

BEFORE THE INTEREST ARBITRATION BOARD

**Dispute Between the
National Railroad Passenger Corporation**

and

**The Passenger Rail Labor Bargaining Coalition (PRLBC) as the representative of the
Brotherhood of Maintenance of Way Employees (BMWED) and
the Brotherhood of Railroad Signalmen (BRS)**

Carrier's Pre-Hearing Brief

NATIONAL RAILROAD PASSENGER CORPORATION

December 27, 2013

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ISSUES BEFORE THE BOARD	2
III. FACTS TO BE PRESENTED AT HEARING.....	2
A. Key Factual Issues	2
B. Amtrak’s Witnesses and Their Testimony.....	6
IV. ARGUMENT	9
A. Amtrak Has A Well-Established Internal Pattern of Settlements in This Round.....	9
B. The PRLBC Incorrectly Interprets PEB No. 242 as Giving Amtrak Labor Organizations an Entitlement to Freight Settlement Terms No Matter the Existence of an Amtrak Internal Pattern nor the Timing of Amtrak and Freight Settlements	12
C. The PRLBC’s Strategy - Choosing Not to Bargain According to the Amtrak Pattern But Intentionally Delaying Negotiations While Awaiting a Freight Settlement – Should Not Be Rewarded.....	15
D. Interest Arbitration and PEB Decisions Support Giving Controlling Weight to Applicable Internal Patterns.....	19
E. The Board Should Award as the BMWED and BRS Contract Terms Either (i) the Amtrak Internal Pattern, or (ii) A Cost-Neutral Variation on the Amtrak Internal Pattern That Provides Greater General Wage Increases for Offsetting Cost Reductions from Health Care and / or Work Rule Changes	23
V. CONCLUSION.....	25

I. INTRODUCTION

This Pre-Hearing Brief is submitted on behalf of the National Railroad Passenger Corporation (“Amtrak” or the “Carrier”) to summarize the evidence and arguments that Amtrak will present at hearing in support of its position in this dispute with the two labor organizations, the Brotherhood of Maintenance of Way Employees (“BMWED”) and the Brotherhood of Railroad Signalmen (“BRS”), represented jointly by the Passenger Rail Labor Bargaining Coalition (“PRLBC”).

On a superficial level, this dispute presents a question of what is the appropriate reference point for settlements with the BMWED and the BRS: as Amtrak advocates, the internal Amtrak pattern that is reflected in agreements since 2010 with all of Amtrak’s labor organizations except BMWED or BRS; or as PRLBC advocates, the BMWED and BRS freight deals that were reached in early 2012, following the recommendations of Presidential Emergency Board (“PEB”) No. 243 in late 2011. If the choice before the Board is viewed solely as one between the Amtrak internal pattern or the freight deals, then the Board needs to focus on: the strength of the Amtrak internal pattern, the recognized labor relations importance of internal patterns, the destabilizing effect of PRLBC breaking the Amtrak pattern, the PRLBC’s intentional bargaining strategy of delay and failure to negotiate, and the historic relationship between Amtrak and the freights. If the Board instead views its role as fashioning a settlement dealing with the full range of options, then the Board needs to focus on: what alternatives are available, through reasonable modifications of health care and work rule provisions, to generate offsetting cost savings that could fund additional general wage increases for the BMWED and the BRS. Amtrak’s case is intended to provide the Board with sufficient evidence to assess both the narrow pattern question and the fuller range of settlement options.

II. ISSUES BEFORE THE BOARD

The parties have stipulated the issue before the Board as determining the terms of successor agreements between Amtrak and the BMWED and Amtrak and the BRS. In its November 15, 2013 Statement of Position (Amtrak Exhibit 100), which is incorporated by reference, Amtrak described the underlying issues in detail. To assist the Board, the table appended as Amtrak Exhibit 102 provides a summary description of the core issues between the Amtrak internal pattern proposal and the PRLBC proposal.

III. FACTS TO BE PRESENTED AT HEARING

A. Key Factual Issues

Amtrak's proof at hearing will be focused on answering for the Board three sets of questions:

- (i) *Is there an internal pattern of agreements among the labor organizations representing Amtrak's employees?*

What are the elements of the Amtrak internal pattern?

What weight should the Board give in this proceeding to the Amtrak internal pattern?

- (ii) *What occurred in this round of bargaining between Amtrak and the PRLBC that resulted in no agreements with the BMWED and the BRS?*

How are the parties respectively accountable for the delay and the failure in reaching agreement?

- (iii) *Other than the Amtrak-advocated internal Amtrak pattern, or the PRLBC-advocated version of the freight deal, are there other alternatives available to the Board for fashioning a settlement?*

Specifically, can cost-saving modifications in health benefits or work rules provide funding for additional general wage increases beyond the Amtrak internal pattern?

1. Existence of an Internal Amtrak Pattern

Amtrak's principal argument in this proceeding is that there exists an irrefutably strong internal pattern among Amtrak's other labor organizations and that this internal Amtrak pattern alone should be the basis for the Board's award of new contract terms for the BMWED and BRS. Amtrak will prove – beyond peradventure – that in this bargaining round there is, in fact, a well-established and consistent internal Amtrak pattern of labor agreements. That internal Amtrak pattern was established with the first labor organization in April 2010, covered two-thirds of Amtrak represented employees before the November 2011 freight decision in PEB No. 243 (Joint Exhibit 58), and was joined most recently by the United Transportation Union (“UTU”) in April 2013. The internal Amtrak pattern now encompasses 17 agreements, 13 of 15 Amtrak labor organizations, and covers operating and non-operating employees across the workforce, constituting 84% of the Amtrak represented workforce. Indeed, the only labor organizations *not* covered by the Amtrak pattern are two of the engineering crafts, represented by the BMWED and BRS.

The elements of the Amtrak internal pattern are intentionally limited and simple:

(1) General wage increases of 14% spread over the period July 1, 2010 through January 1, 2015; (2) Health benefit changes of an increase in employee contribution of up to 15% and an increase in the emergency room co-pay from \$50 to \$75; (3) Work rule changes of payroll efficiencies and discipline procedure changes, as well as craft-specific work rule changes; (4) Me-Too protection against subsequent Amtrak agreements¹; and (5) Duration through January 1, 2015, the date of the last general wage increase. Essentially, the only variations across the agreements are the craft-specific work rule changes contained in the different labor organization agreements.

