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August 31, 2016

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
August 31, 2016
Part of
Public Record

**Re: Docket No. EP 734, Dispute Resolution Procedures Under The Fixing
America's Surface Transportation Act of 2015**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket are the National Railroad Passenger Corporation's Comments on the Board's Notice of Proposed Rulemaking on Dispute Resolution Procedures Under The Fixing America's Surface Transportation Act of 2015.

If you have any questions, please contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Lanzon", written over a horizontal line.

Christine E. Lanzon
Senior Associate General Counsel

Enclosures

Docket No. EP 734

STB Notice of Proposed Rulemaking

**DISPUTE RESOLUTION PROCEDURES UNDER THE FIXING
AMERICA'S SURFACE TRANSPORTATION ACT OF 2015**

COMMENTS OF THE NATIONAL RAILROAD PASSENGER CORPORATION

August 31, 2016

The National Railroad Passenger Corporation (“Amtrak”) submits these comments in response to the Board’s July 26, 2016 Decision in Docket No. EP 734, “Dispute Resolution Procedures Under the Fixing America’s Surface Transportation Act of 2015” (served July 28, 2016) (*see* Fed. Reg. Vol. 81, No. 149 at 51147 (August 3, 2016) (the “Decision”). For purposes of these comments, the rule proposed by the Board in the Decision is referred to as the “Proposed Rule,” and the Fixing America’s Surface Transportation Act of 2015, Public Law 110-432, is referred to as the “FAST Act.”

Amtrak suggests changes in the language of the Proposed Rule (1) to clarify what Amtrak believes to be the Board’s intent -- *i.e.*, to add a new pre-complaint mediation process, while adopting existing mediation procedures for post-complaint mediation for certain enumerated disputes arising under PRIIA 209¹ and PRIIA 212;² and (2) to clarify procedures following a request to the Board for informal assistance in securing outside professional mediation services.

¹ Pub.L. 110-432, Div. B, Title II, § 209, Oct. 16, 2008; 49 U.S.C. § 24101 *note*.

² *Id.* § 212(a), *codified at* 49 U.S.C. § 24905

1. Applicability of Current Part 1109 Mediation Procedures to PRIIA 209 and PRIIA 212 Disputes Following The Filing of a Complaint with the Board.

As noted in the Proposed Rule, the FAST Act added new language to the statutes governing state-supported routes, 49 USC § 24712 (“PRIIA 209 disputes”), and determining compensation for use of the Northeast Corridor, 49 USC § 24905 (“PRIIA 212 disputes”). In both instances, the FAST Act requires the Board to “establish procedures for resolution of disputes brought before it under this [subsection or paragraph], which *may include* [the] provision of professional mediation services.” See FAST Act §§ 11204 and 11305 (emphasis added).

The Proposed Rule adds a new § 1109.5 to the existing mediation rules found in 49 C.F.R. Part 1109. With respect to the enumerated PRIIA 209 and PRIIA 212 disputes, the Proposed Rule permits certain parties to “request that the Board informally assist in securing outside professional mediation services,” which request may be made “even in the absence of a complaint proceeding before the Board.” The Proposed Rule also states that these pre-complaint procedures are available “[i]n addition to the mediation procedures under this Part 1109 that are available following the filing of a complaint in a proceeding before the Board.”

Amtrak agrees that the FAST Act amendments require the adoption of procedures related only to mediation of the enumerated disputes, rather than any other form of dispute resolution. The provisions of 49 USC § 24905(c)(2) already require expedited (120 day) STB adjudication of disputes when a formal proceeding is commenced before the Board by the filing of a complaint. It is also clear that nothing in the FAST Act amendments requires the parties to engage in, or the Board to adopt procedures requiring, binding arbitration. Binding arbitration also makes no sense in situations likely to arise under PRIIA 209 and 212 – *i.e.*, recurring issues involving multiple parties on which uniformity is needed. Because arbitrators need not provide reasons for their decisions, or follow precedent, binding arbitration could lead to the same issues being re-litigated with different results, which is precisely what

Congress intended to avoid when it required uniform policies under PRIIA 209 and 212, and when it enacted the FAST Act requiring less formal dispute resolution procedures for the expeditious resolution of such disputes.³

However, Amtrak believes that the Proposed Rule lacks clarity in one important respect. In the “Supplementary Information” portion of the Decision, the Board states that its existing procedural rules do not apply to contested matters arising under PRIIA 209 or PRIIA 212, but that “parties seeking to bring contested matters before the Board should be guided by the Board’s existing Rules of Practice, as applicable.” This statement in the “Supplementary Information” portion of the Decision may create an ambiguity with respect to whether the current provisions of Part 1109, dealing with mediation *after* the filing of a complaint,⁴ apply in a contested matter under PRIIA 209 or 212; *i.e.*, whether the current provisions should be deemed “applicable” in accordance with the statement in the Supplementary Information.

This ambiguity could be cured by revising the Proposed Rule to explicitly provide that the mediation procedures available to parties under existing §§ 1109.1, 1109.2, and 1109.3 are also applicable to disputes arising under PRIIA 209 or PRIIA 212. For example, the first sentence of Proposed Rule § 1109.5(a) could be revised to provide:

- (a) The mediation procedures under subparts 1109.1, 1109.2, and 1109.3 are applicable to disputes arising under section 209 of the Passenger Rail Investment and Improvement Action of 2008, as amended, following the filing of a complaint in a proceeding before the Board. In addition, prior to the filing of a complaint in a proceeding before the Board, Amtrak or a State member of the State Supported Route Committee...

Similarly, the first sentence of Section 1109.5(b) could be revised to read:

- (b) The mediation procedures under subparts 1109.1, 1109.2, and 1109.3 are applicable to disputes arising under section 212 of the Passenger Rail Investment and Improvement Action of

³ This is not to suggest that these mediation procedures can or should displace existing, consensual forms of dispute resolution, such as those already contained in the PRIIA 212 Policy or in bilateral agreements.

⁴ See, e.g., 49 C.F.R. § 1109.2(a) (“Mediation may be commenced in a dispute before the Board...”); *id.* § 1109.2(b) (“Parties wishing to pursue mediation may file a request for mediation with the Board at any time following the filing of a complaint.”).

2008, as amended, following the filing of a complaint in a proceeding before the Board. In addition, prior to the filing of a complaint in a proceeding before the Board, the Northeast Corridor Commission established under 49 U.S.C. § 24905, Amtrak, or public authorities...

2. Procedures Following Receipt of a Request for Informal Assistance

Subsection (c) of the Proposed Rule provides that a requesting party will submit a letter to the Director of the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), and that OPAGAC shall then "contact the requesting party in response to such request within 14 days of receipt of the request." Amtrak believes that this subsection should be expanded to address certain additional procedures following the filing of a request with OPAGAC, including: (1) timing and means of service of the requesting letter on all affected parties, and the fact that all affected parties must consent; (2) the purpose for which OPAGAC will contact the requesting party; (3) whether and how OPAGAC will contact other affected parties; and (4) confidentiality requirements. If these issues can be addressed with reference to already existing rules, Amtrak recommends that those rules be specifically identified and made applicable in this subpart.

Respectfully submitted,



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