

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**WADE F. HALL,  
HATTIE N. MCCOY-KEMP,  
VICTORIA F. STATON,**

**On behalf of themselves and on  
behalf of all others similarly situated,**

**Plaintiffs,**

v.

**NATIONAL RAILROAD PASSENGER  
CORPORATION, *et al.***

**Defendants.**

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 : **No. 03-CV-1764 (GK)**  
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 : **Class Action**  
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 : **Jury trial demanded**  
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 : **Next-scheduled Court**  
 : **deadline: December 1, 2004,**  
 : **Amended Complaint due**  
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**SECOND AMENDED CLASS ACTION COMPLAINT**

Plaintiffs, by and through their counsel, allege as follows:

**NATURE OF THE ACTION**

1. This is an action under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001, *et seq.* Plaintiffs are former employees of Defendant National Railroad Passenger Corporation (“Amtrak” or the “Company”) and participants in Amtrak’s pension plan, the Retirement Income Plan for Employees of National Railroad Passenger Corporation (the “Pension Plan” or the “Amtrak Pension Plan”). *See* October 3, 2003 Answer of Defendant Amtrak and Defendant Retirement Plan Committee (the “Retirement Plan Committee”) to the original, August 19, 2003 Complaint (“Defs. Ans.”) ¶ 1 (Amtrak and the Retirement Plan Committee admitting Plaintiffs’ status as such). Plaintiffs are also current or

former participants in Amtrak's defined contribution plan, the National Railroad Passenger Corporation Retirement Savings Plan (the "401(k) Plan" or the "Savings Plan"). The Pension Plan and 401(k) Plan are collectively referred to hereinafter as "the Plans."

2. Plaintiffs bring this action (a) on behalf of themselves and some 375 other similarly situated Pension Plan participants (referred to herein as the "Cutback Class") and (b) on behalf of themselves, both the Pension and the 401(k) Plans as a whole, and all participants of both Plans (referred to herein as the "§ 502(a)(2) Class").

3. On behalf of the Cutback Class, Plaintiffs seek, *inter alia*, a declaration that a September 14, 2001 purported amendment to the Amtrak Pension Plan, intended by management to eliminate a "Railroad Retirement Supplement" that was the key component of a duly enacted July 2001 "Voluntary Early Retirement Plan" ("VERP"), never became part of the Pension Plan because Amtrak's Board of Directors failed to adopt any such amendment in writing in accordance with the terms of the Pension Plan, ERISA and/or the Company's governing statutes, articles of incorporation and by-laws. Plaintiffs seek a further declaration that the Amtrak Defendants (defined below) were and are in breach of their fiduciary duty to, among other things, administer the Pension Plan in accordance with its terms, *see* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), when they nevertheless proceeded to operate the Pension Plan and the VERP as if it had indeed been amended to eliminate the Railroad Retirement Supplement and denied the Cutback Class the right to elect the July 2001 VERP with the Railroad Retirement Supplement feature intact. *See* Count I.

4. Plaintiffs alternatively seek to have the alleged September 14, 2001 amendment declared void, if it was properly adopted in a corporate law sense, as violative of ERISA's "anti-

cutback” provision, ERISA § 204(g), 29 U.S.C. § 1054(g), which explicitly protects “retirement-type subsid[ies]” and/or “early retirement benefit[s]” such as the VERP’s Railroad Retirement Supplement from being “eliminate[ed] or reduc[ed]” by later amendment. *See* Count II.

5. Accordingly, in Counts I and II Plaintiffs, on behalf of themselves and the Cutback Class, ask that, among other things, this Court redress violations of ERISA and/or the terms of the Plan, and enforce ERISA and/or the terms of the Plan, by, *inter alia*:

- Declaring that the Pension Plan was not properly amended on or about September 14, 2001 in the way then proposed by management and that the July 2001 VERP and Railroad Retirement Supplement was and is a part of the Plan and that the Amtrak Defendants have failed to administer the Plan in accordance with its terms by denying participants the right to retire under the July 2001 VERP with Railroad Retirement Supplement feature; and/or
- Voiding the September 14, 2001 amendment, if the Court finds that it was otherwise properly adopted, as violative of ERISA’s anti-cutback provision; and
- Compelling Amtrak to reform or amend the Plan to provide for a new date by which the approximately 300 eligible participants who did not elect the improperly-reduced, September 2001 VERP may now elect the original July 2001 VERP; and
- Compelling Defendant Retirement Plan Committee (the “Committee”), the Plan’s Administrator and a Named Fiduciary, and the Committee’s individual Members (the “Members”), to administer the Plan in compliance with the law and, more specifically, compelling the Committee (a) to re-calculate the amounts due to the some 75 participants who elected the improperly-reduced September 2001 VERP but were and are entitled to receive the improperly-eliminated Supplement minus the \$15,000 lump sum they received, plus interest for

all past benefits due, in accordance with the terms of the July 2001 VERP, and (b) process the election forms of, and calculate the amounts due to, all participants (out of a possible 300 or so who were eligible under the terms of the original, July 2001 VERP) who now elect the original VERP, in accordance with ERISA and the terms of the original VERP, together with interest for all past benefits due.

6. Plaintiffs also bring suit on behalf of themselves, the § 502(a)(2) Class and the Pension Plans as a whole, *see* ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), against Amtrak's current and former Presidents David L. Gunn, George D. Warrington and Thomas Downs who breached their strict fiduciary duties under both Plans and under ERISA by failing for many years -- from approximately 1995 to October 2003 -- to appoint a Retirement Plan Committee for the Pension Plan and a Savings Plan Committee for the 401(k) Plan -- the Plans' expressly designated Plan Administrators and Named Fiduciaries -- to act as a day-to-day fiduciary for the Plans. Amtrak is also a defendant in connection with these claims. *See* Count III.

### **JURISDICTION AND VENUE**

7. The Pension Plan is and was at all relevant times an "employee pension benefit plan," an "employee benefit plan," and a "defined benefit plan," within the meaning of ERISA §§ 3(2)(A), 3(3), and 3(35), 29 U.S.C. §§ 1002(2)(A), 1002(3), 1002(35). *See* Defs. Ans. ¶ 4 (Amtrak and the Committee admitting same). The 401(k) Plan is and was at all relevant times an "employee pension benefit plan," an "employee benefit plan," and a "defined contribution plan," within the meaning of ERISA §§ 3(2)(A), 3(3), and 3(34), 29 U.S.C. §§ 1002(2)(A), 1002(3), 1002(34).

8. This Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States. Specifically, this action is brought under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), which provides that participants may bring a civil action on behalf of their Plans against the Plans' fiduciaries for appropriate relief under ERISA § 409, 29 U.S.C. § 1109, and under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), which gives participants the right "to enjoin any act or practice which violates any provision of [Title I of ERISA] or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of [Title I of ERISA]."

9. This Court has personal jurisdiction over the Defendants because each resides and/or may be found and/or transacts or transacted business in, and/or has or had significant contacts with, the District of Columbia. *See* Defs. Ans. ¶ 6 (Amtrak and Retirement Plan Committee admitting same).

10. Venue is proper here, under ERISA § 502(e), 29 U.S.C. § 1132(e), for at least three reasons. First, this is the District where the Plans are administered. *See* ERISA § 502(e), 29 U.S.C. § 1132(e). *See* Defs. Ans. ¶ 7 (Amtrak and Retirement Plan Committee admitting same). Second, this is the District where the breaches took place. *See* ERISA § 502(e), 29 U.S.C. § 1132(e). Third, this is the District where the Defendants reside or may be found. *Id.* *See* Defs. Ans. ¶ 7 (Amtrak and Retirement Plan Committee admitting same).

## **THE PARTIES**

11. Plaintiff Wade F. Hall is, and at all relevant times has been, a participant, as defined in ERISA § 3(7), 29 U.S.C. §1002(7), in the Pension Plan, *see* Defs. Ans. ¶ 8 (Amtrak and Committee admitting same), and the 401(k) Plan.

12. Plaintiff Hattie N. McCoy-Kemp is, and at all relevant times has been, a participant, as defined in ERISA § 3(7), 29 U.S.C. §1002(7), in the Pension Plan, *see* Defs. Ans. ¶ 9 (Amtrak and Committee admitting same), and the 401(k) Plan.

13. Plaintiff Virginia F. Staton is, and at all relevant times has been, a participant, as defined in ERISA § 3(7), 29 U.S.C. §1002(7), in the Pension Plan, *see* Defs. Ans. ¶ 10 (Amtrak and Committee admitting same), and the 401(k) Plan.

14. Defendant National Railroad Passenger Corporation (“Amtrak” or the “Company”), incorporated in the District of Columbia with its principal place of business in the District of Columbia, was and is the Plan sponsor of both Plans within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). *See* Defs. Ans. ¶ 11 (Amtrak and Committee admitting same as to the Pension Plan). *See also* Pension Plan § 1.51. (Except as otherwise specified, all references to the “Pension Plan” are to the Pension Plan as restated through December 30, 1994 and subsequently amended, a true and correct copy of which is attached to the original Complaint as Exhibit 1.) (Plaintiffs incorporate all Exhibits attached to the original Complaint by reference). *See additionally* Savings Plan § 2.12, as restated through January 1, 1989 and subsequently amended). Amtrak was and is also a party in interest to the Plans within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14), because it was or is (a) a fiduciary of the Plans; (b) a person providing services to the Plans; (c) an employer some of whose employees

are covered by the Plans; and/or (d) a corporation fifty percent or more of which is owned directly or indirectly by persons described in subparagraphs (a), (b) or (c).

15. As a non-fiduciary with respect to the Plans, Amtrak is sued here for knowingly participating in others' fiduciary and co-fiduciary breaches with respect to the failure to appoint and appropriately monitor a valid plan administrator and/or those persons acting in place of a valid plan administrator, and for amending the Pension Plan in violation of ERISA's anti-cutback rule. Amtrak was also a fiduciary to the Pension Plan within the meaning ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) because, through its Directors, President, officers, employees and agents (some of whom are named Defendants herein), the Company exercised discretionary authority or discretionary responsibility by, among other things, communicating with participants regarding the VERP generally and more specifically regarding the releases of liability Amtrak sought on behalf of itself and others arising out of Amtrak's and others' involvement with the Pension Plan. Amtrak is sued in its fiduciary capacity for, among other things, making false or misleading material statements and/or omissions to the Cutback Class in connection with its solicitation of releases from them which can be read as waiving those participants' rights to their statutorily protected benefits. Additionally, Amtrak is sued in its fiduciary capacity as having effectively acted as Administrator to both Plans following its Company's Presidents' failure to appoint and appropriately monitor a valid plan administrator and, in the case of the 401(k) Plan, for its miscommunications and failures to communicate with 401(k) Plan participants concerning the investment of their individual accounts and for its misinvestment of Plan assets.

16. Defendant David L. Gunn is the President and Chief Executive Officer of Amtrak and a Member of its Board of Directors and has been since June 2002. As President, he was and

is charged with the duty of appointing members of the Pension Plan's Retirement Plan Committee and the 401(k) Plan's Savings Plan Committee -- the only valid Administrators for the Plans -- and was and is to that extent a fiduciary of the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). As a Director, Mr. Gunn was and is charged with the duty to ratify such appointments and was and is to that extent a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). In both fiduciary capacities, Mr. Gunn had and has a duty to monitor the Committee Members (or those acting in their place, with or without authority to do so) to ensure that they were discharging their duties and provide them with the information they needed to do so. He similarly had and has a duty to remove any Committee Members who were or are administering either Plan in violation of ERISA or the terms of the Plans.