¹ See *infra* note 7.

2. Amtrak-PRLBC Bargaining History

The most important fact in this case is that Amtrak went first in this round and established its internal pattern with a majority of its represented employees well before any freight agreements: the terms of the internal Amtrak pattern were established with the first tentative agreements in April 2010, almost two years before the February 2012 freight deals that PRLBC advocates as solutions for the BMWED and BRS agreements. Amtrak will demonstrate that it is unprecedented since its creation in 1971 that Amtrak led the bargaining round by reaching agreements with a critical mass of its employees before the freight carriers settled in national handling.

That Amtrak achieved early-round voluntary settlements establishing the internal Amtrak pattern and preceding the freight deals was the result of Amtrak's purposeful and successful bargaining strategy. Amtrak was criticized in PEB No. 242 (Joint Exhibit 57) for delaying bargaining for multiple years, refusing to offer retroactive pay, relying on a limited internal pattern, and not following earlier freight settlements. Amtrak will explain at hearing that prior to the 2010 round, Amtrak President Joseph Boardman and senior management determined to avoid a replication of the delay criticized in PEB No. 242 by pursuing simple, reasonable, and early deals with all labor organizations in this round. That strategy succeeded when multiple labor organizations agreed to the internal Amtrak pattern agreements during 2010 – covering more than 50% of Amtrak's represented employees.

Three PRLBC-represented labor organizations – the Sheet Metal Workers International Association (SMWIA), the National Conference of Firemen & Oilers (NCFO), and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBBB) – during 2011 broke away from PRLBC and reached Amtrak pattern

agreements, thus recognizing the establishment of the internal Amtrak pattern and the delayed resolution of freight national handling.

In contrast, the BMWED and BRS adopted an intentional bargaining strategy of delaying agreement with Amtrak and waiting for resolution of freight deals in national handling. No progress occurred in bargaining from December 2010 until February 2012 because it was the PRLBC's bargaining strategy not to meet, let alone reach agreements with Amtrak. Then, in February 2012, the PRLBC placed the BMWED freight deal on the table as the only grounds for settlement. Since February 2012, the PRLBC's consistent argument has been that BMWED and BRS are entitled to the terms of the freight deals based on the "precedent" of prior Presidential Emergency Board decisions, notwithstanding the existence of the strong Amtrak internal pattern established earlier in this round.

But, in fact, the PRLBC's table proposals have not been identical to the freight deals. On the significant issue of employee health care contributions, the PRLBC maintains that Amtrak must continue the status quo of a monthly contribution of \$177.54, and not follow the higher employee health care contribution amount under the freight deals. Since health care cost containment was a central recommendation of PEB No. 243, the PRLBC's cherry-picking approach evidences not only an inconsistency with its "freight deal" rhetoric, but an overall bargaining strategy that has not been directed towards achieving agreements with Amtrak.

3. Alternatives for Funding Wage Increases

Amtrak has *not* taken the position in bargaining that the terms of the internal Amtrak pattern are the only possible settlement terms with the PRLBC. Instead, Amtrak has represented to the PRLBC since 2010 and the NMB throughout mediation that there is a range of cost saving modifications in either health care benefits or work rules that could generate funding for

additional general wage increases for BMWED and BRS-represented employees.² During direct negotiations and in mediation, Amtrak presented a range of health care benefit and work rule changes and the cost savings they could generate, but the PRLBC flatly rejected that approach. A July 17, 2013 Amtrak proposal provided an example of certain health care changes that could generate an additional 1% increase in wages during 2014. At hearing, Amtrak intends to update this approach through testimony that will describe specific health benefit and work rule changes and the updated cost savings that could be generated during the remaining years of an agreement to fund additional wage increases during the same period.

In presenting this testimony concerning certain health care and work rule modifications and offsetting cost savings, Amtrak does not intend to undermine the internal Amtrak pattern as the appropriate award in this proceeding. Instead, Amtrak's goal is to provide the Board with the economic tools for fashioning an alternative approach, to be available to the Board if it concludes that is the appropriate solution to the current dispute.

B. Amtrak's Witnesses and Their Testimony

The following description summarizes the testimony of Amtrak's witnesses in its direct case.

1. Charles Woodcock, Leader – Corporate Labor Relations, Amtrak

As Amtrak's principal labor relations officer, Mr. Woodcock will provide detailed testimony about Amtrak's labor relations strategy this round and the resulting agreements that establish the Amtrak internal pattern. He will explain the chronology of reaching the agreements that constitute the Amtrak internal pattern and the specific elements of that pattern. Mr. Woodcock will also provide a chronology of the bargaining this round with the PRLBC and

² This was the approach utilized to achieve a 2013 settlement with the UTU, in which a performance bonus for conductors was agreed along with work rule criteria related to certifications, qualifications, attendance and accepting assignments that generate offsetting cost savings for Amtrak.

other Amtrak labor organizations, including the development of Amtrak's overall bargaining strategy, Amtrak's bargaining table approaches on potential health care and work rule changes, and the PRLBC's intentional strategy of delaying and failing to bargain with Amtrak until freight deals were concluded.

2. Jerrold Glass, President, F&H Solutions Group

Jerrold Glass will present expert testimony as a labor economist, labor relations expert, and collective bargaining negotiator concerning pattern bargaining. This will include explanations of internal and external patterns in the railroad and other industries. Mr. Glass will analyze the historic relationships and patterns among and within Amtrak, the freight railroads, and the commuter railroads. He will discuss prior bargaining rounds and Presidential Emergency Boards and how Amtrak's strategy this round relates to prior railroad disputes. His ultimate opinion will support following the Amtrak internal pattern in this proceeding.

3. Thomas Rand, Principal, PRM Consulting Group

As a health benefits expert, Mr. Rand will provide testimony concerning the Amtrak health benefit plan ("AmPlan") and the level of benefits provided compared to both the private sector and the federal sector. He will describe both AmPlan and the freight health plan and the costs associated with covering PRLBC-represented employees under the various party health benefit proposals. Mr. Rand will provide the Board with a list and description of alternative health benefit plan changes that could be considered as part of a settlement and the cost savings attributed to these alternatives. His ultimate opinion will be that the AmPlan is sufficiently generous to provide numerous opportunities for cost saving modifications that could fund additional general wage increases.

