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September 30, 2016

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

**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 Reply 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 blue ink, appearing to read "William H. Herrmann", written over a horizontal line.

William H. Herrmann  
Vice President and Managing Deputy General Counsel  
National Railroad Passenger Corporation  
60 Massachusetts Avenue, NE  
Washington, DC 20002

Enclosures

DOCKET No. EP 734

STB Notice of Proposed Rulemaking

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

REPLY COMMENTS OF THE  
NATIONAL RAILROAD PASSENGER CORPORATION

September 30, 2016

In response to the Notice of Proposed Rulemaking in Docket No. EP 734 ("NPRM"), the California Department of Transportation and several other California entities filed substantially similar comments, urging the Board to interpret the FAST Act provisions to require adoption of compulsory, binding arbitration. The Board should decline to do so.

With very narrow exceptions not relevant here, binding arbitration is a wholly voluntary alternate dispute resolution mechanism. *See, e.g., Thomson CSF v. American Arbitration Association*, 64 F.3d 773, 776 (2d Cir. 1995) ("Arbitration is a contractual by nature – 'a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.'") (*citing United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960)). This well-established principle is recognized in the Board's existing arbitration regulations governing arbitration of disputes arising under title 49, subtitle IV of the United States Code (49 U.S.C. sec. 10101 *et seq.*). *See* 49 C.F.R. sec. 1108.1(c) (defining the arbitration program as the program "under which participating parties ... **have agreed voluntarily** in advance, or on a case-by-case basis to resolve disputes ... using the Board's arbitration procedures.") (emphasis added). Nothing in the FAST Act suggests, much less mandates, that the Board vary from this practice and impose binding arbitration on unwilling parties; indeed, the word "arbitration" never appears in either relevant section of the Act.

The California entities assert that the Board's proposed rule is insufficient because it "makes no provision whatsoever for *binding* dispute resolution" or for "a decision of the Surface Transportation Board." *See, e.g.*, Initial Comments of CCJPA, at 2. This argument ignores the fact that the Board has jurisdiction to conduct binding "dispute resolution" of the enumerated issues using its normal adjudicative powers. Section 24712(c)(1) provides that if certain disputes relating to PRIIA 209 arise, either party may request the *Board* (not an arbitrator) to conduct dispute resolution, and Section 24905(c)(4) provides the same with respect to certain PRIIA 212 disputes. As noted in the Supplementary Information portion of the NPRM, procedures already exist for submitting certain types of contested matters to the Board for adjudication, and those provisions also govern the contested matters enumerated in the FAST Act "as applicable."<sup>1</sup>

The language of Section 24712(c)(3), requiring a decision to be binding on the parties, supports this interpretation. The statute specifies that it is the "decision of the Surface Transportation Board" that is binding, not the decision of a third party arbitrator. There is no reason to believe this provision refers to anything other than the decisions rendered by the Board in the normal adjudicatory process, or to read into the statutory language an implied direction that the Board issue a rule imposing compulsory binding arbitration for these disputes.

There is also no need for the Board to adopt a new set of procedures requiring compulsory binding arbitration. With respect to PRIIA 212 in particular, the policy adopted by the affected parties already includes a procedure to "resolve disagreements related to the interpretation and application of the policy," which includes among other things the ability to request informal assistance from the

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<sup>1</sup> 49 U.S.C. § 24903(c)(2) requires that contested matters be decided by the Board on an expedited (120-day) basis. However, other procedures such as the form of the petition, service requirements, etc. can be found in the Board's existing rules regarding contested matters.

Board.<sup>2</sup> In addition, the agreements reached by the parties under both PRIIA 209 and 212 may provide for certain alternate dispute resolution procedures. It would be duplicative and unnecessary for the Board to first impose, and then fashion rules and procedures for, arbitration as an alternative dispute resolution mechanism, when voluntary and agreed-upon dispute resolution procedures already exist.

Finally, requiring binding arbitration for the enumerated disputes would be bad policy. As discussed in Amtrak's initial comments, binding arbitration is not the best tool for resolving recurring issues involving multiple parties on which uniformity is needed, such as many of the issues likely to arise under PRIIA 209 and 212. Congress clearly intended uniformity of application of the policies adopted under PRIIA 209 and 212, which would be difficult to achieve in the arbitral process.

For these reasons, Amtrak urges the Board to decline to impose mandatory, binding arbitration on the affected parties.

Respectfully submitted,



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60 Massachusetts Avenue, NE  
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<sup>2</sup> Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy, as amended June 2016, Section 2.7 ("Dispute Resolution").