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Re: *Comments on Dispute Resolution Procedures under the Fixing America's Surface Transportation Act of 2015*, STB Docket No. EP-734 (Service Date July 26, 2016)

Dear Ms. Brown,

On behalf of the Capitol Corridor Joint Powers Authority (CCJPA), I am writing to express our views on the Board's recent proposal to establish dispute resolution procedures under Section 11204 of the Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94 (Dec. 4, 2015) (codified at 49 U.S.C. § 24712(c)).¹ While we appreciate the Board's prompt action to implement this important directive, we believe the current proposal falls short of what Congress intended and expressly required. The CCJPA believes that the Board is compelled to provide for *binding* dispute resolution by both the plain language of the FAST Act and as a matter of sound policy, and that more robust procedural rules should be developed to guide parties to the dispute resolution mechanisms under the proposal.

Congress created the State-Sponsored Route Committee (Committee) in part to oversee further amendments to the cost allocation methodology approved under Section 209 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, div. B (Oct. 16, 2008). *See* 49 U.S.C. § 24712(a)(6). The Committee is also required to establish the form, frequency, and content of the invoices and financial and performance reports that Amtrak is required to provide to States sponsoring a State-supported route, and the planning and demand reports that States must provide to Amtrak. *Id.* § 24712(b). To ensure the smooth operation of the new Committee and its functions, Congress provided –

If a dispute arises with respect to the rules and procedures implemented [by the Committee], an invoice or a report provided under [49 U.S.C. § 24712(b)], [or] implementation or compliance with the cost allocation methodology developed under section 209 of the Passenger Rail Investment and Improvement Act of 2008 . . . or amended [by the Committee], either Amtrak or the State may request that the Surface Transportation Board conduct dispute resolution under this subsection.

¹ The CCJPA does not operate service on the Northeast Corridor, and therefore expresses no views as to those aspects of the Board's proposal specifically implementing Section 11305 of the FAST Act.

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Id. § 24712(c)(1). Congress gave the Board discretion to “establish procedures for resolution of disputes brought before it under this subsection, which *may* include provision of professional mediation services.” *Id.* § 24712(c)(2) (emphasis added). However, Congress required that “[a] decision of the Surface Transportation Board under this subsection shall be binding on the parties to the dispute.” *Id.* § 24712(c)(3).

CCJPA believes that the Board’s proposal fails to fulfill the requirements of this section in two material respects. First, and most importantly, the Board’s proposal makes no provision whatsoever for *binding* dispute resolution. By definition, parties to mediation are not bound by the outcome of those proceedings unless they reach a voluntary settlement. We believe that Congress, in enacting this requirement, was conscious of the past discussions and related meetings among the parties that involved the Federal Mediation and Conciliation Service (FMCS) which centered on disagreements on the cost allocation policy, and thus intended for the parties to have recourse to a binding mechanism for resolving such disputes. The Board’s proposal fails to satisfy this statutory mandate.

Second, the plain language of the statute contemplates a much more significant role for the Board than mere “informal assistance in securing outside professional mediation services.” It is unclear, for example, how there could ever be a “decision of the Surface Transportation Board under this subsection,” 49 U.S.C. § 24712(c)(3), if only outside mediation services are available. The statute also provides, “[E]ither Amtrak or the State may request that *the Surface Transportation Board* conduct dispute resolution under this subsection.” 49 U.S.C. § 24712(c)(1) (emphasis added). But under the Board’s proposal, it is only an outside mediator that would conduct resolution. Similarly, by directing the Board to “establish procedures for resolution of disputes *brought before it*,” 49 U.S.C. § 24712(c)(2) (emphasis added), we believe that Congress intended the Board to itself assist parties in resolving a dispute, and not to transfer it to an outside professional mediation service.

In light of these statutory requirements – that the Board must make a decision and that that decision be binding on the parties – the CCJPA believes the Board should amend its proposal to include a process for binding arbitration. At this time, the CCJPA has no opinion as to whether such arbitration should be before the Board or an outside arbitrator. However, the Board’s revised proposal should address (a) the selection process for an arbitrator or panel of arbitrators, (b) parties’ payment for the services of an arbitrator(s), and (c) rules of practice to govern the arbitration proceeding. Whether arbitration is conducted by Board staff or an outside arbitrator, the Board should also provide standards for its review of an arbitration award. *See, e.g.*, 9 U.S.C. § 10(a) (standard of review under the Federal Arbitration Act).

The CCJPA also believes that the Board has the authority to compel, and ought to compel, arbitration upon request from a State or Amtrak. This is particularly important for disputes related to the rules and procedures of the State-Supported Route Committee, and invoices or reports under 49 U.S.C. § 24712(b), because it appears that the dispute resolution procedures adopted by the Board in this proceeding are the *only* means of resolving such disputes. By contrast, parties to a dispute involving the implementation of the cost allocation methodology may commence a formal Board proceeding pursuant to Section 209(b) of PRIIA, as amended by the FAST Act. *See* 49 U.S.C. § 24101, note.

Provided that binding dispute resolution procedures are adopted, the CCJPA has no objection to professional mediation services also being made available to parties that wish to pursue it. Indeed, Congress specifically noted that professional mediation services may be one component of the dispute resolution procedures adopted by the Board. However, we believe that the Board must better define its

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role in assisting parties to secure professional mediation services, and provide for certain baseline procedural rules. Specifically, the Board should clarify whether it intends to maintain a list of available outside mediators and whether it will be willing to play a role in selection of a mediator in the event parties cannot agree to one. Likewise, the Board should specify whether it will order the non-requesting party to participate in mediation, and establish procedures for the parties' equal payment for mediation services. CCJPA also urges the Board to incorporate its existing procedural rules in 49 C.F.R. § 1109.3 to ensure such matters as the mediation's confidentiality, meaningful participation by the parties' principals, and the recusal of mediators from subsequent proceedings before the Board.

CCJPA appreciates the opportunity to offer its views on this rulemaking, and looks forward to working with the Board on implementing dispute resolution procedures responsive to Congress' direction and the needs of State sponsors of passenger rail.

Sincerely,



David B. Kutrosky,
Managing Director