4. Bruce Pohlot, Chief Engineer, Amtrak

Mr. Pohlot, who supervises both the BMWED and BRS engineering workforces at Amtrak, will provide testimony about potential work rule changes for each craft. He will describe the opportunities for cost-saving improvements in efficiency with each work group. For specific work rule changes, Mr. Pohlot will describe the issues under current work rules, the type of workable changes suggested by Amtrak, and the costing out of such changes for purposes of funding additional general wage increases.

5. James Gillula, Managing Director, IHS Economics

As a labor economist, Dr. Gillula will provide expert testimony concerning the BMWED and BRS compensation at Amtrak, compared to both private sector and federal sector employees. This will include an analysis of wage and benefit comparability, quit rates, and historic and projected wage increases for BMWED and BRS against a number of comparators. Dr. Gillula's ultimate opinion will be that the BMWED and BRS employees do enjoy a wage and benefit premium relative to comparable private sector employees in similar regions and that trend would continue under Amtrak's internal pattern settlement proposal.

6. Donald ("DJ") Stadler, Vice President of Operations, Amtrak

DJ Stadler is Amtrak's current Vice President of Operations and former Chief Financial Officer, and he will provide a financial analysis to the Board. Mr. Stadler will provide an explanation of the place of labor costs relative to the BMWED, the BRS, and other labor organizations, in Amtrak's operating and capital budgets. His testimony will include an explanation of Amtrak's recent and future financial challenges related to Congressional funding, the budgeting of the Amtrak internal pattern costs, and the costing of Amtrak's and the PRLBC's proposals.

7. Joseph Boardman, President and Chief Executive Officer, Amtrak

As Amtrak's President and CEO since late 2008, Mr. Boardman is responsible for Amtrak's corporate strategy, including the carrier's labor relations approach. He will explain his role in funding the wage increases resulting from PEB No. 242 and his development of a comprehensive labor relations approach as part of Amtrak's broader corporate strategy. Mr. Boardman will explain Amtrak's strategy this round of securing prompt and reasonable agreements with its labor organizations and how it has succeeded with 84% of Amtrak's represented workforce.

IV. ARGUMENT

A. Amtrak Has A Well-Established Internal Pattern of Settlements in This Round

The Amtrak agreements reached since 2010 not only meet the definition of an "internal pattern" under recognized labor law standards, they constitute an extraordinarily strong example of an internal pattern in the railroad industry, or any other industry. Prior PEBs and interest arbitration awards in the railroad industry have outlined four relevant criteria for determining whether an employer has established an "internal pattern" that should form the basis for resolving a collective bargaining dispute. Those factors include whether the pattern:

(1) covers at least 50% or more of the unionized workforce; (2) applies to multiple crafts or classes, including operating and non-operating crafts; (3) developed during the same bargaining round, or in other words is contemporaneous with the current dispute; and

(4) addresses multiple economic and non-economic topics, such as compensation, health insurance, work rules, and/or duration.

For example, in each of the following decisions, a Board found a clear internal pattern based on one or more of above factors:

- PEB No. 231 (SEPTA & BLE, 1996) recommended settlement with the wage terms that all unions had agreed to, except one union (BLE), because there was an “unbroken internal pattern ... covering comparable time periods.” *Id.* at 7-8. (Amtrak Exhibit 104).
- PEB No. 222 (Amtrak, 1992) recommended settlement of the wage terms based on the internal Amtrak pattern that covered more than 50% of employees, across several crafts, which removed Amtrak from the prior freight pattern established in PEB No. 219. *Id.* at 9, 15. Joint Exhibit 55).
- PEB No. 187 (National Railway Labor Conference & Railway Employees’ Department, 1975) recommended settlement with the internal wage pattern where all other unions, constituting 85% of employees, had agreed to the wage settlement. *Id.* at 14. (Amtrak Exhibit 105).
- PEB No. 186 (National Railway Labor Conference & BRAC, 1975) recommended settlement on the basis of an existing pattern formed by agreements with seven organizations representing 59.4% of workers involved in collective bargaining. *Id.* at 8. (Amtrak Exhibit 106).
- PEB No. 176 (National Railway Labor Conference & Employees’ Conference Committee, 1969) recommended that the shop crafts accept the wage pattern established for 77% of railroad employees. *Id.* at 8. (Amtrak Exhibit 107).
- PEB No. 97 (Eastern, Western, and Southeastern Carriers Conference Committees & Brotherhood of Locomotive Firemen and Enginemen, 1952) recommended the carrier’s wage proposal that already had been accepted by 89% of railroad employees. *Id.* at 13, 27. The pattern included all non-operating employees and 51% of operating employees. *Id.* at 16. (Amtrak Exhibit 108).
- PEB No. 57 (Akron, Canton & Youngstown RR Co. & BLE, Brotherhood of Locomotive Firemen & Enginemen, Switchmen’s Union of North America, 1948) recommended the internal pattern where 90% of railroad employees had accepted the carrier’s proposed wage increase. That wage structure applied to operating organizations and non-operating organizations. *Id.* at 6. (Amtrak Exhibit 109).
- *In re Massachusetts Bay Commuter Rail Co.* (Golick, Lucek, Roth, Sept. 12, 2011) recognized and applied an internal pattern where 80% of employees already were covered by an established internal pattern. (Amtrak Exhibit 110).
- *In re Massachusetts Bay Commuter Railroad Company and American Train Dispatchers Association* (Litton, Lucek, McCann, Feb. 17, 2012) recognized and applied an internal pattern where 12 of the 14 carrier unions already had ratified agreements in place. (Amtrak Exhibit 111).
- *Compare with* PEB No. 242 (Amtrak, 2007) (no dominant internal pattern, only covered minority of employees, not contemporaneous deals between unions, and not broad across classifications) (Joint Exhibit 57); PEB No. 230 (NCCC & IAM, IBEW, SWMIA, 1996) (no dominant internal pattern found with only 40% coverage, also pattern did not cover traditional shopcraft employees) (Amtrak Exhibit 112).