17. Defendant George D. Warrington was the President and Chief Executive Officer of Amtrak from 1998 to 2002. As President, he was charged with the duty of appointing members of the Pension Plan's Retirement Plan Committee and the 401(k) Plan's Savings Plan Committee was to that extent a fiduciary of the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Mr. Warrington also had a duty to monitor the Plans' Committee Members to ensure that they were discharging their duties and provide them with the information they needed to do so. Mr. Warrington similarly had a duty to remove any Committee Members who were administering the Plans in violation of ERISA or the terms of the Plans.

18. Defendant Thomas Downs was the President and Chief Executive Officer of Amtrak from 1993 until 1997. As President, he was charged with the duty of appointing members of the Pension Plan's Retirement Plan Committee and the 401(k) Plan's Savings Plan



Committee was to that extent a fiduciary of the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Mr. Downs also had a duty to monitor the Plans' Committee Members to ensure that they were discharging their duties and provide them with the information they needed to do so. Mr. Downs similarly had a duty to remove any Committee Members who were administering the Plans in violation of ERISA or the terms of the Plans.

19. Throughout the relevant time, Defendant Retirement Plan Committee was supposed to be and now (since October 2003) is the Plan Administrator and a Named Fiduciary of the Plan within the meaning of ERISA §§ 3(16)(A), 402(a), 29 U.S.C. §§ 1002(16)(A), 1102(a). *See* Defs. Ans. ¶ 12 (Amtrak and the Retirement Plan Committee admitting that the Committee is the Plan Administrator and a Named Fiduciary of the Pension Plan). *See also* Pension Plan § 10.01; *see also id.*, §§ 1.42, 1.47. The Retirement Plan Committee is located in the District of Columbia. *See* Defs. Ans. ¶ 12 (Amtrak and Committee admitting same). *See also* Pension Plan § 10.01. Throughout the relevant time, Defendant Savings Plan Committee was supposed to be and now (since October 2003) is the Plan Administrator and a Named Fiduciary of the 401(k) Plan within the meaning of ERISA §§ 3(16)(A), 402(a), 29 U.S.C. §§ 1002(16)(A), 1102(a). *See* 401(k) Plan §§ 2.17, 2.20. The Savings Plan Committee is located in the District of Columbia. The two Committees are collectively referred to herein as the "Committees" and singly, in context, as the "Committee." At all times since October 2003, their membership has been identical.

20. Defendants William Herrmann, Warren Reisig and Gordon Hutchinson were and/or are Members of the Retirement Plan Committee and the Savings Plan Committee and are

the John Does ##1-3 referred to in the prior Complaint.<sup>1</sup> John Does ##4-10 are or were Members of either or both Committees. The Plans require that Committee either be an employee of Amtrak or a member of the Board of Directors. *See* Pension Plan § 10.01; Savings Plan § 10.01. Each Member of each Committee was and is a fiduciary of the Plan under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) because the Committees, as Plan Administrator and a Named Fiduciary for their respective Plans, had authority to control and manage the operations of that Plan, *see* ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). Both Committees had and have a serious of specifically-assigned fiduciary duties, responsibilities and authority with respect to each Plan. *E.g.*, Pension Plan § 10.03; Savings Plan §§ 10.03, 11.02. These essential plan administrator fiduciary duties are all, under the terms of the Plans and ERISA, non-delegable duties, unless they are duly delegated by majority vote of a duly constituted Retirement Plan or Savings Plan Committee. Pension Plan §§ 10.04, 10.07; Savings Plan §§ 10.04, 10.07.

### **STATEMENT OF FACTS**

**I. FOR SOME 8 YEARS, THE PENSION PLAN AND THE 401(K) PLAN WERE OPERATED WITHOUT A VALIDLY APPOINTED PLAN ADMINISTRATOR IN VIOLATION OF THE EXPRESS TERMS OF THE PLANS, COSTING THE PLANS AND PARTICIPANTS MILLIONS OF DOLLARS IN LOST BENEFITS.**

21. Under the terms of the Plans, the Board of Directors of Amtrak (the “Board” or the “Directors”) and Amtrak’s President were and are “Named Fiduciar[ies]” of the Plans with respect to the appointment of the respective Committees, *see* Pension Plan § 1.36; Savings Plan § 2.17, and Amtrak’s President was and is responsible for the appointment, monitoring and removal of the Members of both Committees. Pension Plan §§ 10.01, 10.02, 10.05; Savings Plan

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<sup>1</sup> All references to the Committees herein should be read as references to the Committee Members and vice versa.

§§ 2.17, 10.01, 10.02, 10.05. From approximately 1995 to October 2003, Messrs. Downs, Warrington and Gunn breached their fiduciary and co-fiduciary duties by failing to appoint or monitor a “Retirement Plan Committee” in the case of the Pension Plan and a “Savings Plan Committee” in the case of the 401(k) Plan and by failing to appoint or monitor those persons who were acting in a *de facto* but unauthorized fiduciary capacity as Plan Administrator in the Committees’ absence.

22. Mr. Gunn remains in breach to this day for failing to remove the Plans’ current Committee Members – Messrs. Herrmann, Reisig and Hutchinson -- who are administering the Pension Plan in violation of ERISA and the terms of the Plan (including in violation of ERISA’s anti-cutback rule) and/or refuse to administer the Plan in conformance with ERISA and the terms of the Plan (including the statutory anti-cutback rule) by, among other things, remedying the illegal cutbacks discussed more fully below. Mr. Gunn remains in breach also for failing to remove those same Defendants who, as Members of the Savings Plan Committee, are also violating their fiduciary duties with respect to, among other things, their duty to decide whether to permit participants to direct the investment of their individual accounts, see Savings Plan § 5.02, and the selection of the specific “investment alternatives,” if any, that the Plan is to make available to participants for that purpose, *id.*, § 5.01, 5.02.

23. Among other things, Defendants’ failure to appoint Plan Committees until quite recently means that for all those years the Pension and 401(k) Plans were essentially operating in an *ultra vires* fashion by persons acting without authority and without the belief they were fiduciaries with personal liability for the prudence and loyalty of their actions. This cost the Plans and Plan participants millions of dollars in lost benefits or potential benefits.

24. In the case of the Pension Plan, the absence of a valid Administrator meant that in September 2001 VERP-eligible Plan participants whose Railroad Retirement Supplement was unbeknownst to them was about to be eliminated had no one who considered themselves a fiduciary looking out for their exclusive best interests and thus participants were left without a fiduciary and advocate who might prevail upon the Company (acting through its Board of Directors) to reject management's call to cut the Railroad Retirement Supplement from the VERP. The Plan Administrator (not then in office) was charged with the job of employing "an enrolled actuary, an independent certified public accountant and counsel" to, among other things, "render advice upon request with regard to matters arising under the Plan," Pension Plan § 10.03. Together with a Plan Administrator, these professionals, acting on behalf of participants, see Pension Plan § 1.05, may have presented a differing analysis (including an analysis showing that the Supplement was or might well be a protected benefit) that might have caused management to withdraw the proposed cutback in whole or in part or call upon the Board to reject it in whole or in part. Indeed, under the Pension Plan, the Board was required to "tak[e] into account the recommendations of the Retirement Plan Committee [the Plan Administrator] and the Actuary" as regards Plan funding and sponsor contribution issues, Id. § 9.02(a). A duly appointed Committee/Plan Administrator would have prevented the Railroad Retirement Supplement from being eliminated.

25. On a Plan-wide basis, the absence of a valid Pension Plan Administrator Committee also means, among other things, that the Pension Plan has spent millions of dollars pursuant to numerous contracts of doubtful validity entered into with a variety of service providers with no one exercising fiduciary oversight on participants' behalves. The Pension Plan

has been mismanaged in numerous other ways causing the Plan injury and loss and depriving participants of their right to a properly administered Plan, compliant with its terms and the requirements of federal law. Whatever plan administrator duties were exercised during this time period were exercised by unauthorized individuals, presumably from Amtrak's Human Resources Department, who were not subject to any fiduciary oversight, were not the persons designated in the Plan document to be discharging these duties and were presumably unaware that they were *de facto*, albeit unauthorized, Plan fiduciaries. These persons caused the Pension Plan to engage in numerous unauthorized transactions and took and failed to take action on behalf of the Plan that has resulted in injury and loss to the Pension Plan and its participants.

26. According to the Pension Plan's most recently available IRS Form 5500 and Summary Annual Report, Mr. Reisig himself, purporting to act as "plan administrator" on October 15, 2003 when he signed the form, concedes that at best by the end of 2002, the Plan had just enough money to meet its liabilities. *See* Form 5500, Annual Return/Report of Employee Benefit Plan, 2002, Retirement Income Plan for Employees of National Railroad Passenger Corporation; Summary Annual Report, 2002, Retirement Income Plan for Employees of National Railroad Passenger Corporation. As a matter of fact, the Pension Plan is currently underfunded, has been throughout the pendency of this litigation and will remain so for the foreseeable future.<sup>2</sup>

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<sup>2</sup> According to the Independent Auditor's Report regarding the Plan 2001-2002 statement of net assets available for benefits, Retirement Income Plan for Employees of National Railroad Passenger Corporation, 2001-2002 Financial Statements and Supplemental Schedules, "[b]ecause of the significance of the information that we did *not* audit, we are unable to, and do not, express an opinion on the accompanying financial statements and supplemental schedules taken as a whole." (emphasis added). However, the Auditor did note that Amtrak "has a history of recurring operating losses," "is highly dependent upon substantial Federal government subsidies," and without such subsidies, "the Company may not be able to fund the Plan." The Auditor also observed that although some Plan benefits are

27. In the case of the 401(k) Plan, the consequences of Defendants' failure to appoint a Plan Committee have been no less dramatic. Under the terms of the 401(k) Plan, it is quite clear that the Plan sponsor at least at the time of the Plan's initial adoption in 1981 or restated in 1989 wisely decided not to necessarily permit Plan participants to have investment direction over their individual accounts. Notwithstanding the widespread nature of such participant direction (or "control") in defined contribution plans, it has long been well known among benefit specialists and investment experts that individual plan participants are thoroughly unprepared and often times completely incompetent to act as their own investment managers. *See, e.g., "A Lesson for Social Security: Many Mismanage Their 401(k)'s," The Wall Street Journal, December 1, 2004.* Indeed, since the 1980's John Hancock has published annual surveys that establish, in essence, that most participants do not even know the difference between a stock and a bond.

28. For that reason, the Plan sponsor here in the 1980's made it an important, threshold fiduciary determination, to be made by a duly appointed and constituted Savings Plan Committee, to decide *whether* participants would be given *any* investment direction or control over their individual accounts. *See* Savings Plan § 5.02 ("The Committee will prescribe from time to time the specific investment alternatives, *if any*, which are available under the Plan"). However, because at some point in 1995, the Committee ceased to exist, that decision was no longer made by the duly authorized Plan fiduciary and thus such decision as was made was *ultra vires* and in breach of the express terms of the 401(k) Plan.

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insured by the Pension Benefit Guaranty Corporation ("PBGC"), "the PBGC does not guarantee all types of benefits under the Plan, and the amount of benefit protection is subject to certain limitations."

