

BEFORE PRESIDENTIAL EMERGENCY BOARD NO. 242

In the Matter of:)

NATIONAL RAILROAD PASSENGER)
CORPORATION,)

- and -)

AMERICAN TRAIN DISPATCHERS ASSOCIATION;)
BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES/IBT; BROTHERHOOD OF RAILROAD)
SIGNALMEN; INTERNATIONAL ASSOCIATION)
OF MACHINISTS AND AEROSPACE WORKERS;)
INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS; JOINT COUNCIL OF)
CARMEN, COACH CLEANERS AND HELPERS;)
NATIONAL CONFERENCE OF FIREMEN AND)
OILERS, SEIU; THE AMERICAN RAILWAY AND)
AIRWAY SUPERVISORS ASSOCIATION-)
MAINTENANCE OF EQUIPMENT; and THE)
AMERICAN RAILWAY AND AIRWAY)
SUPERVISORS ASSOCIATION-MAINTENANCE OF)
WAY.)

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**POST-HEARING BRIEF ON BEHALF OF NON-OPERATING
ORGANIZATIONS**

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INTRODUCTION

This submission is made on behalf of all of the Organizations appearing before this Board. Its principal focus is the retroactive pay issue.

In its opening statement, Amtrak stated that “the first important question this Board should ask itself [is]: Why have the last eight years of reopened agreements not resulted in a settlement?” (12/11/07 Tr. 26) Amtrak posits this question to contend that the Organizations are at fault for failing to make an agreement over the preceding eight years and should “be held accountable for those decisions” that caused the delay. (*Id.* at 44). Thus, Amtrak inexplicably selects the weakest possible ground upon which to defend its position.

Coupled with this argument is Amtrak’s request that the Board endorse its attempt to change the bargaining paradigm to one where the Organization that settles first in a given round receives more value than each Organization thereafter. Amtrak seeks a blessing to present patently unacceptable work rule change proposals in future rounds to delay negotiations interminably and profit by not having to pay retroactive pay when the Organizations predictably refuse to capitulate to Amtrak’s demands.

The Unions urge the Board to reject Amtrak’s invitation to endorse this significant alteration of the balance between labor and management under the Railway Labor Act. Rejection will afford the Unions no leverage, but will avoid the destabilizing effect on collective bargaining negotiations that Amtrak’s position promotes. In the Organizations’ view, 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. A recommendation that limits the amount of retroactive pay defeats this purpose

and causes instability because it provides carriers with economic incentive to delay making voluntary agreements.

ARGUMENT

I. AMTRAK ENGAGED IN SURFACE BARGAINING TO DELAY MAKING AGREEMENTS WITH THESE ORGANIZATIONS

Joel Parker, Vice President of the Transportation Communications International Union, opined that Amtrak's retroactivity contention would destabilize labor relations on Amtrak and other rail properties:

Under Amtrak's new paradigm, unions who settle first get more money than those who settle later, and the members of unions who refuse to capitulate to long lists of sweeping work rule demands receive thousands of dollars less than unions who settle earlier . . . [I]t is the most destabilizing proposal I have encountered in more than 30 years of representing members. (12/12/07 Tr. 106 – 7)

Amtrak has asserted that its "principle" of no retroactivity, regardless of the length of negotiations, provides both labor and management an incentive to settle "sooner rather than later." (PRLBC Ex. 34) That one-sided "principle" is illogical and economically unsound, in that it gives management an economic incentive not to settle.¹

The facts in this case illustrate why Amtrak's attempt to change the bargaining dynamic must be rejected. Since the 2000 bargaining round began, Amtrak has avoided making agreements with the Engineering and Shopcraft Organizations by employing a strategy plainly at odds with Section 2, First's duty to make every reasonable effort to make and maintain agreements. 45 U.S.C. § 152, First. That strategy consisted of demanding vague, draconian work rule changes and then refusing to discuss or provide

¹ In this matter, denial of retroactive pay would reward Amtrak with \$65 million for insisting upon vague generic demands widely known to be unacceptable to the Organizations, or any unions for that matter.

information about them. Amtrak's unspecified demands allegedly were needed to provide undefined "efficiencies;" in fact, they constituted a transparent device intended to stall meaningful negotiations. Linked with its "principle" of no retroactive pay and the interminable procedures of the Railway Labor Act, Amtrak profited each day by bargaining in bad faith.

