United States General Accounting Office

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Report to the Ranking Democratic Member, Committee on Transportation and Infrastructure, House of Representatives

January 2004

COMMUTER RAIL

Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations

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GAO-04-240

January 2004

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Highlights

Highlights of GAO-04-240, a report to the Ranking Democratic Member, Committee on Transportation and Infrastructure, House of Representatives

COMMUTER RAIL

Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations

Why GAO Did This Study

Commuter and freight rail services have the potential to play increasingly important roles in the nation's economy and transportation system as demand for these services increases. Because the cost of building new infrastructure can be cost-prohibitive, commuter rail agencies typically seek to use existing infrastructure—which is primarily owned by private freight railroads. Consequently, commuter rail agencies must negotiate to purchase, lease, or pay to access the existing infrastructure from freight railroads. GAO was asked to examine (1) the challenges commuter rail agencies and freight railroads face when negotiating and sharing rights-of-way, (2) the actions that help facilitate mutually beneficial arrangements between commuter rail agencies and freight railroads, and (3) the role the federal government plays in negotiations between commuter rail agencies and freight railroads.

What GAO Recommends

GAO recommends that the Department of Transportation (DOT) and STB determine whether it would be appropriate for them to provide guidance and information, such as best practices and information on the applicability of the federal liability cap, to commuter rail agencies and freight railroads. DOT and STB generally agreed with the report's findings, conclusions, and recommendation.

www.gao.gov/cgi-bin/getrpt?GAO-04-240.

To view the full product, including the scope and methodology, click on the link above. For more information, contact JayEtta Z. Hecker at (202) 512-2834 or heckerj@gao.gov.

What GAO Found

Freight railroads and commuter rail agencies face a number of challenges when negotiating agreements and sharing access to the same rights-of-way, including reaching agreement on compensation, capacity, and liability issues. For instance, in negotiating the agreements, freight railroads typically require that the commuter rail agency contractually indemnify them from any liability in the event of a commuter rail accident and procure a certain level of insurance coverage. Officials from freight railroads said they seek these provisions to protect their shareholders from the potential costs associated with commuter rail accidents. However, accepting these liability terms—notably the expense of maintaining a high level of insurance—can be problematic for the commuter rail agencies. In 1997, Congress limited the aggregate damages that may be awarded to all passengers from claims from a particular rail accident to $200 million and permitted providers of rail transportation to enter into indemnification agreements. However, we found some confusion within the commuter and freight rail community as to whether the liability cap applied to commuter rail agencies, which could result in problems during negotiations. After reviewing the legislation, we have concluded that the liability cap applies to commuter rail operations.

Although there is no exact formula for success, officials from commuter rail agencies and freight railroads identified actions that can help facilitate mutually beneficial arrangements—understanding each other's position, identifying and using incentives to leverage cooperation, securing adequate and flexible funding, and establishing good lines of communication. Although commuter rail agencies and freight railroads agreed on actions that could help facilitate win/win arrangements, they disagreed on the appropriate role for the federal government in negotiating access or resolving disputes between commuter rail agencies and freight railroads.

The Federal Transit Administration (FTA), Federal Railroad Administration, and Surface Transportation Board (STB) have responsibility for different aspects of rail transportation. For example, FTA helps fund the planning and development of eligible commuter rail projects. However, none of the three agencies play a role in commuter rail access negotiations. Therefore, they have not provided any guidance or information to commuter rail agencies or freight railroads to facilitate and inform negotiations.

Source: Sound Transit in Seattle, Washington.

To accommodate commuter trains on certain rail lines, capacity enhancements may be required. However, physical constraints, such as the steep terrain and Puget Sound that frame portions of Burlington Northern Santa Fe Railway Company's right-of-way in the state of Washington may make it difficult to add capacity enhancements in some cases.

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Abbreviations

ARAA	Amtrak Reform and Accountability Act of 1997
AAR	Association of American Railroads
APTA	American Public Transportation Association
BNSF	Burlington Northern Santa Fe Railway Company
CSX	CSX Transportation
DOT	Department of Transportation
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
ICC	Interstate Commerce Commission
STB	Surface Transportation Board
UTA	Utah Transit Authority

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United States General Accounting Office
Washington, DC 20548

January 9, 2004

The Honorable James L. Oberstar
Ranking Democratic Member
Committee on Transportation
and Infrastructure
House of Representatives

Dear Mr. Oberstar:

As highways become increasingly congested, communities are looking to different forms of public transit for relief. An increasingly popular choice is commuter rail—passenger trains operating on railroad tracks to provide regional rail service. For instance, 18 transit agencies currently provide commuter rail service[1] in the United States, and an additional 19 commuter rail projects are in various stages of planning or development in communities across the nation. An attractive feature of this type of transit service for communities is that commuter rail can operate on existing railroad rights-of-way, eliminating the need to build a new rail corridor, which could be cost prohibitive. However, the majority of existing rail rights-of-way in the United States are owned by private freight railroads. Consequently, commuter rail agencies—which have no statutory rights of access to freight railroads' tracks—must often negotiate with the freight railroads to purchase, lease, or pay to access their rights-of-way.