29. Had a duly appointed Committee existed, the investment of Plan assets would have been entrusted to professional investment managers instead of participants and these professional would have yielded the Plan and Plan participants millions of dollars in increased investment return and decreased investment expenses. Alternatively, had a duly appointed Committee existed, even if it permitted a limited or unlimited amount of participant direction, its selection of investment alternatives would have been far superior to the selection made by the unauthorized person or persons who, in *ultra vires* fashion, purported to assume this most essential of fiduciary duties. Today, the Committee, although perhaps duly constituted, has not discharged its fiduciary duty to make the threshold decision whether participant investment direction is in the best interests of participants and to the extent after a due diligence it were determined that it was has not complied with its fiduciary duties with respect to the selection of investment alternative or the actual investment of participants' individual accounts and the assets of the Plan. The result has been to cost the 401(k) Plan and Plan participants millions in unnecessary investment fees and expenses and millions in losses and/or lost investment return.

**II. JULY 26, 2001: AMTRAK'S BOARD AMENDS THE PENSION PLAN TO INCLUDE A VERP FEATURING A RAILROAD RETIREMENT SUPPLEMENT.**

30. On July 26, 2001, as part of a company-wide downsizing, Amtrak, acting through its Board of Directors (the "Board"), amended the Amtrak Pension Plan to include a Voluntary Early Retirement Plan ("VERP") that contained a specially-defined "Railroad Retirement Supplement" (or the "Supplement") to encourage Amtrak management employees to take early retirement by offering them a larger retirement benefit than they would have received absent the VERP. This was not the first time management or the Amtrak Board had adopted a special early

retirement plan or created an early retirement benefit consisting in part of a specially-defined “Railroad Retirement Supplement”: at management’s request, Amtrak’s Board had at least once previously enacted a VERP containing such a “Railroad Retirement Supplement” during an earlier downsizing effort. *See* Pension Plan § 4.06 (as of December 30, 1994). *See* Defs. Ans. ¶ 13 (“Defendants admit that previously, Amtrak’s Board of Directors authorized and approved a voluntary early retirement program that was implemented to include what has been referred to as a ‘Railroad Retirement Supplement’”).

31. Under the Pension Plan, the Board is responsible for all Plan amendments. *See* Plan § 13.01 (“Amendment. The Sponsor reserves the right at any time and from time to time and retroactively if deemed necessary or appropriate, by action of its Board, to modify or amend the Plan in whole or in part”). *See* Defs. Ans. ¶ 14 (Amtrak and Retirement Plan Committee admitting same). The July 26, 2001 VERP Amendment to the Pension Plan was formally adopted on July 26, 2001 “by action of [Amtrak’s] Board,” taken at a formal meeting of Amtrak’s Board that day.

32. The July 26, 2001 Board meeting was presided over by Michael S. Dukakis, then Chairman of Amtrak’s Board. *See* Defs. Ans. ¶ 14 (Amtrak and Retirement Plan Committee admitting same). *See also* National Railroad Passenger Corporation, Board of Directors, Minutes of Meeting, July 26, 2001 at 1, a true and correct copy of which is attached to the original Complaint as Exhibit 2; *see* Defs. Ans. ¶ 15 (Amtrak and Retirement Plan Committee admitting authenticity of Ex. 2). At the meeting, Amtrak management, including Amtrak’s then-President and Chief Executive Officer George D. Warrington, informed the Board both in writing and orally that Amtrak’s Human Resources Department had developed the VERP, along



with two other plans (a voluntary separation plan and an involuntary separation plan) in order “[t]o achieve the cost savings associated with a 15 percent reduction in management staff.” *See* Amtrak Board of Directors Agenda Item Executive Summary – Title: Management Separation/Severance Plans, a true and correct copy of which is attached to the original Complaint as Exhibit 3. *See* also Defs. Ans. ¶ 15 (Amtrak and Retirement Plan Committee admitting authenticity of Ex. 3). Aiding the Human Resources Department in developing the VERP and the other plans were actuaries and other professional employee benefits specialists at Aon Consulting. The proposed plans were thoroughly evaluated before being presented to Amtrak’s Board.

33. At the July 26, 2001 meeting, Warrington and Arlene Friner, Amtrak’s then-Chief Financial Officer, “discussed the terms” of the proposed plans in detail with the Board, as well as “the process and schedule for implementation of these plans.” *See* Ex. 2 at 11-12.

34. Management’s “Proposal” to the Board was that the Board adopt an “Early Retirement Plan” (later referred to as the “Voluntary Early Retirement Plan” or “VERP” as discussed below) with the following terms:

“Any management employee 55 years of age or older with 10 or more years of Amtrak service who files retirement papers between September 15 and October 31, 2001 will receive the following retirement package:

- Fire years of age added to pension formula; and
- *A monthly supplement (equal to railroad retirement annuity) payable until employee is able to commence unreduced railroad retirement annuity benefits.”*

“In order to receive benefits under this plan, an employee must elect to retire from Amtrak during the window period and sign a release agreement. The employee must also agree not to exercise seniority rights back into an agreement-covered position.”

Ex. 3 at 2 (emphasis added). The “Proposal” specifically provided that “the Early Retirement Plan will be funded out of Amtrak’s Retirement Income Plan Trust,” *id.*, that is, out of the assets of the Pension Plan. (The other two plans did not implicate the Pension Plan or its assets and were to be funded out of Amtrak’s operating budget. *Id.*) Management informed the Board that “[t]he anticipated total cost of the Early Retirement Plan option [to the Plan] is \$9.0-\$12 million.” *Id.* This “assume[d] 150-200 management employees w[ould] exercise this option,” *id.*, out of some 375 employees who were eligible for it as a result of their age and years of service.

35. The VERP’s monthly Railroad Retirement Supplement constituted a “retirement-type subsidy” and/or an “early retirement benefit” within the meaning of ERISA § 204(g), 29 U.S.C. § 1154(g) because it was a benefit in excess of the Pension Plan’s normal retirement benefit and was payable to participants in connection with their retirement from the Company. As defined in management’s proposal (“[a] monthly supplement . . . equal to [a participant’s] railroad retirement annuity . . . payable until [the participant] is able to commence unreduced railroad retirement annuity benefits”), the Railroad Retirement Supplement was quite valuable because it would entitle participants electing the VERP to receive from Amtrak a monthly supplement equal to the monthly annuity they would eventually receive from the Railroad Retirement Board under the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.*, until such time as they received that annuity from the Board.

36. More specifically, the VERP that Amtrak fashioned would pay participants 55 years of age or older with 10 years of Amtrak service who retired during a September 15-October 31, 2001 retirement “window” additional retirement income in connection with their retirement from the Company in excess of the Pension Plan’s normal retirement benefit in two different ways: (a) by increasing the value of the early retirement already part of the Pension Plan by adding five years of age to their pension formula; and (b) by paying participants an amount equal to the annuity they would eventually receive from the Railroad Retirement Board – as management put it: “A monthly supplement (equal to railroad retirement annuity) payable until employee is able to commence unreduced railroad retirement annuity benefits.” Ex. K, Management “Proposal” filed with July 26, 2001 Minutes; *id.* at 3 (management to Board: “Recommended Action: Management recommends that the Board approve the attached resolutions authorizing the separation/severance plans set forth above”).

37. This was how Amtrak defined the early retirement benefit (and/or retirement type subsidy) which came to be referred as the “Railroad Retirement Supplement” at issue here. For most participants this would have entitled them to monthly payments worth many tens of thousands of dollars, bridging them from the time of their early retirement to the day that they received their Railroad Retirement Annuity from the Railroad Retirement Board.

38. The Railroad Retirement Annuity is a feature of the Railroad Retirement system, which was created by legislation first enacted in 1934. The Railroad Retirement system is similar to but separate from the Social Security system which it actually pre-dates. The Railroad Retirement system provides retirement and disability benefits for workers in the railroad industry

and displaces Social Security for such workers. Therefore Plaintiffs and their similarly situated colleagues do not receive Social Security as such at all.

39. The Railroad Retirement system is funded by a tax on employees and carriers. *See* 26 U.S.C. §§ 3201-3233. It resembles both a private pension program and a social welfare plan. The single benefit it provides is comprised of two different “tiers.” Although comprised of these two “tiers,” there is only one combined benefit paid. The “Tier I” aspect of the benefit is the amount obtained by applying the Social Security benefit formula to the eligible employees’ combined railroad and social security earnings. It is not a payment under the Social Security Act nor is it a payment exactly identical to social security. Moreover, the “Tier II” aspect of the benefit has no parallel under Social Security: the Tier II aspect of the Railroad Retirement benefit is a supplemental annuity which, like a private pension plan, is tied to earnings and career service and is comparable to the pensions paid over and above social security benefits in other heavy industries. *See* 45 U.S.C. § 231a(b) and § 231b(e).

40. The fact that Railroad Retirement workers receive, as part of their benefit, something that no Social Security recipient receives – a Tier II private-type additional pension credit – makes the Railroad Retirement annuity more valuable than that received under Social Security. According to the Railroad Retirement Board, “railroad retirement benefits remain substantially higher than social security benefits.” [http://www.rrb.gov/opa/qa/pub\\_0303.html](http://www.rrb.gov/opa/qa/pub_0303.html). The Railroad Retirement Board states that whereas the average age retirement benefit being paid under social security at the end of fiscal year 2002 was \$880 a month, “the average age annuity being paid by the Railroad Retirement Board at the end of fiscal year 2002 to career rail

employees was \$1,930 a month, and for all retired rail employees the average was \$1,495” – approximately twice as much. *Id.*

41. Railroad Retirement workers also receive another (relatively modest) supplemental annuity that Social Security recipients do not, *see* 45 U.S.C. § 231b(e), further distinguishing the two systems.

42. Unlike social security recipients who are not eligible for their full unreduced benefits until much later, a railway worker with thirty years of service can begin drawing her full unreduced Railroad Retirement annuity *at age 60* – another important benefit with no parallel under the Social Security Act.

43. Yet another difference between the two systems is the manner in which their benefits are taxed. A participant’s Railroad Retirement annuity is not taxed like social security. Instead, the portion that exceeds the corresponding social security (or “FICA”<sup>3</sup>) tax rate, *see* IRC § 86, is treated as a benefit provided under a qualified employer plan, *see* I.R.C. §§ 72(r)(1), 72(r)(2)(A), 72(r)(3), with the tax-advantaged effect of making the benefit includible in income only when paid under the annuity rules of I.R.C. § 72; eligible for tax-free rollover to another qualified plan or an individual retirement account or annuity; and exempt from income tax withholding like pensions and annuities. Social security has no comparable tax advantages or features.

44. Amtrak management urged the Board to adopt the VERP with the Railroad Retirement Supplement feature, saying: “Recommended Action: Management recommends that

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<sup>3</sup> Federal Insurance Contributions Act, *see* 26 U.S.C. §§ 3101(a), 3111(a).

the Board approve the attached resolutions authorizing the separation/severance plans set forth above.” Ex. 2 at 3.

45. After due consideration, by a vote of 5-0, the Board adopted the VERP and the other plans, resolving as follows:

WHEREAS, Management has presented to the Board an organizational restructuring plan for the Corporation; and

WHEREAS, This restructuring plan will result in the consolidation and elimination of a number of positions within the Corporation’s management workforce; and

WHEREAS, Management believes that it is preferable to encourage employees who might be affected by the organizational restructuring to voluntarily leave Amtrak through programs that provide a transition to other employment; and

WHEREAS, Management has set forth in the attached Executive Summary the terms of three proposed employee separation/severance plans: a Voluntary Separation Plan, an Early Retirement Plan, and an Involuntary Separation Plan; therefore, be it

RESOLVED, That the three employee separation/severance plans described in the attached Executive Summary are authorized and approved; and

FURTHER RESOLVED, That the President and Chief Executive Officer is authorized to take all necessary steps to implement the three separation/severance plans described in the attached Executive Summary.”