Amtrak consistently refused to provide details about its work rule proposals. Joel Parker testified:

At the meetings I attended . . . we asked for economic data on what savings would result from each of their demands. Amtrak could not or would not produce answers. We asked them to prioritize their demands several times. Amtrak refused. We asked if any rules could come off the table, Amtrak said no. We asked if Amtrak was willing to do quid pro quos. The answer was no. (12/12/07 Tr. 158)

This was consistent with bargaining that took place with the engineering crafts. (Dodd, 12/13/07 Tr. 10-13) For example, in Amtrak's June 12, 2000 Section 6 proposal to the BMWED, Amtrak's subcontracting proposal stated: "Permit greater flexibility in contracting out work, as needed." (PRLBC Ex. 43) After release, more than seven years later on November 6, 2007, Amtrak's proposal to BMWED was amended to provide: "Contracting out – Eliminate all existing contracting out restrictions and provide that employees furloughed as a result of contracting will have an option for up to and including 1 year severance pay, or transfer with relocation, or remaining on furlough." (PRLBC Ex. 3)

In rebuttal, Mr. Bress attempted to persuade the Board that Amtrak's BMWED subcontracting proposal "is very specific" and limited to contracting out "non-core" work. (12/13/07 Tr. 276-7) He referred to Bress Exhibit 21-D to support his claim. Amtrak never served this proposal on the BMWED or discussed it in bargaining. It is

dated December 6, 2007, one week after this Board was established. It first appeared in Amtrak's submission to this Board. When asked directly about the timing of this proposal by Member Sandberg, Bress' answer was less than straightforward:

Sandberg: The slide 2 and Exhibit 21-D

Bress: Yes

Sandberg: When was that presented to the Unions?

Bress: We had talked to the Unions about doing this kind of work as a result of -- early on -- as a result of an arbitration decision that we lost on the North end. I mean, we've gone to arbitration decisions on carpet laying, tree trimming on the North end, carpet laying elsewhere. Certain kinds of paint jobs that we did lose and that we felt that this kind of work should not be --we'll call it--subject to the approval or consent of the Union.

Sandberg: Can you tell me when the specific proposal had been?

Bress: I don't have the date, but I can get it to you. (12/13/07 Tr. 154-55)

Bress never provided the Board with the date because Amtrak never presented Exhibit 21-D to the BMWED during negotiations. For eight years, Amtrak presented these Organizations with only general, unspecific proposals, conceptual in nature, and refused to engage in meaningful discussions or provide cost data to support them.

Amtrak knew that these Organizations could not agree to unlimited contracting out. As George Francisco, NCF&O's President, put it: "[N]o self-respecting union would accept an unlimited contracting out proposal . . . [I]f we accepted unlimited contracting out, there would be no existence of any of our members on the property, and there would be no collective bargaining agreement to police." (12/12/07 Tr. 377) Amtrak was not

seeking rule “reform.” It was stalling negotiations.² It is bad enough that the employees will not receive interest on retroactive pay owed. Amtrak’s tactics must not be rewarded by a recommendation that converts the retroactive wages due them from an interest free loan to a gift to Amtrak.

Amtrak’s opening statement alleged the Organizations were responsible for the delay: “[T]here was a union political strategy to wait for political change. It was waiting for every Congressional election, presidential election. Things are going to get better. We’re going to get a better deal, and that took up much of the last eight years.” (12/11/07 Tr. 28) No evidence was ever offered to prove this assertion. The record evidence is to the contrary. The BRS requested a release from mediation on December 16, 2002. (PRLBC Ex. 46) The BMWED requested release on July 8, 2003. (PRLBC Ex. 47) The IBEW requested a release on January 22, 2004. These unsuccessful requests all predated the 2004 presidential and congressional elections. Amtrak’s allegation of fault is without merit.

II. THERE IS A DIFFERENCE BETWEEN UNWILLINGNESS TO PAY AND AN INABILITY TO PAY

Another question this Board should address in order to recommend a settlement is, according to Amtrak, a “factual” finding of whether Congress has the will to fund retroactive wage increases. Amtrak is confident that the “factual” record is clear on this point. “There’s a Union brief, you know, it refers to Congressional funding issue as speculation. We shouldn’t read the tea leaves. Well, the tea leaves are out on the table.