As demand for commuter rail services is increasing in communities across the country, the demand for freight transportation services is also growing. For example, the Department of Transportation (DOT) estimates that freight rail tonnage will increase by about 50 percent from 1998 to 2020.[2] The rail network, like other modes of transportation, has capacity limitations—that is, only a certain amount of rail traffic can be efficiently and safely accommodated by existing infrastructure. When commuter rail trains use freight-owned rights-of-way, the amount of capacity, or the number of train "slots," available for freight trains may be reduced. Thus, freight railroads must balance requests by commuter rail agencies to

[1]For purposes of this report, we refer to transit agencies that provide commuter rail service as "commuter rail agencies."

[2]Department of Transportation, *Freight Analysis Framework* (October 2002).

purchase or use their tracks against their ability to serve their current freight customers as well as their efforts to grow their freight business in the future.

As you requested, this report discusses (1) the challenges freight railroads and commuter rail agencies face when negotiating agreements and sharing access to the same rights-of-way, (2) the actions that help facilitate mutually beneficial arrangements between freight railroads and commuter rail agencies, and (3) the role the federal government plays in access negotiations between freight railroads and commuter rail agencies. To address these objectives, we visited 8 commuter rail agencies and 4 Class I freight railroads[3] across the nation. During these site visits, we interviewed senior level management; toured operation, dispatching, and maintenance facilities; and/or traveled on the commuter rail system. We conducted structured interviews with officials from the other 29 commuter rail agencies—both existing and proposed—and the remaining 3 Class I freight railroads. We also interviewed officials at the Federal Transit Administration (FTA), Federal Railroad Administration (FRA), Surface Transportation Board (STB), and the National Railroad Passenger Corporation (Amtrak) as well as representatives from a variety of industry associations. Additionally, we reviewed federal laws and regulations; court cases and research related to the rail industry; and internal documents of federal agencies, commuter rail agencies, and freight railroads. We conducted our work from June through November 2003 in accordance with generally accepted government auditing standards. (See app. I for a more detailed discussion of the report's scope and methodology.)

Results in Brief

Freight railroads and commuter rail agencies face a number of challenges when negotiating and sharing access to the same rights-of-way. However, reaching agreement on compensation, capacity, and liability issues present the most problems when negotiating agreements, according to both commuter rail and freight railroad officials. For example, freight railroads generally do not want to allow commuter rail service on their rights-of-way unless they are protected from the potential liability associated with passenger rail accidents. As a result, freight railroads typically require that the commuter rail agency contractually indemnify them from any liability

[3]Class I railroads are the largest railroads, as defined by operating revenue, and account for the majority of U.S. rail freight activity. There are three classes of railroad. STB designates the class of railroad and in 2002 defined Class I railroads as railroads with operating revenues of $271.9 million or more.

in the event of a passenger accident and procure a certain level of insurance coverage to guarantee their ability to pay the entire allocation of damages. Accepting these liability terms can be problematic for the commuter rail agencies; therefore, negotiations could stall or fail. Recognizing the freight railroad's potential exposure to liability when hosting passenger trains on their rights-of-way, Congress enacted the Amtrak Reform and Accountability Act of 1997 (ARAA), which limited the aggregate overall damages that may be awarded to all passengers for all claims from a particular rail accident to $200 million and permitted providers of rail transportation to enter into indemnification agreements allocating financial responsibility for passenger accidents. However, in discussions with officials from commuter rail agencies and freight railroads, we found some confusion as to whether the liability cap established in the ARAA applied to commuter rail agencies. After reviewing the legislation, we have concluded that the liability cap applies to commuter rail operations based upon the plain language of the statute and our review of the pertinent legislative history. Given the growing demand for commuter and freight rail services and financial pressures on the rail industry, reaching agreement will likely become even more difficult in the future. In addition to negotiation challenges, there are day-to-day or operational challenges that the commuter rail agency and freight railroad have to work through when sharing the same rights-of-way. Officials from commuter rail agencies and freight railroads identified a number of challenges in sharing the same rights-of-way; however, the most commonly cited problems were associated with the dispatching of trains (i.e., controlling the movement of trains) and maintaining the rights-of-way.

There is not a defined formula for developing mutually beneficial arrangements between commuter rail agencies and freight railroads. A "cookie cutter" approach is not possible because every situation is unique—from the parties involved to the needs and expectations for the commuter rail system—requiring the agreements to be tailored to the circumstances of the situation. The characteristics of the rights-of-way, such as freight traffic density and the physical constraints of each rail line, also vary from location to location, creating unique negotiating environments. For example, the freight railroads would likely be more willing to allow commuter rail trains on a lightly used branch line (or secondary line) than a main line that is critical to their freight network. Although there is not a formula for negotiating and cultivating successful arrangements, officials from commuter rail agencies and freight railroads identified conditions or actions that can help facilitate mutually beneficial arrangements between commuter rail agencies and freight railroads. The

most frequently identified actions include understanding each other's position, identifying and using incentives to leverage cooperation, securing adequate and flexible funding to help improve capacity and infrastructure, and establishing good communication between both parties.

