has the authority to compel, and should compel, arbitration or such other dispute resolution mechanisms that the Board adopts.
4. If professional mediation is acceptable as the only form of dispute resolution available under Section 24712, the Board's role in the proposed procedures is insufficient. It is not clear what it means for the Board to "informally assist in securing outside professional mediation services." Specific questions that arise include:
 - o Will the Board maintain a list of mediators?
 - o Will the Board intervene when parties cannot agree to a mediator?
 - o Will the Board establish terms for the payment of mediation services?
 - o Will the Board require parties to participate in mediation?