² See, e.g., *Vanderbilt Products, Inc. v. NLRB*, 297 F.2d 833 (2d Cir. 1961) (Employer bargained in bad faith by conditioning negotiations upon proposals “a self-respecting union” could not be expected to accept).

We can all read them. The money is not there from the Federal government.” (Amtrak Closing Stmt., 12/13/07, Tr. 256-7)

As to the question of Congress’ willingness to pay wage increases retroactively, as of the dates they were to become effective, the Organizations submit this issue is for Congress to decide, not this Board. See Presidential Emergency Board No. 234 (1997), at 6. This issue calls for a political judgment, not one grounded in economics or labor relations. This is not an ability to pay issue. A Congress whose Article I powers include funding the public policies of the richest nation on earth indisputably has the “ability” to make Amtrak employees whole for the interminable delay of these negotiations.

Even if the finding was within this Board’s purview, there is no legitimate factual record here upon which such a political judgment could be based. The only “direct” evidence before this Board is contradictory hearsay testimony and opinions of a handful of both management and labor witnesses and their attorneys, purportedly based upon alleged conversations with an unknown number of unidentified members of Congress and/or staff members. The so-called “circumstantial” evidence consists of Congressional decisions in 2001 and 2002 not to appropriate any operating funds to Amtrak, presumably made under the then-mistaken belief that Amtrak should be capable of making an operating profit, and a series of appropriations for capital, debt and operating subsidies made since 2002 by Congress.

Nothing in the history of past appropriations suggests that Congress ever considered the issue of retroactive pay for Amtrak employees who now have been subjected to a virtual wage freeze for eight years. Noticeably absent from the voluminous “circumstantial” evidence within the record - Amtrak budget requests (see,

e.g., PRLBC Ex. 37³), annual reports, monthly reports to Congress, and appropriation bills - is a single example or explanation, or even a mention, of funds which would be needed, either prospectively or retroactively, to pay wage increases and benefits based upon the freight agreements of 2002 and 2007. This would seem to be information that a responsible Amtrak management would provide to Congress as far back as 2002 since “[t]here is no dispute that Amtrak’s wages and benefits have historically been related to the freight patterns.” (Amtrak Opening Stmt., 12/11/07 Tr. 30)

III. AMTRAK IS NOT “ENTITLED” AS OF RIGHT TO THE ORGANIZATIONS’ HEALTH INSURANCE CONCESSIONS

The Amtrak employees represented by the Organizations before this Board currently do not contribute towards the \$1,199 monthly cost to Amtrak for their health insurance. (Carrier’s Ex. 5, Testimony of Thomas O.S. Rand, p. 9) As part of the Organizations’ “package” proposal, Amtrak’s health and welfare costs would immediately decrease to \$983.75, an immediate savings to Amtrak of \$214.25 per month per employee.⁴ If the Organizations’ health and welfare benefit proposal is applied as a

³ “Amtrak’s failure to reach a labor settlement is not a result of inadequate federal funding. To the contrary, salary and benefit costs are derived from Amtrak’s operating budget which is financed mostly by self-generated revenues. For each of the last several years, the Committee has provided Amtrak with operating support at or near the levels sought by Amtrak’s Board of Directors.... While pleased with Amtrak’s improved financial performance, the Committee is concerned that these revenues might be directed toward increased capital spending rather than be held in reserve to insure that all the funds needed for new collective bargaining agreements are immediately available to the railroad.” (July 16, 2007 Report accompanying Senate Bill 1789, p. 93; Griffin, 12/11/07 Tr. 395-96)

⁴ The Organizations’ proposal includes \$48 per month per employee of net cost savings to AmPlan in addition to the employee contribution of \$166.25 per month for a total AmPlan savings of \$214.25 per month per employee. (Carrier’s Ex. 5, Testimony of Thomas O.S. Rand, p. 9)

“pattern” to all 16,172 employees covered by AmPlan (Bress Ex. 2), this concession by the Organizations will contribute \$41,578,212 per year⁵ to Amtrak’s operating fund.