The federal government currently does not play a role in access negotiations between commuter and freight railroads. Three federal agencies, FTA, FRA, and STB, have responsibility for different aspects of rail transportation. Specifically, FRA is primarily focused on ensuring safe operation of railroads; FTA's primary role is providing funding to transit projects, including commuter rail; and STB is responsible for the economic regulation of railroads. For example, FTA helps fund the planning and development of eligible commuter rail projects—currently funding up to 60 percent of the total capital costs of new projects through its New Starts program.[4] According to officials from FRA, FTA, and STB, these agencies do not have the authority or responsibility for commuter rail access issues; therefore, they do not currently act to facilitate negotiations or resolve impasses between commuter rail agencies and freight railroads regarding access to freight-owned rights-of-way. For instance, none of these agencies have issued guidance or information on commuter rail access issues, such as best practices for negotiations, to commuter rail agencies or freight railroads. Commuter rail agencies and freight railroads differ on the roles they would like to see the federal government play in negotiations between commuter rail agencies and freight railroads. In general, most commuter rail agencies would like the federal government to play a more active role, such as serving as a mediator; freight railroads do not want the federal government involved, except for assuring the adequacy of funding for commuter rail projects.

We recommend that the Secretary of Transportation and the Chairman of the Surface Transportation Board determine whether it would be appropriate and useful for them to provide guidance and information, such as tips for successful negotiations and information on best practices, availability of federal resources, and the applicability of the liability

[4]FTA's New Starts program provides funds to transit providers for constructing or extending certain types of mass transit systems, like commuter rail projects. Current law allows FTA to grant up to 80 percent of the estimated net project cost to individual transit projects. However, on the basis of direction from Congress in the conference report that accompanied DOT's fiscal year 2002 appropriations act, FTA instituted a preference policy to recommend projects with federal shares that do not exceed 60 percent for funding. The administration's proposed surface transportation reauthorization legislation seeks to reduce the statutory federal share to no more than 50 percent of the net project cost.

provisions in the Amtrak Reform and Accountability Act of 1997, to commuter rail agencies and freight railroads. This information and guidance would serve to facilitate and inform negotiations. If DOT and STB determine that it would be helpful for them to provide such information but that they lack the statutory authority to do so, DOT and STB should seek a legislative change to allow them to provide guidance and information to commuter rail agencies and freight railroads. We provided draft copies of this report to DOT and STB for their review and comment. DOT and STB officials generally agreed with the report's findings, conclusions, and recommendation. They also provided some technical comments on our draft, which we incorporated where appropriate.

Background

Commuter rail is a type of public transit that is characterized by passenger trains operating on railroad tracks and providing regional service (e.g., between a central city and adjacent suburbs).[5] Commuter rail systems are traditionally associated with older industrial cities, such as Boston, New York, Philadelphia, and Chicago. However, over the past decade, commuter rail systems have been inaugurated in such cities as Dallas and Seattle as communities sought to ease congestion on their roads. Today, there are 18 commuter rail agencies throughout the country. (See fig. 1.) In the first quarter of 2003, commuter rail systems provided an average of 1.2 million passenger trips each weekday. Advocates of commuter rail contend that it provides a number of public benefits, including reduced highway congestion, pollution, and energy dependence. Moreover, commuter rail service can operate on existing rights-of-way, which eliminates the time and significant expense associated with constructing new infrastructure. The potential benefits ascribed to commuter rail have stimulated interest in this type of public transit in many communities across the country; as a result, many communities are planning to provide commuter rail service. Specifically, as figure 1 shows, 19 commuter rail projects are currently in various stages of planning or development in communities across the nation. All of the proposed commuter rail agencies have purchased or plan to purchase, lease, or pay to access existing rights-of-way from freight railroads or other entities.

[5]For more information about commuter rail, see FRA's statement of policy concerning enforcement of railroad safety laws (49 CFR 209, Appendix A).

Figure 1: Map of Existing and Proposed Commuter Rail Systems

Source: GAO.