This current bargaining round between Amtrak and its labor organizations clearly meets *all four* criteria considered by prior PEBs and interest arbitrators as to whether a clear internal pattern exists. First, this current bargaining round features a broad Amtrak pattern, which now covers 84% of Amtrak’s unionized employees – far beyond the bare majority threshold cited by other awards as sufficient for an internal pattern. Again, it is only the BMWED and the BRS that have not joined the Amtrak internal pattern. Second, both operating and non-operating crafts on Amtrak have settled, including the locomotive engineers (BLET) and conductors (UTU) and all shopcraft labor organizations (including the SMWIA, NCFO, and IBBB – members of the PRLBC).

Third, the internal agreements here are contemporaneous. The current bargaining round began after January 1, 2010, when effectively all Amtrak agreements became amendable. Within the first year of bargaining, Amtrak reached 9 settlements, all based on a reasonable and fair internal pattern, and which covered almost 57% of the unionized workforce in less than 12 months.³ Then, in 2011, three of the PRLBC labor organizations, the SMWIA, NCFO, and IBBB, decided to settle this round based on the established pattern from 2010. This resulted, in less than two years’ time, in an internal pattern that covered all but four labor organizations, and with almost 64% of Amtrak’s unionized employees under new contracts. Since early 2012, after PEB No. 243 and the initial freight deals, Amtrak has reached agreements with its operating crafts, the BLET and the UTU, in January 2012 and April 2013 respectively, which included another 2,400 employees under the Amtrak pattern.

Finally, the Amtrak internal pattern is not limited to certain topics, but rather covers *all* substantive issues with little to no variation. Those topics are wages, health insurance benefits,

³ The alacrity of these settlements evidences that, particularly in the difficult economic climate of 2010, the Amtrak pattern proposals were attractive to Amtrak’s unions.

common work rules, Me-Too clauses, and duration. Only minor work rule variations exist, as unique to specific crafts or classes.

Given that Amtrak's internal pattern meets not just some, but *all four key factors* cited by prior precedent to support an internal pattern, this Board should conclude that Amtrak has established a dominant internal pattern for purposes of resolving this dispute. Indeed, PRLBC cannot seriously contest the existence of the Amtrak internal pattern, but instead will attempt to convince the Board to ignore the compelling implications to this case of such a strong Amtrak internal pattern.

B. The PRLBC Incorrectly Interprets PEB No. 242 as Giving Amtrak Labor Organizations an Entitlement to Freight Settlement Terms No Matter the Existence of an Amtrak Internal Pattern nor the Timing of Amtrak and Freight Settlements

PRLBC's core argument is that given the historic relationship between Amtrak and freight settlements, and especially the decision in PEB No. 242, the current bargaining round must be resolved on the freight pattern, rather than Amtrak's well-established internal pattern. In pursuing this argument, PRLBC misreads PEB No. 242 as effectively creating an entitlement to freight settlements for Amtrak employees, ignoring Amtrak internal patterns, and eviscerating any prospect for future collective bargaining on Amtrak. But PEB No. 242 must be read in its entirety and as relating to the specific bargaining dispute presented to it in 2007. The facts of the current round are distinctly different and render PEB No. 242 and its reliance on freight settlements totally inapposite.

Amtrak cannot and does not deny that there has been a historic relationship between Amtrak settlements and freight settlements, which was recognized in PEB No. 242: "Freight Agreements have served over the years as the historical pattern referenced for establishment of wages, benefits and working conditions at Amtrak. For over 30 years, the Parties have used the Freight Agreements as the pattern for purposes of negotiating new Amtrak Agreements with the

Organizations.” Report of PEB No. 242, at 14.⁴ Indeed, the relevance of freight patterns was not even the contested issue in PEB No. 242, it was its application to the specific issue of retroactivity. “The Carrier and the Organizations embrace these general concepts. It is in their application where their positions diverge.” *Id.* at 15

The discussion of freight patterns in PEB No. 242 occurred entirely in a context where freight agreements *preceded* Amtrak settlements.⁵ Indeed, PEB No. 242 had before it two rounds of freight agreements, (2000-2004) and (2005-2009), while in 2007 Amtrak had no agreements covering the majority of its employees since 1999. In the current round we have an unprecedented fact – Amtrak going first, reaching initial agreements almost two years before the freights, and reaching such pattern settlements with over two-thirds of the Amtrak represented employees *before any freight deals were reached*. As will be explained through the testimony of Jerrold Glass, that is a unique factual development in the history of the relationship between Amtrak and the freights.

Second, the recommendation of PEB No. 242 was predicated entirely on a finding rejecting Amtrak’s argument that there existed an internal Amtrak pattern. The PEB No. 242

⁴ This historic relationship arose because the freight, passenger, and commuter rails initially operated under the same agreements on the same railroads, but there has, in fact, been divergence since the 1970s. The PEB No. 242 Board characterized PEB No. 222 as finding “Freight Agreements to be the appropriate pattern comparators for Amtrak employees.” *Id.* at 29. That description is, at a minimum, incomplete, and perhaps misleading. PEB No. 222, in fact, did *not* follow the freight pattern on wages, because Amtrak had established a different internal wage pattern: “This is not the case with Amtrak. It has settled with a number of organizations representing about half of its employees on a wage package different from that recommended by PEB 219. By doing so, it has introduced into the present case an “internal model” different from that established by PEB 219. In short, through negotiations and its position before us, it has taken itself out of the PEB 219 mold, at least as to wages. Hence, the possibility of a “destabilizing” effect between those bound by the PEB 219 recommendations and others gaining a better wage benefit is not present. This is not to say that the PEB 219 recommendations may not be relevant. Rather, they will be considered, where appropriate, on the same footing as other probative material.” PEB No. 222, at 9.

⁵ Notably, the PRLBC recognized in its pre-hearing brief in PEB No. 242 that the historical connection with the freights, and the origin of that “pattern,” is premised on “Amtrak [] historically negotiat[ing] its bargaining agreements *after* national freight agreement negotiations for the round are concluded.” PRLBC Pre-Hearing Brief in PEB No. 242, at 26 (emphasis added) (Amtrak Exhibit 113).