Ex. 2 at 12.

**III. JULY-SEPTEMBER 2001: AMTRAK ANNOUNCES THE VERP FEATURING THE RAILROAD RETIREMENT SUPPLEMENT TO EMPLOYEES AND ENCOURAGES THEM TO ELECT IT.**

46. Immediately upon receiving the Board's July 26, 2001 approval, management announced the VERP with great fanfare and began a several weeks long campaign to induce employees to take it and retire. Over the course of the ensuing weeks, eligible employees were repeatedly told about the VERP's terms in great detail -- including the specific terms of the Railroad Retirement Supplement -- and were affirmatively led to believe that this was a promise they could rely upon.

47. For example, the same day the VERP was enacted the Company issued a press release and the Company President issued an Employee Advisory both discussing the VERP. *See* "Employee Advisory," Ex. 4 attached to the original Complaint; Defs. Ans. ¶ 21 (Amtrak and Retirement Plan Committee admitting authenticity of original Complaint Ex. 4); *see* [www.amtrak.com/press/ATK-01146.html](http://www.amtrak.com/press/ATK-01146.html) (press release still on Amtrak website).

48. Then, on July 30, 2001 participants were sent a formal letter describing the VERP and the Railroad Retirement Supplement feature in great detail. *See* July 30, 2001 Letter from Lorraine A. Green, original Complaint Ex. 6; Defs. Ans. ¶ 25 (Amtrak and Retirement Plan Committee admitting authenticity of same). That letter and additional details, including a list of Frequently Asked Questions, were posted on the Company internal website. *See* July 30, 2001 Intranet posting original Complaint Ex. 5; Defs. Ans. ¶ 22 (Amtrak and Retirement Plan Committee admitting authenticity of same).

49. In August 2003, the Company issued an additional Employee Advisory about the VERP featuring the Railroad Retirement Supplement. *See* August 3, 2002 Employee Advisory, original Complaint Ex. 7; Defs. Ans. ¶ 26 (Amtrak and Retirement Plan Committee admitting authenticity of same).

50. On August 13, 2001, Amtrak posted on its Intranet: “Early Retirement Frequently Asked Questions.” *See* August 13, 2001 Intranet posting, original Complaint Ex. 8; Defs. Ans. ¶ 27 (Amtrak and Retirement Plan Committee admitting authenticity of same).

51. Also in August, Amtrak sent participants a formal, printed booklet describing and promising them the VERP as adopted by the Board on July 26, 2001. The Company repeatedly referred to the booklet as a “Summary Plan Description.” *See* emails to participant Phil Barnes from Defendants Herrmann and Reisig, September-October 2001 (Herrmann, Amtrak’s Deputy General Counsel, repeatedly referring to this document or its substantially identical, later iteration as the “SPD” and “Summary Plan Description”); *see also* Release (indicating that participants were given “the 2001 Voluntary Early Retirement Plan *Summary Plan Description*”; the signing participant is required to acknowledge that he or she is not relying on any written or oral representations not contained in the release, the VERP itself or “the 2001 Voluntary Early Retirement Plan *Summary Plan Description*”) (emphasis added).<sup>4</sup>

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<sup>4</sup> The Company apparently takes the position now that this booklet and an identical booklet modified to eliminate references to the Supplement were *not* Summary Plan Descriptions. If so, the fact that Defendants told participants, in the Release, in emails, and elsewhere, that it *was*, and that it was something that they *could* rely upon, when in fact it was *not* renders all such Releases invalid as a matter of law.



**IV. AT THE ELEVENTH HOUR, MANAGEMENT ATTEMPTS – UNSUCCESSFULLY -- TO HAVE THE BOARD AMEND THE PLAN AGAIN TO CUTBACK THE ORIGINAL VERP BY ELIMINATING THE RAILROAD RETIREMENT SUPPLEMENT AND REQUIRE EMPLOYEES WHO ELECT THE REDUCED VERP TO RELINQUISH THEIR RIGHTS AS A CONDITION OF RECEIVING THE REDUCED BENEFITS.**

52. By early September 2001, Amtrak management realized that far more employees than management had originally predicted were intending to elect the VERP. While management believed that this number of elections would not place the Pension Plan in an underfunded status, it might shorten the “contribution holiday” that Amtrak enjoyed because of the Pension Plan’s overfunding. Thus, management began to reconsider its decision to recommend, and the Board’s decision to enact, a VERP that provided for the Railroad Retirement Supplement as defined by the July 26, 2001 Amendment. In an undated, one-page document entitled “Voluntary Early Retirement Plan Update” (a true and correct copy of which is attached to the original Complaint as Exhibit 9),<sup>5</sup> generated in late August 2001 and presented to the Board at its August 30, 2001 meeting, management reviewed the situation, saying:

“The following is an update to the Voluntary Early Retirement Plan. The Board of Directors approved a Voluntary Early Retirement Plan at the July board meeting. A summary of the Voluntary Early Retirement plan provisions are as follows:

- Management employees age 55 or older with 10 or more years of Amtrak service are eligible to participate.
- The Voluntary Early Retirement Plan will run from September 15 through October 31.
- Payments will be made from the pension plan trust.
- Amtrak will add 5 years of age when calculating pension benefits.
- Amtrak will provide employees a supplemental payment equal to the railroad retirement annuity benefit payable at normal retirement age. This supplement will end once the employee reaches normal or full retirement age.

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<sup>5</sup> See Defs. Ans. ¶ 28 (Amtrak and Committee admitting authenticity of Ex. 9).

Management provided the Board a cost estimate of \$12 million dollars.<sup>[6]</sup> This cost estimate was based on information provided by Amtrak's pension actuary and assumed 50% of those employees eligible would elect to participate in the Voluntary Early Retirement Plan. Management requested Amtrak's pension actuary to update the Voluntary Employee Retirement Plan cost estimate for the following reasons.

- The Railroad Retirement Board provided Amtrak will [sic] actual calculations of the supplemental railroad retirement payments.
- The stock market has continued to under perform thus causing a negative impact on the current pension plan surplus.
- The potential for a greater number of the eligible employees electing the Voluntary Early Retirement Plan that we originally projected.

Based on updated information we estimate that the Voluntary Early Retirement plan will cost \$25 million, assuming a participation rate of 50%.<sup>[7]</sup> Although we do not believe this will place the pension plan in an under funding [sic] position, the pension plan's pension contribution holiday will be shortened. If a greater percentage of employee's [sic] participate and the stock market continues to decline the potential exists that Amtrak will need to make a contribution to the pension plan in 2003. The actual cost of the Voluntary Early Retirement Plan will not be known until we know which employees elect to participate in the plan."

Ex. 9.

53. At no time during the August 30, 2001 meeting did management propose to cut back the promised benefits and the Board did not consider any such cutback. Indeed, it was the view of many, including Defendants Herrmann and Reisig (at least at that time), that it was "too late" for Amtrak to try to do so.

54. Nevertheless, thereafter, either unaware or heedless that they were proposing that the Company violate ERISA's anti-cutback rule, management decided to ask the Board to amend the Plan to eliminate the promised monthly Railroad Retirement Supplement and replace it with a far less valuable lump sum payment of \$15,000. Management also resolved to ask the Board,

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<sup>6</sup> Compare July 26, 2001 Executive Summary at 3 (wherein management told the Board that the VERP would cost not \$12 million but "\$9.0-\$12 million").

in the same amendment, to require employees to sign a release as a condition to receiving even these reduced benefits – a release which could be construed as relinquishing participants’ right to the Railroad Retirement Supplement. See Defs. Ans. ¶ 29 (Amtrak and Committee stating that they admit that “certain employees executed a ‘General Release Agreement’ *in exchange for, inter alia*, the receipt of certain retirement benefits”) (emphasis added).

55. Without waiting for the Board’s next scheduled meeting at which management would formally ask the Board to amend the original VERP as set forth above, management had formal letters printed to send employees informing them of the cutback. This was done even though management could not be certain that the Board would in fact agree to such a dramatic alteration of the VERP that had been promised and already announced to employees, and specifically, that the Board would agree to eliminate its key feature, the Railroad Retirement Supplement (which it had given other early retiring employees as part of at least one earlier downsizing). In a letter dated September 14, 2001 (the same day of the scheduled Board meeting) signed by Human Resources Vice President Lorraine Green, a true and correct copy of which is attached to the original Complaint as Exhibit 10, Amtrak told workers, in pertinent part: “Dear Amtrak Colleague: As you know, Amtrak is offering a Voluntary Early Retirement Plan (VERP) as part of the overall restructuring of the company. The purpose of this letter is to advise you of the changes that Amtrak is making to the plan.”

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<sup>7</sup> Compare Ex. 11, September 14, 2001 Executive Summary at 2 (a document roughly contemporaneous with Ex. 9 but wherein management indicates that it believes 75%, not merely 50%, of eligible participants would have elected the original VERP).

“[I]n order to accomplish [our] objectives, a more modest VERP would need to replace the plan initially outlined last month.”

“Amtrak will not be able to provide a supplemental for those who will not yet receive full Railroad Retirement Annuity benefits, as first announced.”

Ex. 10. *See* Defs. Ans. ¶ 30 (Amtrak and Committee admitting authenticity of Ex. 10).

56. Management asked the Board to amend the Plan, eliminate the Railroad Retirement Supplement and replace it with a \$15,000 lump sum payment. In support of this request, management presented the Board with an Executive Summary pertaining to the VERP and the proposed new amendment to the Plan, a true and correct copy of which is attached to the Complaint as Exhibit 11. *See* Defs. Ans. ¶ 31 (Amtrak and Committee admitting authenticity of Ex. 11). This Executive Summary contradicted or differed from the undated, one-page document (created, presumably, in early September 2001) entitled “Voluntary Early Retirement Plan Update” (Ex. 9) in that it failed to disclose to the Board that the principal (or a principal reason) why management now believed the original VERP was too costly was because management had underestimated the number of employees who would want to elect it, as management discussed internally in Ex. 9. The September 14, 2001 Executive Summary also asserted that if the Railroad Retirement Supplement were not cut back, the Pension Plan surplus would be “depleted,” whereas in Ex. 8 management said internally “we do not believe this [following through with the original VERP] will place the pension plan in an under funding position.” In any event, the Executive Summary stated as follows:

“As part of Amtrak’s efforts to streamline its organization, eliminate inefficiencies and reduce costs, the Board approved a Voluntary Early Retirement Plan (VERP) at its meeting on July 26, 2001. The VERP as approved had two main components: (i) five years of age added to

Amtrak's pension formula; and (ii) a full supplement to the Railroad Retirement benefits that would otherwise [not] be available until age 65. Management planned to fund the VERP benefits through the accumulated surplus in Amtrak's Retirement Income Plan Trust (the "Fund"). Because a portion of the pension funds in this Fund are invested in the stock market and the market has experienced a recent downturn, before proceeding further with the VERP Senior Management requested an updated actuarial analysis to ensure that the integrity of the pension fund is preserved."