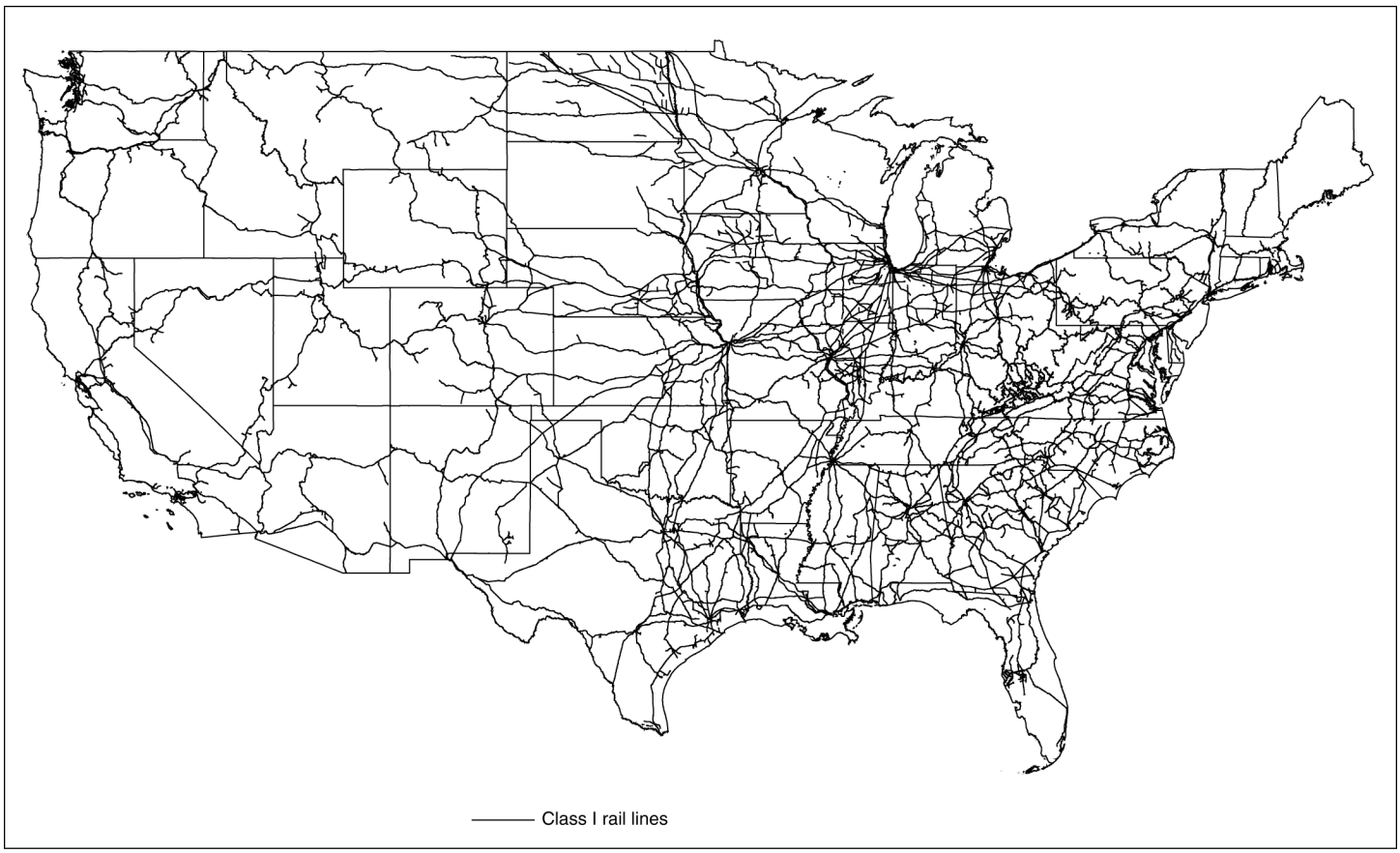
As demand for commuter rail services is increasing in communities across the country, the demand for freight transportation services is also growing. The nation's private railroads are important providers of freight transportation services. Currently, 7 Class I railroads—CSX Transportation (CSX), Burlington Northern Santa Fe Railway Company (Burlington Northern Santa Fe), Union Pacific Railroad Company (Union Pacific), Norfolk Southern, Kansas City Southern Railway Company,

Canadian National Railway, and Canadian Pacific Railway[6]—and over 500 short line and regional railroads[7] are operating in the United States. These railroads operate the nation's freight rail system as well as own the majority of rail infrastructure in the United States. (See fig. 2.) According to the Association of American Railroads (AAR), freight railroads carried about 42 percent of domestic intercity freight (measured by ton miles) in 2001. Railroads are the primary mode of transportation for many products, especially for such bulk commodities as coal and grain. In addition, railroads are carrying increasing levels of intermodal freight (e.g., containers and trailers), which travel on multiple modes and typically require faster delivery than bulk commodities. The demand for freight rail service is projected to increase in the future. For example, DOT estimated that freight rail tonnage will grow by almost 50 percent from 1998 to 2020. According to advocates for the freight rail system, transporting freight by rail offers a number of public benefits, including reducing congestion on the highways, lowering highway costs, increasing fuel efficiency, and supporting military mobilization.

[6]The entire Canadian National Railway and Canadian Pacific Railway systems are not Class I railroads. However, the U.S. portions of these railroads (e.g., Grand Trunk Corporation and Soo Line Railroad Company) meet the U.S. regulatory criteria and are Class I railroads.

[7]Short line and regional railroads are small and medium-sized railroads, respectively. Generally, short line railroads are Class III railroads, and regional railroads are Class II railroads. STB defined Class II railroads as railroads with operating revenues less than $271.9 million but more than $21.7 million and Class III railroads as railroads with operating revenues less than $21.7 million in 2002.

Figure 2: Map of Class I Rail Lines



Source: GAO.

Historically, America's rail corridors have been used for both freight and passenger purposes. At one time, both passenger and freight services were operated by the private railroads. The private railroads were required by federal law to maintain their passenger services. However, by the 1970s, American freight railroads were in serious financial decline. Congress responded by passing the Rail Passenger Service Act of 1970, which created Amtrak to provide intercity passenger rail service because existing railroads found such service unprofitable. In creating Amtrak, Congress relieved freight railroads of the requirement to provide passenger service. In return, Amtrak operates primarily over tracks owned by freight

railroads,[8] and federal law requires that freight railroads give Amtrak trains priority access and charge Amtrak an incremental cost—rather than the full cost—associated with the use of their tracks. Congress also passed the Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980, which reduced rail regulation and encouraged greater reliance on competition to set rates. Since these acts were passed, the railroad industry has become more stable, as railroads continue to consolidate to reduce costs, become more efficient, and improve their financial health.