Report includes an extensive discussion that “Amtrak’s Internal Pattern Claim is Not Persuasive in this Case.” *Id.* at 23. “Avoidance of internal wage or benefit inequity is a legitimate consideration. There are a number of reasons why this Board cannot accept Amtrak’s argument that the claimed internal pattern trumps or modifies the Freight Agreements as the appropriate relevant pattern in this case.” *Id.* at 24. The Board rejected Amtrak’s pattern argument because: (1) there was no historic relationship between the agreements with non-operating crafts (TCU, ASWC, ARASA (OBS), and operating crafts, *id.* at 24; (2) “the settlements cover a minority of Amtrak’s unionized working forces,” and Amtrak relied on agreements (particularly operating agreements) that had failed ratification, *id.* at 24-25; (3) the agreements Amtrak relied upon did not cover the period after December 31, 2004, *id.*, at 25; (4) and there was no evidence of pattern with respect to “work rules or other working conditions.” *Id.* at 25. These are the same traditional factors for testing the existence of an internal pattern discussed in Section (A) above, under which Amtrak has unequivocally demonstrated an internal pattern exists in this case.

Not only is the result in PEB No. 242 predicated entirely on a finding of no internal Amtrak pattern for the 1999-2007, the Board expressly limited its finding that the freight pattern predominated to that context. “The finding in this case that the Freight Agreements provide the most fair and appropriate pattern for the Organizations in this dispute is grounded squarely upon historical considerations and also record facts and *should not be construed as opining on whether in the future some pattern other than the Freight Agreement might be fair and appropriate.*” *Id.* at 25, note 3 (emphasis added). Thus, the Board in PEB No. 242 made clear that, if there had been a well-established Amtrak internal pattern, that would have been a different case. This is that different case.

The PRLBC thus misreads PEB No. 242 by assuming that it may forever rely on the freight external pattern to resolve all future Amtrak bargaining rounds, even where Amtrak establishes a strong internal pattern before the freights reach settlements. Although PEB No. 242 chose to adopt, in large part, the freight settlement pattern for Amtrak, that decision clearly applied to *that specific bargaining round* based on the circumstances presented to the Board. At no point in the award did the Board issue a permanent determination – that for all time and regardless of any other relevant factors – Amtrak labor organizations had a default right to the freight settlement terms. PEB No. 242 thus cannot bear the weight that the PRLBC would have this Board place on it.

C. **The PRLBC’s Strategy - Choosing Not to Bargain According to the Amtrak Pattern But Intentionally Delaying Negotiations While Awaiting a Freight Settlement – Should Not Be Rewarded**

Amtrak believes that the parties’ respective bargaining conduct in this round – specifically PRLBC’s pursuit of intentional delay in bargaining with Amtrak in order for the BMWED and the BRS to obtain freight deals that could be used as a basis for an external freight pattern argument – is relevant to the current Board’s deliberations. Amtrak does not believe that an interest arbitration forum, like a Presidential Emergency Board, is the appropriate place for litigating claims with respect to bargaining conduct under the standards of the Railway Labor Act.⁶ Allocating legal blame generally is not conducive to resolving collective bargaining

⁶ The Railway Labor Act provides a general obligation of good faith bargaining under 45 U.S.C. Section 152 First:

“It shall be the duty of all carriers, their officers, agents, and employees *to exert every reasonable effort to make and maintain agreements* concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.” (emphasis added).

This obligation, which is applicable to carriers and unions representing employees, has been termed “the heart of the Railway Labor Act.” *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

settlements. However, in PEB No. 242, the PRLBC made much of the allegation that Amtrak intentionally delayed bargaining and otherwise insufficiently bargained in good faith. *See, e.g.*, PRLBC Pre-Hearing Brief in PEB No. 242, p. 25, 47, (Amtrak Exhibit 113). PRLBC specifically claimed that Amtrak “should not be rewarded for intransigence in bargaining.” *Id.* at 32. While Amtrak believes PEB No. 242 gave too much weight to the PRLBC’s argument, the Board nonetheless found that “the evidence paints a fairly clear picture that places much greater responsibility on Amtrak for the failure to ink a deal over the prolonged period since December 31, 1999, than on the Organizations.” *Id.* at 37. That finding influenced the Board’s overall decision supporting the Unions’ position in PEB No. 242. Now that shoe is on the other foot.

The PRLBC’s bargaining strategy over the past four years will be detailed at the hearing, based on both table behavior and the public statements and positions of the BMWED and BRS. Since 2010, PRLBC has pursued an intentional, public strategy of waiting for the freight deals and effectively declining to bargain with Amtrak during all of 2011. Eventually, a freight decision in PEB No. 243 issued on November 5, 2011, and freight settlements with BMWED and BRS were entered in early 2012. This delay of almost two years from the first Amtrak deals establishing the Amtrak internal pattern allowed the PRLBC to propose, on February 13, 2012, that the BMWED freight agreement serve as an external pattern for a new Amtrak deal. Remarkably, this initial PRLBC comprehensive proposal came more than *two years* after the Amtrak contracts opened, and the proposal noticeably cherry-picked more desirable freight terms by excluding the freights’ increased health and welfare contributions.

Since early 2012, the PRLBC has been inflexible in its demand to Amtrak for the freight deals as the terms for BMWED and BRS settlements, and as Amtrak will demonstrate at hearing, has pursued a form of corporate campaign against Amtrak. The PRLBC’s argument has been

simply that the BMWED and BRS are entitled to the terms of the freight settlements under the precedent of PEB No. 242. While such an “entitlement” argument misreads PEB No. 242, *the critical point is that any reference to freight settlements could occur in this interest arbitration solely because the PRLBC pursued a strategy of delay*, contrary to PRLBC’s Railway Labor Act obligation “to exert every reasonable effort to make...agreements” and contrary to the express directions of PEB No. 242 against bargaining delay. In this current dispute, to paraphrase the PRLBC in PEB No. 242, the BMWED and the BRS “should not be rewarded for intransigence in bargaining.” PRLBC Pre-Hearing Brief in PEB No. 242, at 32.