The updated analysis showed that if Management [sic] proceeded with the plan as originally formulated, the surplus in the Fund would be depleted and the company would be required to make a significant contribution to the Fund as early as 2003. According to the actuary, as a result of a combination of market conditions, additional accrued liabilities and withdrawals, the forecasted surplus in the Fund has declined from approximately \$42 million in December 2000 to \$18.6 million on August 31, 2001. [Footnote omitted]. While Management expects the Fund to continue to grow over the long term, it has nevertheless determined that it would be prudent to offer a more modest VERP than originally envisioned and maintain a surplus in the Fund. Consequently, Management proposes to eliminate the second component of the plan, the more costly Railroad Retirement supplement, and instead offer a one-time lump sum payment of \$15,000."

Ex. 11. As part of the proposed new amendment to the Plan, management also explicitly asked the Board to require employees accepting the reduced VERP to sign a release as a condition to their participation in the reduced VERP. *Id.* (proposing that the Board decree that "[i]n order to receive benefits, an employee must elect to retire from Amtrak during the window period and sign a release agreement").

57. Management did not inform the Board that these proposed amendments would or could violate ERISA § 204(g), 29 U.S.C. § 1054(g). Instead, as the September 14, 2001 Executive Summary makes clear, management focused on the cost savings to the Plan and ultimately the Company which might otherwise have to make a Plan contribution sooner than expected. *Id.* ("Based on current actuarial forecasts and the anticipated costs of this amended plan, the Fund will show at least a \$10 million surplus and Amtrak will therefore continue to enjoy a contribution holiday for several more years. Management estimates that participation in

the VERP will be somewhere between 50 to 60 percent, down from 75% expected for the original plan. At these levels of participation, the VERP as revised is estimated to cost approximately \$7.2 million at 50 percent participation and \$8.6 million at 60 percent.”)

The Executive Summary concluded: “Recommended Action: Management recommends that the Board approve the attached resolutions authorizing an amendment to the Voluntary Early Retirement Plan as set forth above.” *Id.*

58. Management drafted proposed resolutions for the Board members to sign authorizing the proposed cutback. Those proposed draft Resolutions, entitled “Resolutions Authorizing Amendment to 2001 Voluntary Early Retirement Plan,” state as follows:

“WHEREAS, This Board previously approved a Voluntary Early Retirement Plan that provided certain enhanced pension benefits for eligible employees; and

WHEREAS, Management has recommended that this Board adopt an amended benefit plan based on actuarial adjustments in the pension plan funding; and

WHEREAS, Management has set forth in the attached Executive Summary the terms of the proposed amended Voluntary Early Retirement Plan which as been fully described to Members of this Board; therefore, be it

RESOLVED, That the amended Voluntary Early Retirement Plan described in the attached Executive Summary is authorized and approved; and be it

FURTHER RESOLVED, That the President and Chief Executive Officer is authorized to take all necessary steps to implement the terms of the plan described in the attached Executive Summary.”

*Id.*, Attachment. However, the Board never adopted the proposed resolutions in a manner consistent with the Company's governing statutes, articles of incorporation, by-laws, the terms of the Plan and/or ERISA. Therefore, the original version of the VERP, complete with the Railroad Retirement Supplement as defined by the Board on July 26, 2001, remained and remains today a part of the Pension Plan.

59. Since September 14, 2001 and continuing until today, the Plan has been administered as if the Plan had been validly amended that day, as a matter of both Amtrak's governing laws and standards defining Board "action" effective to amend the Plan and as a matter of substantive ERISA law, to eliminate the Railroad Retirement Supplement.

60. Beginning on September 15, 2001, the day the early retirement window opened, and continuing until today, Defendants have prevented eligible participants from electing the original VERP and have refused to pay those participants who elected the reduced, September 2001 VERP the monthly Railroad Retirement Supplement to which they are entitled under the terms of the Plan, read without reference to the events of September 14, 2001, whether they are properly viewed as ineffective to amend the Plan and eliminate the Supplement, as constituting valid corporate action but a violation of ERISA § 204(g), 29 U.S.C. § 1054(g) or both.

61. Eligible participants who elected the reduced VERP have never been given the benefit of the Railroad Retirement Supplement promised in July 2001 and all other participants have been prevented from electing the original VERP. Moreover, Defendant Gunn, who has fiduciary responsibility for the oversight and monitoring of the Committee and its Members, has failed to do anything to ensure that the Committee and its Members administer the Plan in compliance with ERISA in this regard.

**V. SOME 75 EMPLOYEES, NEVER GIVEN AN OPPORTUNITY TO ACCEPT THE ORIGINAL VERP, ACCEPT THE AMENDED, REDUCED VERP AND ARE REQUIRED UNDER THE TERMS OF THE ALLEGED SEPTEMBER 14, 2001 AMENDMENT TO SIGN A “RELEASE” WHICH WAS AS MUCH A CUTBACK AS ELIMINATION OF THE RAILROAD RETIREMENT SUPPLEMENT ITSELF.**

62. The VERP employees were offered between September 15, 2001 and October 31, 2001 did not comply with the VERP as adopted on July 26, 2001 insofar as it eliminated the monthly Railroad Retirement Supplement and replaced it a one-time lump sum payment of \$15,000 and required employees electing it (the reduced VERP) to sign a release that can be read as waiving their rights to the Railroad Retirement Supplement guaranteed under the July 26, 2001 Amendment. The Committee violated, among other fiduciary provisions of ERISA, ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) by administering the Pension Plan in accordance with the September 14, 2001 Amendment which was and is not “consistent with the provisions of [Title I of ERISA]” and in fact violates ERISA, specifically violating the anti-cutback provisions of ERISA § 204(g), 29 U.S.C. § 1054(g).

63. Moreover, the Committee also violated ERISA § 404(a)(1)(A)-(a)(1)(B), 29 U.S.C. § 1104(a)(1)(A)-(a)(1)(B), by preventing participants from electing the original VERP during the September 15, 2001-October 31, 2001 window and/or causing participants to believe that they could not elect the original VERP during that window when in fact the original VERP, as adopted by the Board on July 26, 2001, gave participants that right and the September 14, 2001 amendment was a legal nullity that could not affect the availability, as a matter of law, of the original VERP. Defendant Amtrak knowingly participated in these fiduciary breaches by, among other things, providing the Committee or whatever unauthorized, *de facto* fiduciaries



were acting in its place with instructions and information as to how to implement the reduced VERP and how to deny participants the right to elect the original VERP and resources with which to do so.

64. The elimination of the Railroad Retirement Supplement devastated employees eligible for the VERP, many of whom had been hoping for just such a retirement-type subsidy and/or begun making active preparations for retirement after the Company's July and August 2001 announcements regarding the VERP. When they learned, on or about September 14, 2001 that the Supplement had been eliminated, employees, encouraged for weeks to accept the package, were dumbfounded. Many complained or made inquiry.

65. In response to such inquiries and on its own, Amtrak, through its Directors, President, officers, employees and agents, communicated with participants about the VERP, the September 14, 2001 Amendment and related matters. In so doing acted as a fiduciary within the meaning ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). This required the Company to make full and accurate disclosure to participants of all material facts and to do so only after the Company made an adequate due diligence concerning the assertions, implicit and explicit, it was making about the VERP to participants.

66. However, in violation of this duty, Amtrak conducted no investigation whatsoever, or an inadequate investigation, into whether, for example, September 14, 2001 Amendment was lawful under ERISA and provided participants with false, misleading and/or inaccurate information about the amended VERP's legality. A prudent investigation would have revealed that the September 14, 2001 Amendment was illegal. This was a fact which Amtrak had a duty to discover and affirmatively disclose even absent participant inquiry.

67. An example of Amtrak's breaches in this regard is an email response -- made while the amended VERP window was still open -- to one participant inquiry by Amtrak's Deputy General Counsel for Labor and Employment William H. Herrmann. *See* October 18, 2001 email from William Herrmann to inquiring Plan participant, copying Warren Reisig, along with preceding and subsequent emails between September 24, 2001 and October 25, 2001, a true and correct copy of which is attached to the original Complaint as Exhibit 13. *See* Defs. Ans. ¶ 35 (Amtrak and Retirement Plan Committee admitting authenticity of Ex. 13). In this email, Mr. Herrmann correctly stated that the original, July 26, 2001 "VERP [was] an ERISA plan and therefore subject to the requirements of ERISA," but wrongly and inaccurately stated that the Company had the right to "amend [the] plan" even if that meant "a lesser" benefit. *Id.* Mr. Herrmann stated that "[t]he original VERP was amended" and that the VERP in its entirety -- not just the Supplement but also the 5 year add-on to the Amtrak Pension Plan -- could be added or withdrawn to the Plan by the Company at will, consistent with ERISA. *Id.*<sup>8</sup>

68. A group of approximately 75 eligible employees, many under explicit protest, accepted the amended, reduced VERP. Because the Committee followed the terms of the illegal September 14, 2001 Amendment instead of the original July 26, 2001 Amendment, these participants received a one-time lump sum payment of \$15,000 instead of the promised monthly Railroad Retirement Supplement. Additionally, as noted, these employees were required, by the express terms of the amended, reduced VERP as adopted by the Board on September 14, 2001,

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<sup>8</sup> Mr. Herrmann made no contention that the Railroad Retirement Supplement was not a protected benefit (either in whole or in part) under ERISA's anti-cutback rule. Putting aside that issue for the moment, there can be no legitimate dispute that once part of the Plan, the 5 year add-on, a classic "early retirement benefit" explicitly protected against cut-back by ERISA § 204(g), 29 U.S.C. § 1054(g), could not be eliminated "all together" [sic] or even reduced, as Mr. Herrmann contended in his email.

to sign a release as a condition to participating in the amended, reduced VERP. A true and correct copy of the release Amtrak and/the Committee solicited from employees pursuant to the September 14, 2001 Amendment is attached to the original Complaint as Exhibit 14. *See* Defs. Ans. ¶ 36 (Amtrak and Retirement Plan Committee admitting authenticity of Ex. 14).

69. The release purports to “release and discharge Amtrak, members of its Board of Directors, officers and agents and employees from any and all liabilities and claims of any kind or nature” known or unknown. Ex. 14. In soliciting the release from participants, Amtrak, through its Directors, President, officers, employees and agents, was communicating with participants about the Plan and, as such, was a fiduciary within the meaning ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). As fiduciaries, Amtrak was under a duty to make full disclosure to participants of all material facts that could affect their decisionmaking with respect to their benefits and to conduct an adequate due diligence concerning the assertions, implicit and explicit, the Company was making to participants in tendering them the release to sign. In violation of this duty, Amtrak conducted no investigation whatsoever, or an inadequate investigation, into whether alleged September 14, 2001 amendment was lawful under ERISA and yet by asking employees to sign the release Amtrak was implicitly asserting the amendment was lawful and that, to that extent, employees were not waiving anything or anything of substance. A prudent investigation, however, would have revealed that the September 14, 2001 amendment was illegal, a fact which Amtrak had a duty not only to discover but to affirmatively disclose. Had such disclosure been made, no employee would have signed the release. The absence of such disclosure renders each such release, as a matter of law, neither knowing or voluntary. The

absence of such disclosure also makes the release materially false and/or misleading, which also, in turn, renders each such release, as a matter of law, neither knowing or voluntary.