Unlike Amtrak, commuter rail agencies do not possess statutory rights of access to freight railroads' tracks. If a commuter rail agency wants to use a freight railroad's existing infrastructure, it must negotiate with the freight railroad to purchase, lease, or pay to access the railroad's right-of-way. If the two parties reach agreement, there are often multiple documents detailing this agreement, including the purchase, lease, or access agreement and the shared use agreement.[9] The number and type of agreements vary by the parties involved and location. The contents of these agreements may also vary, but they are likely to address a number of important issues, including dispatching trains, maintenance of rights-of-way, liability, capital improvements, and access fees, among other things. Hence, the agreements will govern how the two parties will operate on the rights-of-way they share. The period of time covered by the agreements and amount of time required to negotiate the agreements also varies. For example, some commuter rail agencies and freight railroads reach agreement in a manner of months; negotiations of other commuter rail agencies and freight railroads can extend over a period of years.

As commuter rail agencies buy or lease rights-of-way from freight railroads, they create unique and complex relationships with the freight railroads. As table 1 shows, about half of the existing and proposed commuter rail agencies lease or plan to lease rights-of-way from freight railroads for their operations. An even greater number of these agencies own or plan to purchase at least a portion of the rights-of-way from freight railroads. (See tab. 1.) When the commuter rail owns rights-of-way, there

[8]Over 95 percent of Amtrak's 22,000-mile network operates on freight railroad tracks. Amtrak owns about 730 miles of track, primarily on the Northeast Corridor between Boston, Massachusetts, and Washington, D.C.

[9]The shared use agreement documents how the rights-of-way will be operated—for example, it will outline the agreed-upon dispatching rules.

is a role reversal between the freight railroad and the commuter rail agencies from the typical relationship—that is, if a freight railroad uses the commuter rail agency's rights-of-way, the commuter rail agency is the host and the freight railroad is the tenant. Moreover, as table 1 shows, a number of existing and proposed commuter rail agencies may be both the host and tenant in certain situations, creating a unique relationship with the freight railroads with whom they interact.[10]

Table 1: Type of Rights-of-Way Arrangement by Commuter Rail Agency

Name of commuter rail agency	Own or plan to own right-of-way	Lease or plan to lease right-of-way from freight railroads
Existing commuter rail agencies		
Altamont Commuter Express		X
Connecticut Department of Transportation: Shore Line East line New Haven line	X[f]	[b]
Maryland Transit Administration (MARC)	X[e]	X
Massachusetts Bay Transportation Authority	X	X
Metra	X	X
MTA Long Island Rail Road	X[a]	
MTA Metro-North Railroad	X[a]	
New Jersey Transit Corporation	X	X
North County Transit District (Coaster)	X	
Northern Indiana Commuter Transportation District	X	
Peninsula Corridor Joint Powers Board (CALTRAIN)	X	X
Pennsylvania Department of Transportation		[b]
Sound Transit	X	X
Southeastern Pennsylvania Transportation Authority	X	X
Southern California Regional Rail Authority (Metrolink)	X[a]	X
Tri-County Commuter Rail Authority (Tri-Rail)	X[a]	
Trinity Railway Express	X	
Virginia Railway Express	X[e]	X
Proposed commuter rail agencies		
Akron line[d]	X	X

[10]For example, the Southeastern Pennsylvania Transportation Authority owns a portion of the rights-of-way it uses; and freight railroads use these rights-of-way. In addition, the Southeastern Pennsylvania Transportation Authority uses rights-of-way owned by CSX, Amtrak, and the City of Philadelphia.

Name of commuter rail agency	Own or plan to own right-of-way	Lease or plan to lease right-of-way from freight railroads
Alaska Railroad Corporation	X[a]	
Austin-San Antonio Intermunicipal Commuter Rail District	X	X
Charlotte Area Transit System	X	
Cumberland-Dauphin-Harrisburg Transit Authority	X	
Dane County T2020 (Transport 2020)		X
Delaware Department of Transportation[c]	TBD	TBD
Eastern Corridor, Hamilton County Transportation Improvement District	X	
Georgia Rail Passenger Program	TBD	TBD
Johnson County Transit		X
Nashville to Lebanon Corridor Regional Transportation Authority	X[a]	X
NeoRail line	X	X
New Haven-Hartford-Springfield Commuter Rail		[b]
Northstar Corridor		X
Regional Transportation District	X	X
Sonoma-Marin Area Rail Transit	X[a]	
Triangle Transit Authority	X	X
Washington Country Commuter Rail	X[a]	X
Utah Transit Authority, Commuter Rail	X	X

Source: GAO.

TBD = To be determined.

Note: The proposed commuter rail agencies' plans to purchase or lease rights-of-way are subject to change.

[a]The rights-of-way are owned by commuter agency's local or state government or the agency's regional transportation authority.

[b]Commuter rail agency operates exclusively on Amtrak-owned rights-of-way.

[c]Southeastern Pennsylvania Transportation Authority provides a "turnkey," or contracted commuter rail service for the Delaware Department of Transportation between Newark/Wilmington, Delaware, and Philadelphia, Pennsylvania.