Even the PRLBC recognized in its PEB No. 242 Post-Hearing Brief that “the role of the Board is to make a recommendation that encourages all parties to bargain in good faith, not just in this bargaining round, but in the future as well.” *Id.* at 1 (Amtrak Exhibit 114). Amtrak respectfully submits that adopting the PRLBC’s position in this case would not meet the very standard it proposed just several years ago. Amtrak is extremely concerned that an award supporting BMWED and BRS in their intentional decisions *not* to bargain according to the parameters of Amtrak’s internal pattern, but to delay bargaining in hope of a different freight settlement that could be argued as an external pattern, will destabilize collective bargaining in this round and distort bargaining incentives on Amtrak in the future. As 13 of Amtrak’s 15 labor organizations already have agreed to new contracts, based on a clear and reasonable Amtrak pattern, an award in the PRLBC’s favor would: (1) destabilize the existing agreements for 84% of Amtrak unionized employees;⁷ (2) undermine the other Amtrak labor organizations that made

⁷ As will be explained further at hearing, the Amtrak internal pattern agreements contain Me-Too Clauses, providing

“In the event the Carrier reaches agreements with other Organizations (representing other crafts) which contain more favorable general wage increases or benefits during the current round of negotiations, such provisions will be incorporated into this agreement, unless such improvement(s) was made in consideration for modification(s) in other work rules in the agreement between the parties.”

deals through good faith bargaining; (3) reward the PRLBC's delaying and intransigent bargaining conduct over the last several years; and, most importantly, (4) reduce or eliminate any incentive for Amtrak labor organizations to settle contracts in the future prior to the conclusion of freight national handling, even if that means *years* of no effective bargaining on Amtrak while the parties await the establishment of an external freight pattern. That approach will only replicate, not avoid, the lengthy bargaining rounds on Amtrak that PEB No. 242 so clearly rejected.

PRLBC's position would mean that Amtrak is a *de facto* participant in the result of national handling for all time, even though Amtrak has essentially not been party to the national freight negotiations since Amtrak spun off from the freights in 1971 to create a separate, national passenger service line.⁸ The practical effect of the PRLBC's position – mandating that Amtrak adopt the outcome of freight settlements from national handling in every round while Amtrak is not a party to those national negotiations – is neither legally nor practically tenable.⁹

Amtrak interprets these provisions as not implicated by any BMWED and BRS agreements that provide general wage increases beyond the Amtrak pattern that are funded through health care and work rule changes beyond the Amtrak pattern. If the PRLBC unions obtain agreements through interest arbitration with more favorable wages and benefits, without offsets, then either Amtrak's labor costs will be substantially increased through an obligation to provide comparable increases to the employees under the other agreements, or there will be a substantial dispute under those clauses between Amtrak and its other unions.

⁸ As will be explained at hearing, historically, Amtrak in the first decade of bargaining sometimes entered "standby agreements" that adopted freight terms, or joined freight bargaining on limited issues; this changed dramatically in 1981. Further, Amtrak is not a member of the National Railway Labor Conference, the freight bargaining entity.

⁹ Under Section 2, Third of the RLA, a carrier has the right to designate its representatives for bargaining, "without interference, influence, or coercion." 45 U.S.C. § 152, Third. *See, e.g., Rwy. & Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675, 679 (8th Cir. 1989) (carrier has no duty to enter into a new round of national handling even if the carrier has joined in previous rounds). *See also Gen. Comm. of Adjustment, GO-386 v. Burlington N. & Santa Fe R'y Co.*, 295 F.3d 1337, 1340 (D.C. Cir. 2002) (weight given to historical participation in national handling). As noted above, Amtrak left freight national handling over three decades ago.

D. Interest Arbitration and PEB Decisions Support Giving Controlling Weight to Applicable Internal Patterns

Even if the internal Amtrak pattern versus external freight pattern issue were not the result of intentional delay by the PRLBC, the internal Amtrak pattern must be given predominance by the Board. Where a clear internal pattern has been established, interest arbitration and PEB decisions not only give deference to that pattern, they give **controlling weight** to that pattern for resolving that specific bargaining dispute. As stated in *Elkouri & Elkouri*:

Arbitration of primary disputes over the terms of a new contract is a substitute for successful bargaining, and the ‘pattern’ or ‘package’ indicates what might have evolved from successful bargaining had the parties acted like others similarly situated. Attention to the ‘pattern’ or ‘package,’ rather than adherence to any rigid formula, also reduces the risks of parties entering wage arbitration, but also should encourage their own free settlement. It tends to afford equality of treatment for persons in comparable situations. It also provides a precise, objective figure, rather than an artificially contrived rate.

See *Elkouri & Elkouri, How Arbitration Works* 22-69 (7th ed. 2012) (citing *Pacific Gas & Elec. Co.*, 7 LA 528, 534 (Kerr, 1947)). With organizations that have multiple unionized employee groups, an internal settlement pattern has been the foremost criteria for resolving disputes through interest arbitration or PEBs. *Elkouri* specifically states that “[a] well-established internal pattern generally is given greater consideration by arbitrators than external patterns.” *Id.* at 22-87. Thus, “hornbook law” supports giving predominant weight in interest arbitration to internal patterns.

A recent commuter rail case illustrates this principle. *In re Massachusetts Bay Commuter Railroad Company and American Train Dispatchers Association* (Litton, Lucek, McCann, Feb. 17, 2012) (Amtrak Exhibit 111), gave a broad, established internal pattern determinative weight. There, the Massachusetts Bay Commuter Railroad Company (MBCR) was engaged in coalition bargaining with the Massachusetts Bay Commuter Rail Labor Bargaining Coalition which

represented all of MBCR's 14 unions. On April 8, 2011 each coalition member, except for ATDA, signed a tentative agreement with MBCR, and 12 of the 14 unions subsequently ratified the tentative agreement. The Board's award extended the agreement reached with the other crafts to the ATDA, ruling that "maintenance of the bargaining pattern [...] established in this case is of paramount importance." *Id.* at 8. Specifically, the Board agreed with the MBCR that "too much time has passed and precedents established to contemplate doing anything other than imposing on the ATDA members the exact same deal that everyone else got." *Id.* Moreover, the Board found that it would "shatter the pattern" and be unfair to grant the ATDA a better deal, especially since there was no demonstrated external inequity. *Id.* at 8-9 (characterizing the difference with external bargaining units of Train Dispatchers as "only one of minor degree").

Interest arbitration outside the railroad industry, particularly in the public sector, follows the same principle. In *City of West Bend*, 100 LA 1118 (Vernon, 1993) (Exhibit 115), the City of West Bend had entered into settlements providing for annual wage increases of 4% with all of its bargaining units, except for the union representing its police officers. *Id.* at 1120-21. In determining whether the internal pattern should be applied to the police officers, Arbitrator Vernon summarized interest arbitration precedent as follows:

[W]here there is a well-established internal pattern among the bargaining units [...] the internal pattern shall prevail unless adherence to the internal pattern results in unacceptable wage level relationships between the unit at bar and its external comparables.