The amount of the cash contribution by the Organizations will increase during the term of the agreement in accordance with a formula up to a maximum of \$200 per month per employee -- potentially an additional \$33.75 per month per employee -- which would raise the annual amount of the health and welfare concession to \$48.13 million annually. This is not a one-time contractual concession. This significant and automatically increasing annual contribution to an item that accounts for 23 percent of Amtrak’s FY 2007 Operating Expenses (Carrier’s Ex. 12, Campbell Demonstrative Exs., p. 10) is dismissed by Amtrak as an “easy issue” before this Board. (Amtrak Closing Stmt., 12/13/07 Tr. 249) It may be “easy” for Amtrak to accept, but it was not “easy” for the Organizations to give up. It is an “easy issue” for this Board only because it is part of the reasonable and market based “package” proposed by the Organizations.

In exchange for this significant and lasting contribution, Amtrak offers the Organizations a one-time lump sum payment equivalent to 30 cents on the dollar of their retroactive pay claims. That is because Amtrak concludes that “[r]etroactive pay, in our view, is not entitled. Nothing in the Railroad Labor Act requires retroactive pay. The contract doesn’t require retroactive pay.” (Amtrak Opening Stmt., 12/11/07 Tr. 28) This is, of course, equally true for the Organizations’ health insurance concessions. It takes little imagination to infer that Amtrak would have protested if the Unions offered only 30 percent of the health and welfare concession the Organizations made in the freight agreements.

⁵ (\$214.25 per month per employee) (12 months) (16,172 employees) = \$41,578,212 per year.

The Carrier argued that it was the analysis of a “poor accountant” to contend that this benefit to Amtrak, received annually *ad infinitum*, can not be used by Amtrak to fund the Organizations’ retroactive pay claim because “those offsets for health and welfare are already in the profit and loss statements we presented.” (Amtrak Closing Stmt., 12/13/07 Tr. 255) That is truly presumptuous, even if true. There is no reason why the Organizations would ever agree to make the full freight concession of health insurance contributions and cost containment measures for 57 percent of the wage value of the freight agreement. (Roth, 12/12/07 Tr. 223) The Organizations may not be as skilled budgeters as Mr. Campbell, but they most assuredly know a one-sided deal when they see one.

So where does this enormous amount of annual contributions go in Amtrak’s sacred budget? It appears that part of the employees’ concessions equaling more than \$125 million in fiscal years 2008 through 2010 have been allocated to pay 21 percent salary increases for management and salaried employees in fiscal year budgets 2008, 2009 and 2010, which total \$43 million. (Carrier’s Ex. 12, Campbell Demonstrative Exs., p. 9, 11)

Amtrak concedes it “is able to pay its prospective wage increases and a \$4,500 lump sum payment (\$5,389 including RRTA costs) to its union-represented employees.” (*Id.*, p. 23) The retroactivity cost of Amtrak’s offer is \$83,201,000. (Carrier’s Ex. 4, Campbell written Statement, Ex. 19) The cost of the Organization’s full retroactivity demand, after reducing Amtrak’s incorrect \$13,500 figure to the correct \$12,848 average

per employee figure, is \$149,005,393. Thus, there is a gap of \$65,804,393.⁶ That gap amounts to approximately eighteen months of employee health and welfare concessions valued annually at \$41,578,212 under the Organizations' offer.⁷ Employees have already given value to fill that gap. The notion that Amtrak has already decided to spend it elsewhere is preposterous.

There is also a fundamental question of equality presented. Assuming *arguendo* the retroactive wage gap cannot be paid out of the current level of Congressional appropriations, why should the issue of paying Amtrak's hourly employees for hours already worked depend upon the will of Congress to have to make, according to Amtrak, a "supplemental" appropriation, while \$43 million of wage increases to a much smaller number of salaried employees is automatically included in projected budgets? Is there an answer other than the salaried employees control the budget?

IV. THE ORGANIZATIONS' PROPOSAL CONFORMS TO A "PATTERN"

Perhaps the most misleading contention Amtrak made during the hearing is the notion that its proposal is "patterned" after another agreement. Manifestly, it is not. The Organizations submit that cherry-picking from a number of agreements to form a proposal accepted by no one is not proposing a "pattern." To the contrary, a true "pattern agreement" captures *both* the benefits and concessions made by each party in crafting a settlement. The purpose of pattern bargaining is to eliminate the incentive of one party to

⁶ In the interest of settlement, the Organizations are amenable to negotiations on the timing of retroactive payments due.