[d]The Akron line, which is proposed to run between Cleveland and Canton, Ohio, was originally part of the NeoRail study, which has several proposed lines out of Cleveland. Due to an opportunity to move forward, the Akron line was separated as a distinct project for planning purposes. The Akron and NeoRail lines may be integrated again at some point in the future.

[e]The commuter rail agency owns a very limited portion of the rights-of-way it uses. Most of the rights-of-way are owned by Amtrak or a freight railroad.

[f]The New Haven line is operated by MTA Metro-North Railroad. The state of Connecticut owns about 50 miles on which the Connecticut trains operate.

Three federal agencies—FRA, FTA, and STB—are responsible for different aspects of commuter or freight rail in the United States. In particular, FRA

administers and enforces the federal laws and related regulations that are designed to promote safety on railroads, such as track maintenance, inspection standards, equipment standards, and operating practices.[11] Freight railroads and commuter rail agencies are subject to FRA regulations. FTA is the primary federal financial resource for supporting locally planned, implemented, and operated transit capital investments. As a form of public transit, commuter rail projects are eligible for FTA funding. Unlike FRA and STB, FTA is not a regulatory agency. STB is responsible for the economic regulation of interstate surface transportation, primarily freight railroads, within the United States. STB has jurisdiction to resolve compensation and access issues between freight railroads and Amtrak in the event of an impasse in negotiations. Proposed legislation (H.R. 2192) would give STB the jurisdiction to order agreements between freight railroads and commuter rail agencies that have reached an impasse during negotiations.[12] The legislation would also grant commuter rail agencies the same right of access to freight railroads' rights-of-way that Amtrak currently possesses. In May 2003, the proposed legislation was referred to the Subcommittee on Railroads, House Committee on Transportation and Infrastructure. As of December 2003, the proposed legislation has not been moved out of the subcommittee.

Commuter Rail Agencies and Freight Railroads Face Numerous Challenges in Negotiating and Sharing Rights-of-Way

According to officials from commuter rail agencies and freight railroads, negotiating and sharing access to the same rights-of-way can be challenging. Although they cited a variety of challenging issues, there was overall agreement among commuter rail agencies (both existing and proposed) and freight railroads that reaching agreement on compensation, capacity, and liability issues presents the most problems during negotiations. For example, commuter rail agencies and freight railroads may disagree as to whether there is adequate capacity available to accommodate commuter trains and/or what capacity enhancements (e.g., additional tracks) are needed to accommodate the commuter rail service. Until the commuter rail agencies and freight railroads reach agreement,

[11]FRA exercises jurisdiction over all areas of railroad safety under title 49, U.S.C., chapter 201.

[12]In May 2000 a similar piece of legislation, Transit Rail Access Improvement and Needs Act for the 21st Century (H.R. 4507), was introduced and referred to the Subcommittee on Ground Transportation, House Committee on Transportation and Infrastructure. The bill proposed to designate STB as a forum for resolution of disagreements between mass transportation authorities and freight railroads regarding access to freight track and rights-of-way.

the commuter rail project may not move forward. If the parties successfully reach agreement and the commuter rail service begins operations, there are yet more day-to-day challenges that the commuter rail agency and freight railroad will have to work through when sharing the same rights-of-way. Officials from commuter rail agencies and freight railroads described a number of challenges in sharing the same rights-of-way; however, the most commonly cited problems were issues associated with dispatching trains and maintaining the rights-of-way.

Negotiating Mutually Beneficial Agreements Is Difficult

Officials from commuter rail agencies and freight railroads cited a variety of challenges in negotiating agreements. However, there was overall consensus about the most significant challenges. These challenges can be grouped into three issues: compensation, capacity, and liability. Depending on how long it takes the commuter rail agencies and freight railroads to resolve these and other issues, the amount of time required to negotiate agreements can range from months to years. Given the growing demand for commuter rail and freight rail services and financial pressures on the rail industry, reaching agreement will likely become even more difficult in the future.

Agreeing to a Price Can Be Challenging

Officials from both commuter rail agencies and freight railroads reported that negotiating a mutually agreeable price for the freight-owned rights-of-way is challenging. Like other transactions, there is often a natural tension between the seller and buyer—that is, the seller wants to obtain the most money from the transaction possible, and the buyer wants to keep the price as low as possible. In addition to this natural tension, the commuter rail agencies and freight railroads cited reasons why they believe the other party's compensation offers or demands can be too high or low, making it difficult to reach agreement.