Id. at 1121. As no such compelling wage disparity existed to justify deviating from the internal pattern, the City's offer was more reasonable as consistent with the internal pattern. *Id.* at 1122. See also, *Hennepin County*, BMS No. 12-PN-1041 (Anderson, Dec. 31, 2012) (finding in police dispute that no compelling reasons existed to depart from the general wage increases established for other employees) (Amtrak Exhibit 116).

The same principles adopted by interest arbitrators naturally extend to PEB decisions. In PEB No. 231 (SEPTA), the Board recommended the well-established internal wage pattern, then in place at all other unions on the carrier, as:

The breaking of an internal pattern of wage settlement by the last Organization in a long line of settlements could indeed adversely impact upon SEPTA's relationship with its other bargaining units. ...Morale of employees represented by other Unions and Organizations would be negatively impacted by realization that BLE members had achieved a result better than that which they had achieved and/or other bargaining units would use the BLE settlement as a springboard to seek increased benefits during the next round of negotiations. Other Unions and Organizations would also make compelling external parity arguments. These results, however, would adversely effect the continuity and stability of employment and the public interest.

Id. at 8. And in PEB No. 222 (Amtrak), the Report to the President recognized the importance of Amtrak's then internal pattern, a pattern that allowed Amtrak to "remove[] itself from the so-called pattern resulting from the PEB 219," which covered the freights. The Board reasoned that:

[Amtrak] has, in fact, established a wage pattern of its own, now covering about 50 percent of its employees. To ignore that pattern and to grant each of the organizations here involved its own wage demand would reduce Amtrak's wage structure to chaos. We decline to make such a recommendation.

Id. at 15. ¹⁰

The same rationale on giving controlling weight to an internal pattern applied in PEB No. 176 (NRLC, 1969). That Board rejected the organizations' arguments that their wages should be set compared to shop craft employees in other industries. Although recognizing the organizations' frustration at being "locked into an established pattern," departure from a pattern in effect with 77% of railroad employees was inappropriate because it would penalize employees

¹⁰ Following PEB No. 222, three labor organizations, the IAM, ATDA, and BLE, could not reach voluntary agreements with Amtrak, and "final offer" arbitration ensued with those three labor organizations. In all three cases, the interest arbitrators selected the existing Amtrak pattern cited in PEB No. 222. (Joint Exhibits 59, 60, and 61).

involved in earlier negotiations and be destructive of the broader system of collective bargaining in the railroad industry, according to the Board. *Id.* at 8. *See also* PEB No. 187 (NRLC, 1975), at 15 (where the Board ruled that it was inappropriate to eliminate an existing wage inequity because a “belated claim of an inequity by the last organization to settle in a given round might raise suspicion or even hostility among other organizations that waived or did not assert such claims in order to achieve the pattern”); PEB No. 186 (NRLC, 1975), at 8 (maintaining the pattern of 60% of the employees was in the public interest as well as the interest of the carrier and employees in promoting collective bargaining, and the union had not supplied convincing proof that its agreement should be based on a different wage structure).

PRLBC publicly has referred to PEB No. 225 (Soo Line, 1994) (Amtrak Exhibit 117) as a case where the Board selected an external freight pattern over an internal pattern. But a careful review of Soo Line does not help PRLBC’s argument. The Board focused on the operating/non-operating distinction to ask the following question and focused on a comparison between the operating unions: Should the UTU be treated like BLE on Soo Line or UTU on the freights for purposes of a concessionary agreement? *Id.* at 7-8, 49-50. Ultimately, because the Board adopted the freight PEB No. 219 work rule approach of reducing UTU crew consist, which was not applicable to the BLE, it gave the UTU the benefit of the freight PEB No. 219 wage pattern – it was the *quid pro quo*. Moreover, the Board remarked that the UTU was “contributing the overwhelming preponderance of the labor cost savings required to improve the Carrier’s financial condition,” and in those unique circumstances “[i]t would be inequitable to treat trainmen on the Soo Line substantially differently from their counterparts on the other Class I rail carriers.” *Id.* at 49-50.

Those unique circumstances in PEB No. 225, most notably a reduced manning agreement with cost savings, are not present here. BMWED and BRS have not offered offsetting work rule contribution to distinguish these two labor organizations from other Amtrak labor organizations from a “cost savings” perspective in order to justify a higher wage settlement. In the freight settlements following PEB No. 243, all freight labor organizations received a higher wage settlement than the Amtrak internal pattern, based on a number of factors, including health care tradeoffs, an improving economy, and the overall freight profitability. In contrast to PEB No. 225, BMWED and BRS have contributed less, not more than other Amtrak labor organizations on work rule reform, the PRLBC refuses to discuss work rules, and the BMWED and BRS have resulting excessive overtime that even has triggered congressional attention.

These persuasive authorities from interest arbitration decisions and PEB reports, all upholding the importance of internal patterns, reinforce that which should be intuitive to all those with experience in labor relations. Labor organizations which lead by making agreements achieve greater influence on bargaining trends. But labor organizations which are intransigent at the bargaining table and pursue a delaying strategy are rarely rewarded for such tactics. This Board should follow the clear trend of authority and apply the internal Amtrak pattern as the basis for settlement between Amtrak and the PRLBC.

E. The Board Should Award as the BMWED and BRS Contract Terms Either (i) the Amtrak Internal Pattern, or (ii) A Cost-Neutral Variation on the Amtrak Internal Pattern That Provides Greater General Wage Increases for Offsetting Cost Reductions from Health Care and / or Work Rule Changes

To summarize and to reiterate: *there exists an irrefutably strong internal pattern among Amtrak’s other labor organizations and this internal Amtrak pattern should be the basis for the Board’s award of new contract terms for the BMWED and BRS.* Based on the strength of the Amtrak internal pattern, the fact that the freight deal cited by the PRLBC as an external

pattern became relevant only through the PRLBC's intransigent and delaying bargaining tactics, and the well-established principle that internal patterns should predominate, the Board can conclude that the internal Amtrak pattern is the only appropriate award.