70. Moreover, to the extent that the release purports to release Amtrak and others from claims that the alleged September 14, 2001 amendment was an illegal cutback, on Amtrak's own terms, the release itself "has the effect of -- (A) eliminating or reducing "a retirement-type subsidy" and/or "an early retirement benefit" in violation of ERISA § 204(g), 29 U.S.C. § 1054(g), and is as violative of the anti-cutback rule as the elimination of the Railroad Retirement Supplement itself. Under Amtrak's view, the release definitely disentitles participants from anything other than the September 14, 2001 VERP and thus must be viewed an integral part of the illegal September 14<sup>th</sup> Amendment itself.

71. Moreover, to the extent that the release purports to relinquish claims to the original VERP's benefits, it lacked consideration and is of no force and effect. In order for there to be consideration, there must be mutual concessions. The performance of an act which one party is legally bound to render to the other party is not legal consideration. Thus, a release is not supported by sufficient consideration unless something of value is received to which the releasing party had no previous right. Here, participants had a legal right to a VERP with the Railroad Retirement Supplement. In "exchange" for participants' release, they received less than that to which they already had an absolute right. Amtrak's agreement to provide participants part of that which they had a pre-existing legal duty to pay is not consideration for participants' release and hence that release does not bar participants from seeking to recover that to which they are entitled under the July 26, 2001 VERP.

72. Additionally, even if not part of the illegal cutting back alleged September 14, 2001 amendment and even if supported by valid consideration, the release does not purport to “release and discharge” any person or entity other than “Amtrak, members of its Board of Directors, officers and agents and employees,” meaning that it does not bar participants who signed it or a similarly worded release from asserting claims against the Retirement Plan Committee (as Plan Administrator and a Named Fiduciary) to redress its violations of ERISA or the terms of the Plan, and to enforce ERISA or the terms of the Plan, including but not limited to asserting claims for injunctive relief and breach of fiduciary duty against the Committee for its violations of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) by administering the Plan in accordance with a Plan amendment, namely the September 14, 2001 Amendment, which was and is not “consistent with the provisions of [Title I of ERISA]” and in fact violates ERISA, specifically, ERISA § 204(g), 29 U.S.C. § 1054(g), or for other violations of law. The Committee is not “Amtrak, members of its Board of Directors, officers and agents and employees” and nothing in the release purports to eliminate participants’ right to sue the Committee to redress its violations of ERISA or the terms of the Plan and enforce ERISA or the terms of the Plan even assuming such claims against Amtrak are barred. *See* Ex. 14 (omitting from the list of claims being waived any mention of ERISA claims or claims for breach of fiduciary duty).

73. Plaintiff Hattie N. McCoy-Kemp is one of the employees who accepted the amended, reduced VERP and was forced to sign such a release. In the Fall of 2001, Plaintiff McCoy-Kemp was 57 years old and had over 28 years of creditable service. Under the Railroad Retirement Act, she was and is entitled to receive an unreduced Railroad Retirement Annuity

beginning at age 66 in the amount of approximately \$2,554 per month. Under the July 2001 VERP, she would have received bridging monthly Railroad Retirement Supplement payments in that same amount -- \$2,554 per month -- for almost 9 years (between ages 57 and 66), until she received her unreduced Railroad Retirement Annuity from the Railroad Retirement Board. The cutback of the Railroad Retirement Supplement thus cost Plaintiff McCoy-Kemp approximately \$260,000 (\$275,000 in lost Railroad Retirement Supplements minus the \$15,000 lump sum she received under the reduced VERP), plus interest.

74. In asking her to sign a release, Amtrak and the other Defendants, however, did not disclose to Plaintiff McCoy-Kemp that the September 14, 2001 Amendment violated or possibly violated ERISA's "anti-cutback" rule and hence Amtrak's and the other Defendants' communications to her and all others similarly situated were false and misleading, rendering the release is void and/or not knowing or voluntary as a matter of law. To the extent that the release purports to release Amtrak and others from claims that the September 14, 2001 Amendment was an illegal cutback, the release is as violative of the anti-cutback rule as the elimination of the Railroad Retirement Supplement itself. To the extent that the release purports to relinquish claims to the original VERP's benefits, it lacked consideration and is of no force and effect. Additionally, even if supported by valid consideration, the release does not purport to release or discharge any person or entity other than "Amtrak, members of its Board of Directors, officers and agents and employees," meaning that it does not bar participants who signed it or a similarly worded release from asserting claims to redress its violations of ERISA or the terms of the Plan, and to enforce ERISA or the terms of the Plan, including but not limited to asserting claims for injunctive relief and breach of fiduciary duty against the Committee for violating ERISA §

404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) by administering the Plan in accordance with the September 14, 2001 Amendment which was and is not “consistent with the provisions of [Title I of ERISA]” because it violates ERISA’s anti-cutback rule or other laws, and seeking injunctive relief to compel the Committee to follow ERISA and calculate benefits in accordance with the original VERP, with interest.

75. Plaintiff McCoy-Kemp, on behalf of herself and others similarly situated, seeks, *inter alia*, a declaration that the September 14, 2001 Amendment is void and an order compelling the Retirement Plan Committee to administer the Plan in accordance with the statute without regard to the illegal September 14, 2001 Amendment and the releases obtained pursuant to its terms, and re-calculate her benefits and the benefits of all those similarly situated in accordance with the requirements of the July 2001 VERP and with interest.<sup>9</sup>

**VI. SOME 300 ELIGIBLE EMPLOYEES, NEVER GIVEN THE OPPORTUNITY TO ACCEPT THE ORIGINAL VERP, REJECT THE REDUCED VERP.**

76. Many other employees, approximately 300 in number, who were eligible for the original VERP, declined to accept the much-reduced VERP, and (a) continue to work for the Company; (b) continued working and subsequently retired from the Company with far less valuable pension benefits than those available under the original VERP (Plaintiff Hall is one such employee); or (c) separated from service under some other arrangement less favorable than the VERP (Plaintiff Staton is one such employee). These employees have either not signed releases at all (Plaintiff Hall has signed no release) or, if they have signed a release (Plaintiff

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<sup>9</sup> To the extent that the release that Plaintiff McCoy-Kemp signed is an otherwise enforceable release in favor of Amtrak that covers any or all of the claims asserted here, Plaintiff McCoy-Kemp seeks to advance claims on behalf of herself and those similarly situated only against the non-Amtrak Defendants.

Staton is one such participant), they have not signed any release purporting to release both Amtrak and the Committee, separate Defendants herein.<sup>10</sup>

77. Plaintiff Hall planned to accept the original VERP after learning about it from the Company in early August 2001. In anticipation of retiring under the VERP (and specifically, the Railroad Retirement Supplement), Plaintiff Hall bought a retirement home in Southern Virginia, put his house in Northern Virginia on the market, and sold his late mother's house which was adjacent to his home in Northern Virginia. In the Fall of 2001, Plaintiff Hall was 56 years old, had less than 30 years of creditable service and under the Railroad Retirement Act was entitled to receive an unreduced Railroad Retirement Annuity beginning at age 66 in the amount of approximately \$2,200 per month. Under the July 2001 VERP, he would have received bridging monthly Railroad Retirement Supplement paying that same amount (approximately \$2,200) per month for 10 years (between ages 56 and 66), until he received his unreduced Railroad Retirement Annuity. Plaintiff Hall was also entitled, under the VERP, to have five years added to his age for purposes of computing his Amtrak pension benefit under the Pension Plan. So, intending to elect the VERP and retire, Plaintiff Hall put his house on the market, sold his late mother's house and purchased a retirement home in Southern Virginia and made preparations to move away from the Washington, D.C. area. However, when the original VERP was amended, Plaintiff Hall realized he had to revise all of his plans (at considerable cost and inconvenience to himself and his family) and keep working at least another year, until the Fall of 2002, when he would have 30 years of service after which, at age 60 (December 2004), he would be entitled to

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<sup>10</sup> To the extent that the release that Plaintiff Staton signed (discussed more fully below) is an otherwise enforceable release in favor of Amtrak that covers any or all of the claims asserted here, Plaintiff Staton seeks to advance claims on behalf of herself and those similarly situated only against the non-Amtrak Defendants.



his unreduced Railroad Retirement Annuity. Not counting the considerable damages he incurred (not directly at issue in this case) as a result of Amtrak's reneging on its promises, the cutback of the VERP cost Plaintiff Hall, who retired on August 30, 2002, more than three years of Railroad Retirement Annuity bridging payments (from the Fall 2001 to December 2004), worth approximately \$80,000 plus interest. The cutback of the VERP also cost him five years of service credit which would have substantially increased the value of his Amtrak pension benefits. Plaintiff Hall has been, since the Fall of 2002, drawing \$1,404 per month for life under the Pension Plan. But had he been allowed to elect the VERP and received five years added to his service credit, Plaintiff Hall would have received an additional \$420 per month for life, or a total of \$1,824 per month for life. Thus, on top of the loss of the approximately \$80,000 plus interest in Railroad Retirement payments, Plaintiff Hall is losing an additional \$5,000 a year plus interest, and will continue to do so every year for the rest of his life if he is not allowed to elect the original VERP.

78. Plaintiff Hall, on behalf of himself and others similarly situated, seeks, *inter alia*, a declaration that the September 14, 2001 Amendment is void, an order compelling Amtrak to amend the Plan to allow himself and all other eligible participants who did not elect the amended September 2001 VERP the opportunity to elect it now by a date certain (to be set by the Court in consultation with the parties), and an order compelling the Retirement Plan Committee to administer the Plan in accordance with the statute and calculate his benefits and the benefits of all those similarly situated in accordance with the terms of the July 2001 VERP, with interest.

79. Plaintiff Staton is another employee who, like Plaintiff Hall, planned to elect the original VERP but, when the Railroad Retirement Supplement was eliminated, found she could

not afford to do so. In the Fall of 2001, Plaintiff Staton was 56 years old and had 28 years of creditable service. Under the Railroad Retirement Act, she was and is entitled to receive an unreduced Railroad Retirement Annuity beginning at age 66 in the amount of approximately \$2,700 per month. Under the July 2001 VERP, she would have received bridging monthly Railroad Retirement Supplement payment in that same amount -- \$2,700 per month -- for almost 10 years (between ages 56 and 66), until she received her unreduced Railroad Retirement Annuity from the Railroad Retirement Board. The cutback of the Railroad Retirement Supplement thus cost Plaintiff Staton approximately \$320,000, plus interest. The cutback of the VERP also cost her five years of service credit which would have substantially increased the value of her Amtrak pension benefits. Plaintiff Staton has been, since Spring 2002, drawing approximately \$900 per month for life under the Pension Plan. But had she been allowed to elect the original VERP and received five years added to her service credit, Plaintiff Staton would have received an additional approximately \$300 per month for life, or a total of \$1,200 per month for life. Thus, on top of the loss of the approximately \$320,000 plus interest in Railroad Retirement payments, Plaintiff Staton is losing an additional \$3,600 a year plus interest, and will continue to do so every year for the rest of her life if she is not allowed to elect the original VERP.