From the freight railroads' perspective, the commuter rail agencies' compensation offers are often inadequate. Officials from freight railroads and AAR commented that a common misconception is that rail infrastructure is public property. According to these officials, this misconception leads people to assume that the public should be able to use the railroads for a minimal cost. In reality, most rail infrastructure in the United States is owned by private freight railroads that must generate sufficient profits to survive. This can be difficult given the intense competition within the transportation marketplace and the capital-intensive nature of railroads. According to AAR, the financial health of the freight railroads has improved since the enactment of the Staggers Act; however, overall the freight rail industry does not earn its cost of capital,

and the railroads must borrow money from commercial sources for much of their capital expenditures. It is with this financial backdrop that freight railroads negotiate with commuter rail agencies. Hence, when negotiating a purchase agreement for their rights-of-way, freight railroads typically expect the price to reflect the fair market value, which is a function of the limited commodity and the high demand for its use. Similarly, when negotiating a lease or access agreement, freight railroads generally want to be compensated for all operating, capital, and other costs associated with hosting commuter rail trains. This would include both direct costs, such as costs of dispatching trains and maintaining the rights-of-way, and indirect costs, such as opportunity costs. For example, when a commuter train fills a train slot, the freight railroad loses the opportunity to use the slot for its own purposes or to lease it to another freight railroad at a premium price. According to freight railroads, when they are not compensated for all of the costs incurred from hosting a commuter rail train, the result is that the freight railroads subsidize the commuter rail service. Although the freight railroads recognized the potential public benefits of commuter rail service, they argued that they should not be forced to bear the costs of providing such benefits.

In contrast, from the commuter rail agencies' perspective, freight railroads' compensation demands are often too high. Officials from commuter rail agencies stated that they have limited financial resources. Notably, commuter rail agencies usually rely on public funds to bridge the gap between operating and capital costs and farebox revenue. Officials from APTA and a commuter rail agency also suggested that the price should reflect all of the benefits commuter rail agencies bring to the table. For example, commuter rail agencies could invest in and improve the freight-owned rights-of-way through projects designed to accommodate commuter rail trains, such as improving grade crossings and adding tracks. These projects would benefit the freight railroad's operations as well as the commuter rail service. Finally, if the right-of-way is not fully utilized, the commuter rail service serves as a stream of revenue that the freight railroad would not have otherwise received.

Capacity Issues Are Also Problematic during Negotiations

Another challenge in negotiations is the issue of capacity. The number of trains that can pass over a line of track is limited. If the line is full, or at capacity, additional trains cannot be accommodated unless enhancements are made to increase the capacity of the line. Capacity enhancements can

range from adding new tracks to increasing height clearances of tunnels.[13] (See fig. 3 for an example of a capacity enhancement.) The amount of capacity available varies by line of track. Determining whether capacity is available and/or what capacity enhancements are needed to accommodate additional trains on a particular line is a subjective exercise. For example, depending on the assumptions used, capacity studies of the same line can produce different results. Consequently, capacity issues can become contentious during negotiations.

[13]Adding new tracks can include the construction of a new track to existing single-track line allowing simultaneous operations in opposite directions (double tracking) or the building of additional track(s) to an existing multiple track line. Tunnel clearance enhancements are necessary for the movement of "double-stack" freight trains and double-deck passenger cars.

Figure 3: Example of Capacity Enhancement

Source: Tri-Rail in Pompano Beach, Florida.

This photograph shows a portion of Tri-Rail's (Pompano Beach, Florida) double-tracking project. The track on the bottom is the existing infrastructure; the track on the top is the new line that is currently under construction. The new line of track will allow Tri-Rail to increase the number and frequency of its trains. The final phase of Tri-Rail's double-tracking project is scheduled to be completed in March 2005. The state of Florida purchased about 70 miles of rights-of-way in this region from CSX in 1988. CSX continues to use this right-of-way.

From the freight railroads' perspective, freight service is their core business, and their ability to efficiently move freight through their systems must be protected. Thus, officials from the freight railroads insist that they must protect their systems' capacity to handle today's freight traffic as

well as tomorrow's anticipated traffic growth. According to the AAR, some rail lines do not currently have capacity available for commuter rail operations, or expected increases in freight traffic will consume the available capacity unless capacity is expanded. In determining what capacity enhancements are needed to accommodate commuter rail service, officials from the freight railroads generally argue that the commuter rail agency must "keep them whole"—that is, their ability to serve their freight customers must not be degraded or impinged upon because of the presence of the commuter rail service. Freight railroads also consider the need for additional capacity enhancements in the future when negotiating with commuter rail agencies. In particular, a freight railroad official noted that when adding capacity, it is common practice in the rail industry to "pick the low hanging fruit"—that is, construct the cheapest and most cost-effective enhancement. If the cheapest and most cost-effective enhancements are built for the commuter rail service, any future capacity enhancements needed for freight operations will come at a much higher cost, according to freight railroad officials.

From the commuter rail agencies' perspective, freight railroads are too conservative when estimating available capacity and/or overly optimistic about projected freight traffic growth. Consequently, officials from some commuter rail agencies and APTA argue that freight railroads set excessive demands for capacity enhancements. For example, officials from one commuter rail agency told us that a freight railroad's cost estimate of capacity enhancements needed to accommodate the commuter rail service was $75 million more than the commuter rail agency's estimates. This difference in estimates has contributed to challenges during the negotiations. Even if the commuter rail agencies believe the freight railroads demands are unreasonable, they have little recourse. Because the freight railroads own the infrastructure, the freight railroads' assessment of capacity is the final word, according to commuter rail agencies.