⁷ Perhaps bridging this gap could be helped by refinancing Penn Station at an interest rate less than, in CFO Campbell's words, the "usurious" rate that Amtrak now donates to some banker. (Campbell, 12/11/07 Tr. 227).

hold out in hopes of receiving more benefits or fewer concessions in a round than another party.

Amtrak claims that the tentative BLET agreement, which failed ratification by an overwhelming margin, is an “internal” Amtrak pattern for other organizations on Amtrak’s property. (Amtrak Opening Stmt. 12/11/07 Tr. 34; Parker, 12/12/07 Tr. 163) The BLET tentative agreement cannot set a “pattern” because it overwhelmingly failed ratification. The only “pattern” it suggests is that the employees of these Organizations would likewise reject the agreement. An agreement that applies to no one cannot set a pattern applicable to everyone.

There certainly is no pattern establishing an unlimited right to subcontract on the property. None of the Organizations which settled in the first round agreed to this Amtrak demand.⁸ The Board has heard unrebutted testimony that the BLET, the only Organization that even tentatively agreed to Amtrak’s subcontracting proposal, did so because scope of work restrictions that remained in its agreement made the concession meaningless. (Parker, 12/12/07 Tr. 172) The work rule changes TCU and Amtrak agreed to in traditional *quid pro quo* bargaining for clerks do not have an impact equivalent to the rule changes, like subcontracting and the composite mechanic, that Amtrak demands from its engineering and shop crafts before this Board. (*Ibid.*) Indeed, testimony established that Amtrak wanted the subcontracting clause, in part, to eliminate coach cleaners from its property altogether. (Crosbie, 12/12/07 Tr. 46-7)

⁸ The Clerks’ agreement provided for a non-binding labor/management committee to study both insourcing and outsourcing. Amtrak never convened the committee. (Parker, 12/12/07 Tr. 170, 180)

There can be no doubt that Amtrak's BLET "pattern" agreement departs in significant respects from the freight agreements whose pertinence is acknowledged by all. Amtrak's wage proposal advantages the Carrier by extending the moratorium date without a wage increase during the last year. This is designed to give it wiggle room to compromise on something, degrade the Organizations by requiring them to convince their members that they are worth less than their brothers and sisters on the freights, or simply just to preclude an agreement.

Amtrak lifts wholesale every single concession pertaining to health insurance cost containment and employee contributions made by the Organizations in two rounds of national handling. The Carrier does not even pretend that its BLET "pattern" proposal of an immediate increase of employee contributions from zero to \$166.25 per month, with an automatic 15 percent of annual increase escalator, was arrived at based upon some labor statistics or actuarial computations unique to AmPlan. It could not since it is taken *verbatim* from the freight agreements. Amtrak states, however, it requires further concessions and elimination of benefit improvements provided for in the freight agreements to save an additional \$1.7 million per year because Amtrak needs to be vigilant in containing costs, as if the freight railroads did not have that concern. The departures from the national freight settlement proposed by Amtrak are, the Organizations submit, transparent insults intended to preclude agreement. No honest argument can be made that Amtrak employees should pay \$166.25 per month, the same employee contribution paid by freight employees, for an inferior benefit plan, or that Amtrak retirees should pay \$50 per month while their freight peers pay nothing for the same retiree benefits.

Amtrak also embraces the employee concession in the freight agreement of 2007 to eliminate the Harris COLA. The only important aspects of the freight agreements not embraced by Amtrak are the absence of work rule changes and full wage retroactivity, the *quid* for the significant concessionary *quo* made by the Organizations to address the escalating cost of health insurance, the predominant problem facing employers during this decade. Amtrak's retroactivity omission reduces the monetary value of Amtrak's current BLET proposal to 57 percent of the wage value of the freight agreements. (Roth, 12/12/07 Tr. 223)