80. When the original VERP was reduced and the Railroad Retirement Supplement eliminated by the September 14, 2001 Amendment, Plaintiff Staton had to revise her retirement plans and keep working at least another two years to attain 30 years of railroad service after which she would be entitled to her unreduced Railroad Retirement Annuity at age 60, rather than age 66. However, on February 1, 2002, before she could attain 30 years of railroad service,

Amtrak informed Plaintiff Staton that it was terminating her because her position was being abolished due to the restructuring. Plaintiff Staton was required to sign a release similar to that attached to the original Complaint as Exhibit 14 in order to receive a very modest, additional lump-sum payment. Amtrak and the other Defendants, however, did not disclose to Plaintiff Staton that the September 14, 2001 Amendment violated or possibly violated ERISA's "anti-cutback" rule and hence Amtrak's and the other Defendants' communications to her and all others similarly situated were false and misleading, rendering the release void and/or not knowing or voluntary as a matter of law. Moreover, to the extent that the release purports to relinquish claims to the original VERP's benefits, it lacked consideration and is of no force and effect. Additionally, even if supported by valid consideration, the release does not purport to release or discharge any person or entity other than "Amtrak, members of its Board of Directors, officers and agents and employees," meaning that it does not bar participants who signed it or a similarly worded release from asserting claims to redress its violations of ERISA or the terms of the Plan, and to enforce ERISA or the terms of the Plan, including but not limited to asserting claims for injunctive relief and breach of fiduciary duty against the Committee for violating ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) by administering the Plan in accordance with the alleged September 14, 2001 Amendment which was and is not "consistent with the provisions of [Title I of ERISA]" because it violates ERISA's anti-cutback rule, and seeking injunctive relief to compel the Committee to follow ERISA and the terms of any future amendment ordered by this Court that provides eligible participants with a new date by which they may elect the original VERP and to honor those elections and calculate participants' benefits, with interest, accordingly.

**COUNTS ONE THROUGH THREE**

**COUNT ONE- BROUGHT BY PLAINTIFFS AND THE CUTBACK CLASS**

**(VIOLATION OF ERISA § 404(a), 29 U.S.C. § 1104(a) – BREACH OF FIDUCIARY  
DUTY – FAILURE TO FOLLOW THE TERMS OF THE PLAN -- ALL DEFENDANTS)**

81. Plaintiffs, on behalf of themselves and the Cutback Class, repeat and re-allege the allegations contained in all paragraphs of this Complaint.

82. On July 26, 2001, the Amtrak Board of Directors amended the Plan to provide for a VERP that included a monthly Railroad Retirement Supplement equal to the participant's full Railroad Retirement Annuity and payable until such time as the participant began receiving that Annuity from the Railroad Retirement Board.

83. On September 14, 2001 Amtrak management purported to have the Company's Board of Directors enact an amendment to the Pension Plan purporting to eliminate the monthly Railroad Retirement Supplement as originally adopted in the July 26, 2001 VERP, replace it with a less valuable \$15,000 lump sum payment. However, neither on September 14, 2001 or anytime before or after did the Amtrak Board amend the Pension Plan and modify the original terms of the July 26, 2001 VERP. Nevertheless, in violation of ERISA § 404(a), 29 U.S.C. § 1104(a) (including but not limited to ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D)), since that time, Defendants have been administering the Pension Plan as if the Board had amended the Pension Plan as envisioned by management and have thus interfered with and continue to interfere with the ability of Plaintiffs and the Cutback Class to receive the benefits to which they were and are entitled under the terms of the Pension Plan. Defendants have further violated their

fiduciary duties by misrepresenting to participants that the terms of the original VERP were altered and the Railroad Retirement Supplement eliminated.

84. Defendants should be compelled to amend or reform the Plan to provide that the original, July 2001 VERP may now be elected by eligible participants by a date certain, to be established by the Court after consultation with the parties, and the Retirement Plan Committee and its Members should be compelled to issue all appropriate notices to all affected participants regarding the same. The Retirement Plan Committee and its Members should also be compelled to administer the Plan in accordance with ERISA and the terms of the July 2001 VERP and the terms of any new amendment providing a date by which participants may elect the original VERP. The Retirement Plan Committee and its Members should also be compelled to process election forms and calculate benefits of all participants, regardless of whether they signed a release or not, and should also be compelled to calculate all past due benefits with interest.

**COUNT TWO-**

**BROUGHT BY PLAINTIFFS AND THE CUTBACK CLASS**

**(VIOLATION OF ERISA § 204(g), 29 U.S.C. § 1054(g) – ANTI-CUTBACK RULE –**

**AND BREACH OF FIDUCIARY DUTY FOR**

**ADMINISTERING THE PLAN IN VIOLATION OF ERISA --**

**ALL DEFENDANTS)**

85. Plaintiffs, on behalf of themselves and the Cutback Class, repeat and re-allege the allegations contained in all foregoing paragraphs herein.

86. On July 26, 2001, the Amtrak Board of Directors amended the Plan to provide for a VERP that included a monthly Railroad Retirement Supplement equal to the participant's full

Railroad Retirement Annuity and payable until such time as the participant began receiving that Annuity from the Railroad Retirement Board.

87. Assuming it was otherwise valid, the September 14, 2001 amendment to the Plan purporting to eliminate the monthly Railroad Retirement Supplement as originally adopted in the July 26, 2001 VERP and replace it with a less valuable \$15,000 lump sum payment violated ERISA § 204(g), 29 U.S.C. § 1054(g) because it was “a plan amendment which ha[d] the effect of (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy . . . with respect to benefits attributable to service before the amendment.” As such, Defendants were forbidden by their strict fiduciary duties from administering the Pension Plan in accordance with its terms. *See* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

88. The alleged September 14, 2001 amendment also required employees (such as Plaintiff McCoy-Kemp) who elected to participate in the amended VERP to sign a release before they could receive benefits under the reduced VERP. To the extent that the release purports to release Amtrak and the other listed parties from claims that the alleged September 14, 2001 amendment was an illegal cutback and to relinquish participants’ right to recover the protected Supplement, it is itself an illegal cutback which “ha[d] the effect of (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy. . . with respect to benefits attributable to service before the amendment.” Moreover, the release is void because Amtrak and the other Defendants did not disclose to participants that the alleged September 14, 2001 amendment violated or possibly violated ERISA’s “anti-cutback” rule and hence Amtrak’s and the other Defendants’ communications to participants were false and misleading, rendering the release void and/or not knowing or voluntary as a matter of law. The release is also void to the extent it

purports to relinquish participants' rights to the Railroad Retirement Supplement because it lacked consideration. Additionally, the release does not waive participants' right to bring suit against non-Amtrak Defendants (such as the Retirement Plan Committee and its Members) to obtain equitable relief to redress violations of ERISA or the terms of the Plan and to enforce ERISA or the terms of the Plan.

89. Amtrak also required other participants who did not elect the reduced VERP (such as Plaintiff Staton) to sign similar releases in order to obtain severance benefits considerably less than those to which the participants already had a legal right under the original VERP. Those releases are void because Amtrak and the other Defendants did not disclose to participants that the alleged September 14, 2001 amendment violated or possibly violated ERISA's "anti-cutback" rule. Those releases are also void in relevant part because they lacked consideration. Additionally, those releases do not waive participants' right to bring suit against non-Amtrak Defendants (such as the Retirement Plan Committee and its Members) to obtain equitable relief to redress violations of ERISA or the terms of the Plan and to enforce ERISA or the terms of the Pension Plan.

90. The September 14, 2001 amendment should be declared void as violative of the anti-cutback rule. The release solicited pursuant to its terms (such as that signed by Plaintiff McCoy-Kemp) should also be declared void as violative of the anti-cutback rule. The release should alternatively should be declared void because Amtrak and the other Defendants did not disclose to participants that the September 14, 2001 Amendment violated or possibly violated ERISA's "anti-cutback" rule and because it lacked consideration to the extent it purports to relinquish participants' rights to the Railroad Retirement Supplement. The release additionally

should be declared to have no effect on participants' right to bring suit against non-Amtrak Defendants to obtain equitable relief to redress violations of ERISA or the terms of the Plan and to enforce ERISA or the terms of the Plan. The other releases (such as that signed by Plaintiff Staton) should also be declared void because Amtrak and the other Defendants did not disclose to participants that the alleged September 14, 2001 amendment violated or possibly violated ERISA's "anti-cutback" rule and because the releases lacked consideration to the extent the releases purport to relinquish participants' rights to the Railroad Retirement Supplement. Those releases additionally should be declared to have no effect on participants' right to bring suit against non-Amtrak Defendants to obtain equitable relief to redress violations of ERISA or the terms of the Pension Plan and to enforce ERISA or the terms of the Pension Plan.

91. Amtrak should be compelled to amend or reform the Plan to provide that the original, July 2001 VERP may now be elected by eligible participants by a date certain, to be established by the Court after consultation with the parties, and the Committee and its Members should be compelled to issue all appropriate notices to all affected participants regarding the same. The Committee and its Members should also be compelled to administer the Plan in accordance with ERISA and the terms of the July 2001 VERP and the terms of any new amendment providing a date by which participants may elect the original VERP. The Committee and its Members should also be compelled to process election forms and calculate benefits of all participants, regardless of whether they signed a release or not. The Committee and its Members should also be compelled to calculate all past due benefits with interest.



**COUNT THREE**  
**BROUGHT BY PLAINTIFFS, ON BEHALF OF THE PLANS**  
**AND THE § 502(a)(2) CLASS**  
**(BREACH OF FIDUCIARY DUTY, CO-FIDUCIARY BREACH AND KNOWING**  
**PARTICIPATION IN FIDUCIARY BREACHES -**  
**ALL DEFENDANTS)**

92. Plaintiffs repeat, on behalf of themselves, the § 502(a)(2) Class and the Plans, and re-alleges the allegations contained in all paragraphs herein.

93. By failing to appoint, monitor, make appropriate disclosure to, and/or remove Plan Committee Members, or those acting in their place with or without authority to do so, as set forth above, Amtrak's current and former Presidents breached their strict ERISA fiduciary and co-fiduciary duties in violation of ERISA § 404(a), 29 U.S.C. § 1104(a) and ERISA § 405(a), 29 U.S.C. § 1105(a).

94. By knowingly participating in the foregoing breaches and co-fiduciary breaches Defendant Amtrak is also liable to Plaintiffs, the Plan and the § 502(a)(2) Class pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) because it knew of its Presidents' breaches and nevertheless furthered and/or enabled those breaches.

95. By virtue of these violations of ERISA described in the preceding paragraphs, Plaintiffs are entitled to relief on behalf of the Plans against all fiduciary Defendants (and such other *de facto* fiduciaries as may later be identified) under ERISA § 409, 29 U.S.C. § 1109, including relief to deter such breaches in the future, relief to make the Plans whole for all losses resulting from these breaches, and such other equitable or remedial relief as the Court may deem

appropriate. In addition, Plaintiffs are entitled to relief from or against Amtrak under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), regardless of its status as a fiduciary.

### **CLASS ACTION ALLEGATIONS**

#### **A. The Cutback Class.**

96. Plaintiffs bring suit under Counts One and Two of this Complaint on behalf of themselves and on behalf of the “Cutback Class,” *i.e.*, all other participants and beneficiaries similarly situated under the provisions of Rule 23 of the Federal Rules of Civil Procedure with respect to the anti-cutback violations alleged herein. The proposed Cutback Class is defined as: All persons who are or were participants in or beneficiaries of the Retirement Income Plan for Employees of National Railroad Passenger Corporation (the “Plan”) who were eligible to receive benefits under the Voluntary Early Retirement Plan (“VERP”) as adopted by the Board of Directors of the National Railroad Passenger Corporation (“Amtrak” or the “Company”) on July 26, 2001 but were not allowed to accept the July 26, 2001 VERP due to a September 14, 2001 Plan Amendment and the adherence of the Retirement Plan Committee (the “Committee”) to that September 14, 2001 Amendment. There are three subclasses: (1) Class members who elected to participate in the amended, reduced September 14, 2001 VERP and signed a release in favor of Amtrak but not the Committee; (2) Class members who did not participate in the amended, reduced VERP and have not signed a release in favor of Amtrak or the Committee; and (3) Class members who did not participate in the amended, reduced VERP and signed a release in favor of Amtrak but not the Committee.