Nonetheless, to the extent the Board wishes to consider alternatives to the clear Amtrak internal pattern, Amtrak also has proposed alternative contract terms premised on additional wage increases tied to offsetting cost-savings through specific health benefit and work rule changes. Amtrak has made these proposals based on recognition, as stated in PEB No. 242, "that a pattern is not inviolate," and changes can be "made by the bargaining parties themselves, and by interest arbitrators and PEBs, where shown to be warranted." *Id.* at 44.

Such an alternative approach is similar to the analysis and outcome in PEB No. 176 (NRLC, 1969). In PEB No. 176, the Board noted the existence of an internal wage pattern from which it did not feel like it could depart, but nonetheless noted the possibility of alternative approaches that could be developed. *Id.* at 8. In particular, the Board highlighted that wage increases beyond the pattern in exchange for work rule modifications was an alternative outcome that would respect the existing internal pattern:

To the extent and degree mutually satisfactory modifications of rules are negotiated, appropriate wage adjustments could be made. Wage increases justified by modifications in rules which, through improved organization of work, contribute to efficiency, productivity, and cost reduction would not be incompatible with earlier wage settlements.

Id.; see also PEB No. 241, at 22 (Metro-North, 2007) (given the existing internal pattern settlement, the Board could not recommend granting the IBT the benefits of the pattern and "additional significant wage increases" sought by the IBT "without obtaining, in return, work rule or other concessions as a *quid pro quo* for wages above the pattern settlement.") (emphasis added) (Amtrak Exhibit 118). A similar approach remains an alternative option for this Board,

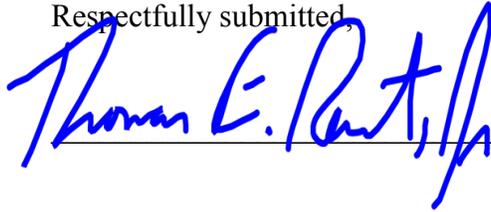
should it choose to award terms to the PRLBC that vary from the established Amtrak pattern. As stated earlier, part of Amtrak's case at hearing will be directed to providing the Board with health care and work rule modification and cost information with which to assess such an approach, if the Board is so inclined.

V. CONCLUSION

This dispute will provide the Board with ample reference points for its deliberations – from Amtrak's perspective, the strong internal Amtrak pattern of agreements begun in 2010, with 13 of 15 Amtrak labor organizations, covering 17 operating and non-operating crafts and covering 84% of the Amtrak represented workforce; from PRLBC's perspective, the 2012 BMWED and BRS agreements with the freight railroads after PEB No. 243. As explained above, however, this case is not just an issue of internal pattern versus external pattern. There are substantial issues of timing and bargaining conduct related to the PRLBC's intentional strategy to delay negotiations for over a year and half waiting for subsequent freight railroad agreements, and those factors should weigh heavily in the Board's decision.

Amtrak's goal in agreeing to interest arbitration was to achieve agreements with the BMWED and the BRS that can complete this round of bargaining on Amtrak. In reaching that goal, Amtrak is prepared to provide the Board with a full explanation of all issues at hearing and to assist the Board in fashioning its award and decision.

Respectfully submitted,



OF COUNSEL

William Herrmann
Thomas Bloom
NATIONAL RAILROAD PASSENGER
CORPORATION
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 906-3971

Thomas E. Reinert, Jr.
Donald L. Havermann
Jonathan C. Fritts
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5084/5867

*Counsel for the National Railroad Passenger
Corporation (Amtrak)*

Dated: December 27, 2013

INDEX OF AUTHORITY

Amtrak Exhibits

Amtrak Ex. 102 – Table Comparing Amtrak Pattern Proposal to PRLBC Proposal

Amtrak Ex. 103 – Health Care Proposal Clarifications Agreed By The Parties

Amtrak Ex. 104 – PEB No. 231 (SEPTA & BLE, 1996)

Amtrak Ex. 105 - PEB No. 187 (National Railway Labor Conference & Railway Employees' Department, 1975)

Amtrak Ex. 106 - PEB No. 186 (National Railway Labor Conference & BRAC, 1975)

Amtrak Ex. 107 - PEB No. 176 (National Railway Labor Conference & Employees' Conference Committee, 1969)

Amtrak Ex. 108 - PEB No. 97 (Eastern, Western, and Southeastern Carriers Conference Committees & Brotherhood of Locomotive Firemen and Enginemen, 1952)

Amtrak Ex. 109 - PEB No. 57 (Akron, Canton & Youngstown RR Co. & BLE, Bhd of Locomotive Firemen & Enginemen, Switchmen's Union of North America – 1948)

Amtrak Ex. 110 - *In re Massachusetts Bay Commuter Rail Co.* (Golick, Lucek, Roth, Sept. 12, 2011)

Amtrak Ex. 111 - *In re Massachusetts Bay Commuter Railroad Company and American Train Dispatches Association* (Litton, Lucek, McCann, Feb. 17, 2012)

Amtrak Ex. 112 - PEB No. 230 (NCCC & IAM, IBEW, SWMIA, 1996)

Amtrak Ex. 113 - PRLBC Pre-Hearing Brief Before PEB No. 242

Amtrak Ex. 114 - PRLBC Post-Hearing Brief Before PEB No. 242

Amtrak Ex. 115 – *City of West Bend*, 100 LA 1118 (Vernon, 1993)

Amtrak Ex. 116 - *Hennepin County*, BMS No. 12-PN-1041 (Anderson, Dec. 31, 2012)

Amtrak Ex. 117 - PEB No. 225 (Soo Line, 1994)

Amtrak Ex. 118 - PEB No. 241 (Metro-North, 2007)

Joint Exhibits

Joint Ex. 55 - PEB No. 222 (Amtrak, 1992)

Joint Ex. 57 - PEB No. 242 (Amtrak, 2007)

Joint Ex. 58 – PEB No. 243 (NCCC, 2011)

Joint Ex. 59 – *In re Amtrak and International Association of Machinists and Aerospace Workers* (Mikrut Jr., July 28, 1992)

Joint Ex. 60 – *In re Amtrak and Brotherhood of Locomotive Engineers* (O'Brien, July 29, 1992)

Joint Ex. 61 – *In re Amtrak and American Train Dispatchers' Association* (Fishgold, Aug. 17, 1992)