In its search for a pattern to justify its proposal, Amtrak has an identity crisis of convenience. It claims it is "very different from freight railroads" because it transports passengers, not freight, and also it is not profitable as the freights have been the past several years. (Amtrak Opening Stmt., 12/11/07 Tr. 21) Sometimes it analogizes itself to the U.S. Postal Service. (*Ibid.*) Amtrak also claims it is really more like an airline, "the eighth largest airline in the country," because it competes with the airlines and its employees should be grateful that they have not suffered the fate of airline employees since the 9/11 disaster. (*Ibid.*) What's the point? Amtrak's work force has been reduced by 30 percent since 9/11. (Roth 12/12/07 Tr. 293-94) Its hourly workers have not had a wage increase since 1999. Amtrak does not even use the wages and benefits of comparable employees working for bankrupt airlines as a comparator. That comparison in fact shows that bankrupt airline wage rates still exceed the wage rates of Amtrak. (Misc. Rebuttal Materials Submitted By Thomas R. Roth, Attachments 3 - 7)

Amtrak studiously avoids trying to explain why it should not be compared to a commuter railroad even though it is the seventh largest commuter railroad in the country.

(Roth, 12/12/07 Tr. 249) The reason Amtrak avoids comparison to the Long Island Railroad and Metro-North, for example, is clear -- that compelling comparison does not support Amtrak's pattern arguments. Amtrak is much more successful and requires a far lower percentage of operating subsidy than any rail passenger carrier in the nation. There is no passenger rail carrier in the world that operates without a public subsidy. Despite its clearly superior ranking among passenger rail carriers, Amtrak's wages and benefits have always been much less than wages and benefits paid to workers doing identical work on commuter railroads.⁹ And Amtrak cannot identify a single commuter railroad, or any railroad for that matter, which has the subcontracting, composite mechanic, overtime and scheduling work rules that Amtrak allegedly must obtain from its employees. Amtrak is not unique. The commuter railroads have, of course, toilets to clean and repair and HVAC units that require servicing expeditiously to minimize turn around times and stay on schedule just like Amtrak.

The Organizations' proposal, unlike Amtrak's, is firmly rooted in an identified pattern, since it proposes *both* the benefits and the concessions that were part of the freight agreements. Our proposal thus represents a package that balances the needs of Amtrak to contain health care inflation while providing the Organizations with modest wage increases and the maintenance of its current work rules. The freight agreements are the appropriate pattern to follow because they reflect good faith, *quid pro quo* bargaining in the relevant labor market.

The Organizations' proposal further embodies the pattern principle because it assures that crafts settling earlier during a round will not obtain agreements that exceed the value

⁹ In PEB Nos. 240 and 241 involving Metro-North, retroactive pay was not even a contested issue.

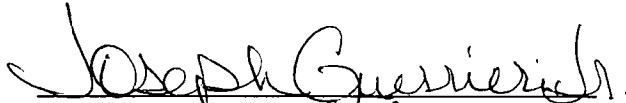
of later settlements by other crafts. Here, if Amtrak's proposal is applied, clerical and service workers would receive \$7,072 more in value than the employees represented in this Board proceeding, not including an additional amount reflecting the time value of money. (Roth, 12/13/07 Tr. 188-89; Misc. Rebuttal Materials Submitted By Thomas R. Roth, Attachment 12) Bargaining destabilization on the property will inevitably occur. But if the Organizations' proposal is adopted, the contracts' value received by all employees is practically the same, applying a conservative time-value of money adjustment to the employees who settled earlier. (Roth, 12/13/07 Tr. 190-1; Misc. Rebuttal Materials, *etc.*, Attachment 11) That is plainly consistent with the concept of pattern bargaining.

CONCLUSION

Amtrak's position is an unprecedented departure from the role Presidential Emergency Boards have always served and are intended to serve. Based on the principle of comparable pay for comparable work, this Board should recommend a settlement that assumes the parties bargained in good faith and could have been reached in a timely fashion.

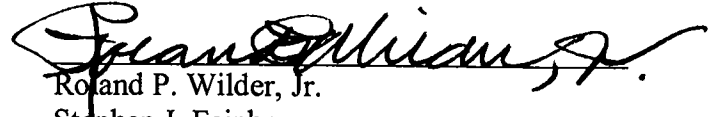
Dated: December 20, 2007

Respectfully submitted,

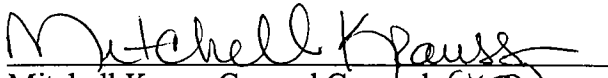


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Post-Hearing Brief on behalf of Non-Operating Organizations was served this 20th day of December upon the following parties by UPS Overnight, Email or Hand Delivery as indicated below:

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