97. The requirements for maintaining this action as a class action under Fed. R. Civ. P. 23(a) are satisfied in that there are too many Cutback Class members for joinder of all of them

to be practicable. There are approximately 375 members of the proposed Class dispersed among many states.

98. The claims of the Cutback Class members raise numerous common questions of fact and law, thereby satisfying the requirements of Fed. R. Civ. P. 23(a)(2). Every issue concerning liability is common to all Cutback Class members, because all such issues concern their entitlement to receive benefits under the terms of the originally-adopted VERP, rather than any action taken by the Plaintiffs or any Cutback Class member. Virtually every issue concerning relief is common to the Cutback Class for the same reason. The Complaint raises several common questions including:

A. Whether the July 26, 2001 Amendment was indeed an amendment to the Amtrak Pension Plan?

B. Whether the Railroad Retirement Supplement was and is a retirement-type subsidy or early retirement benefit subject to the protections of ERISA § 204(g), 29 U.S.C. § 1054(g)?

C. Whether the alleged September 14, 2001 amendment was validly adopted and if so whether it (and the releases obtained from members of subclass #1 pursuant to the Amendment) constitute an illegal ERISA § 204(g), 29 U.S.C. § 1054(g) cutback?

D. Whether the releases are void because Defendants did not disclose to participants that the September 14, 2001 Amendment violated or possibly violated ERISA's "anti-cutback" rule and hence Amtrak's and the other Defendants' communications to participants were false and misleading, rendering the release is void and/or not knowing or voluntary as a matter of law.

Additionally, as to many Cutback Class members, there is the additional common question of whether the releases that subclass ##1 and 3 members signed are void to the extent they can be read as waiving participants' rights to the Railroad Retirement Supplement because they lacked consideration or alternatively whether the releases should be declared to have no effect on those participants' right to bring suit against the Committee to obtain equitable relief to redress violations of ERISA or the terms of the Plan and to enforce ERISA or the terms of the Plan.

99. Plaintiffs' claims are typical of the claims of Cutback Class members, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(3). They do not assert any claims relating to the Plan in addition to or different than those of the Cutback Class.

100. Plaintiffs are adequate representatives of the Cutback Class, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(4). The interests of Plaintiffs are identical to those of the Class. Defendants have no unique defenses against them that would interfere with their representation of the Cutback Class. Plaintiffs have engaged counsel with considerable ERISA class action litigation experience.

101. Additionally, all of the requirements of Fed. R. Civ. P. 23(b)(1) are satisfied in that the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for Defendants and individual adjudications present a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

102. Alternatively, all of the requirements of Fed. R. Civ. P. 23(b)(2) also are satisfied in that Defendants' actions affected all Class members in the same manner making appropriate final declaratory and injunctive relief with respect to the Class as a whole. If necessary, Class

certification also would be appropriate under Fed. R. Civ. P. 23(b)(3) in that a class action is superior to other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. The expense and burden of individual litigation makes it impractical for the members of the Class to pursue individual litigation to vindicate their rights. Plaintiffs are not aware of any problems that would militate against the maintenance of this action as a class action.

**B. The § 502(a)(2) Class.**

103. Plaintiffs also bring suit under Count Three of this Complaint on behalf of themselves, the Plan and on behalf of the “§502(a)(2) Class,” which is defined as:

All persons who are or were participants in or beneficiaries of the Retirement Income Plan for Employees of National Railroad Passenger Corporation (the “Pension Plan”) and/or the National Railroad Passenger Corporation Savings Plan (the “401(k) Plan”) during the period of time there was no validly appointed Retirement Plan Committee in the case of the Pension Plan or Savings Plan Committee in the case of the 401(k) Plan or validly appointed Plan Administrator for either Plan.

104. The requirements for maintaining this action as a class action under Fed. R. Civ. P. 23(a) are satisfied in that there are too many § 502(a)(2) Class members for joinder of all of them to be practicable. There are thousands of proposed § 502(a)(2) Class dispersed among many states.

105. The claims of the § 502(a)(2) Class members raise numerous common questions of fact and law, thereby satisfying the requirements of Fed. R. Civ. P. 23(a)(2). Every issue concerning liability is common to all § 502(a)(2) Class members, because all such issues concern

the Presidents' breach of their fiduciary duties to appoint and ratify the appointment of Plan Committees, monitor the Committees or those acting in their place, remove those Committee Members not performing their duties and/or supply the Committee Members and other fiduciaries with the information they need to discharge those duties, rather than any action taken by the Plaintiffs or any § 502(a)(2) Class member. Virtually every issue concerning relief is common to the § 502(a)(2) Class for the same reason. The Complaint raises several common questions including whether the Presidents failed to appoint a Committee in accordance with the terms of the Plans.

106. Plaintiffs' claims are typical of the claims of § 502(a)(2) Class members, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(3). They do not assert any claims relating to the Plan in addition to or different than those of the § 502(a)(2) Class.

107. Plaintiffs are adequate representatives of the § 502(a)(2) Class, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(4). The interests of Plaintiffs are identical to those of the Class. Defendants have no unique defenses against them that would interfere with their representation of the § 502(a)(2) Class. Plaintiffs have engaged counsel with considerable ERISA class action litigation experience.

108. Additionally, all of the requirements of Fed. R. Civ. P. 23(b)(1) are satisfied in that the prosecution of separate actions by individual members of the § 502(a)(2) Class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for Defendants and individual adjudications present a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

109. Alternatively, all of the requirements of Fed. R. Civ. P. 23(b)(2) also are satisfied in that Defendants' actions affected all § 502(a)(2) Class members in the same manner making appropriate final declaratory and injunctive relief with respect to the § 502(a)(2) Class as a whole. If necessary, § 502(a)(2) Class certification also would be appropriate under Fed. R. Civ. P. 23(b)(3) in that a class action is superior to other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. The expense and burden of individual litigation makes it impractical for the members of the § 502(a)(2) Class to pursue individual litigation to vindicate their rights. Plaintiffs are not aware of any problems that would militate against the maintenance of this action as a class action.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray that judgment be entered against Defendants and that the Court award the following relief including but not limited to:

- A. A certification that this action is a class action pursuant to Fed. R. Civ. P. 23;
- B. A declaration that Defendants breached their fiduciary duties to both Plans' participants and beneficiaries, breached their co-fiduciary duties, and knowingly participated in these fiduciary and co-fiduciary breaches committed by others, by failing to appoint, monitor, appropriately communicate with and/or remove Members of a Retirement Plan Committee or those acting in their place and/or a Savings Plan Committee as required by ERISA and the express terms of the Plans, and for knowingly participating in these breaches and co-fiduciary breaches;

C. A further declaration that the current Members of the Savings Plan Committee are themselves in breach of their fiduciary duty with respect to the selection of investment alternatives and investment of participants' individual accounts and Plan assets;

D. Relief on behalf of the Plan provided in ERISA § 409, 29 U.S.C. § 1109, including recovery for the Plan of all losses resulting from these breaches and co-fiduciary breaches and such other equitable or remedial relief as the Court may deem appropriate, and relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3);

E. A declaration that (i) the Amtrak Board amended the Amtrak Pension Plan on July 26, 2001 to provide for a VERP which contained a Railroad Retirement Supplement equivalent to the full, unreduced annuity participants would receive from the Railroad Retirement Board, (ii) that the Board did not thereafter, in accordance with governing law or standards, modify the VERP as originally enacted to eliminate the Railroad Retirement Supplement management sought to have eliminated, and (iii) that by not permitting eligible participants to elect the original VERP, Defendants have violated and are continuing to violate ERISA § 404(a), 29 U.S.C. § 1104(a) by, among other things, failing to administer the Plan in accordance with its terms.

F. A further declaration that (i) the Railroad Retirement Supplement was a retirement-type subsidy or early retirement benefit subject to the protections of ERISA § 204(g), 29 U.S.C. § 1054(g) and (ii) if the Board did enact management's September 14, 2001 proposal as part of the Pension Plan, that that September 14, 2001 amendment constituted an illegal cutback under ERISA § 204(g), 29 U.S.C. § 1054(g) insofar as it (a) purported to eliminate the originally-adopted VERP's monthly Railroad Retirement Supplement and replace it with a less



generous \$15,000 lump sum payment and (b) purported to require that participants release Amtrak and others from liability for cutting back participants' protected benefits under the July 26, 2001 VERP;

G. A further declaration that Amtrak and other Defendants breached their fiduciary duties by failing to provide participants with full and accurate information concerning the VERP and the September 14, 2001 Amendment;

H. A further declaration that the releases signed by some Cutback Class members are void because Amtrak and the other Defendants did not disclose to participants that the September 14, 2001 Amendment violated or possibly violated ERISA's "anti-cutback" rule and/or because they lacked consideration to the extent they can be read as waiving participants' rights to the Railroad Retirement Supplement;

I. A further declaration that the releases signed by some Class members do not affect participants' right to bring suit against the non-Amtrak Defendants to obtain equitable relief to redress violations of ERISA or the terms of the Plan and to enforce ERISA or the terms of the Plan;

J. A further declaration that Defendants have violated and are continuing to violate ERISA § 404(a), 29 U.S.C. § 1104(a) by, among other things, administering the Plan in accordance with a Plan amendment, namely the alleged September 14, 2001 Amendment, which if otherwise valid was and is not "consistent with the provisions of [Title I of ERISA]" and in fact violates ERISA, specifically, ERISA § 204(g), 29 U.S.C. § 1054(g).

K. An order compelling Amtrak to amend the Plan to provide that the original, July 2001 may now be elected by eligible participants by a date certain, to be established by the Court

after consultation with the parties, and compelling the Committee to issue all appropriate notices to all affected participants regarding the same;

L. A further order compelling the Committee to administer the Plan in accordance with ERISA and the terms of the July 2001 VERP and the terms of any new amendment providing a date by which participants may elect the original VERP;

M. A further order compelling the Committee to process election forms and calculate benefits of all participants, regardless of whether they signed a release or not;

N. A further order compelling the Committee to calculate all past due benefits with interest;

O. A further order awarding Plaintiffs the costs of this action pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), and allow Plaintiffs a reasonable attorney's fee on the basis of the common fund doctrine, along with the reimbursement of the expenses incurred in connection with this action, and/or reasonable attorney's fees pursuant to § 502(g)(1), 29 U.S.C. § 1132(g)(1) at Plaintiffs' election; and

P. An order awarding, declaring or otherwise providing Plaintiffs all relief that Plaintiffs may subsequently specify and/or that the Court may deem appropriate.

**JURY DEMAND**

Pursuant to the Seventh Amendment to the United States Constitution, and Fed. R. Civ. P. 38 and 39, Plaintiffs request and/or demand trial by jury with respect to all issues triable and/or triable as of right by jury.

By:

\_\_\_\_\_/S/ Eli Gottesdiener\_\_\_\_\_  
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Dated: December 1, 2004