Liability Is a Major Challenge for Negotiations

Liability was the most frequently identified challenge by proposed and existing commuter rail agencies and freight railroads. If a passenger rail accident should occur, injured passengers may sue the transportation provider for their damages. Freight railroads have been traditionally sheltered from this exposure when they haul freight. However, when a freight railroad allows a commuter rail service to operate over its rights-of-way, the freight railroad becomes exposed to these risks as passengers may sue the commuter rail provider and owner of the track. Hence, freight railroads do not want to allow commuter rail service on their rights-of-way unless they are protected from liability.

Freight railroads generally want the commuter rail agency to assume all risks associated with the presence of the commuter rail service. This is often referred to as a "but for" arrangement—that is, but for the presence of the commuter rail service, the freight railroad would not be exposed to certain risks; therefore, the freight railroads should be held harmless. Officials from freight railroads stated that they must take this position in order to protect their businesses and stockholders from potential lawsuits. As a result, freight railroads typically require that the commuter rail agency contractually indemnify them from any liability in the event of a passenger accident, and procure a certain level of insurance coverage to guarantee the commuter rail agency's ability to pay for all of the damages. The amount of insurance required can range significantly—for example, we heard insurance coverage requirements of $100 million to $500 million. Several commuter rail agency and freight railroad officials commented that the amount of insurance required has increased in recent years. For instance, officials from one commuter rail agency told us that during negotiations for their new agreement (their previous agreement expired), the freight railroad informed the agency that it must carry $500 million in insurance—double the amount the agency was required in its previous agreement with the freight railroad. This has contributed to stalling the negotiations between the commuter rail agency and freight railroad. Accepting these liability terms can be financially problematic for the commuter rail agencies. The premiums on the commercial insurance coverage becomes an operating expense for the commuter rail agencies—and these expenses can be significant. For example, officials from one commuter rail agency told us that their annual premium for their $125 million insurance coverage is $1.5 million. These officials also noted that the freight railroad they share the rights-of-way with is seeking to increase the amount of insurance the commuter rail agency must maintain from $125 million to $500 million, which would significantly increase its annual premium. Officials from another commuter rail agency estimated that their insurance premiums would account for 20 percent of their annual operating budget.

Recognizing the freight railroads' exposure to liability when hosting passenger trains on their rights-of-way, Congress established liability provisions in the Amtrak Reform and Accountability Act of 1997 (ARAA). Specifically, the act limits the aggregate overall damages that may be awarded to all passengers for all claims (including punitive damages) from a particular rail accident to $200 million. The act also permits Amtrak and other providers of rail transportation to enter into indemnification agreements allocating financial responsibility for passenger accidents. In discussions with officials from commuter rail agencies and freight

railroads, we found some confusion as to whether the liability cap established in the ARAA applies to commuter rail agencies. After reviewing the legislation, we have concluded that the liability cap applies to commuter rail operations on the basis of the plain language of the statute and our review of the pertinent legislative history. However, there are limitations to the protection the legislation provides. The legislation does not limit damages for claims brought by nonpassengers. For example, the legislation would not apply to claims brought by adjacent property owners or populations that may be harmed in a hazardous materials spill or an accident at a rail crossing. Further, because the application of this liability cap has been untested in court, many freight railroads and commuter rail agencies are hesitant to rely upon this statute to cover the full extent of their potential liability. (See app. II for a more detailed discussion of the applicability and limitations of the ARAA.)

Challenges Also Exist in Sharing Rights-of-Way

In addition to the challenges in negotiating agreements, officials from commuter rail agencies and freight railroads identified a number of challenges in the day-to-day operations of shared use rights-of-way. The challenges cited by officials from commuter rail agencies or freight railroads ranged from dealing with the public's concern about additional train traffic to safety concerns. The most frequently mentioned challenges, however, can be grouped into two categories: dispatching and maintenance issues.

Officials from freight railroads and commuter rail agencies frequently identified issues associated with the dispatching of trains as an important challenge in sharing the rights-of-way. Dispatching controls the movement of trains through the rail network. The owner of the rights-of-way generally dispatches all trains on those rights-of-way. For instance, when Virginia Railway Express trains are traveling on CSX-owned rights-of-way, CSX dispatches the Virginia Railway Express trains. Because dispatching controls and directs rail traffic, it is key to the on-time performance of commuter and freight trains. The success of a commuter rail service is largely dependent on its reliability. If commuter rail passengers cannot count on the train to be on time, they will stop using the service. Freight railroads are increasingly providing "just-in-time" delivery for their customers. If the freight trains carrying time-sensitive freight do not arrive on schedule, the freight railroads run the risk of losing customers and/or incurring financial penalties. Thus, officials from commuter rail agencies and freight railroads want their trains to run on time. Keeping both commuter and freight trains consistently on time, however, can be difficult

due to the amount of traffic on a corridor as well as unexpected events, such as severe weather, which disrupts normal operations.

Officials from commuter rail agencies and freight railroads also cited issues associated with maintenance-of-way as a significant challenge in sharing rights-of-way. A frequently cited challenge was finding time in the schedule for maintenance-of-way work. As traffic on the rights-of-way increases, scheduling and performing maintenance become more difficult. For example, if a commuter rail agency provides morning and evening rush hour service as well as mid-day service and the freight trains operate at night, the windows of opportunities for maintenance work are limited. If maintenance is deferred, the tracks may deteriorate from a state of good repair, resulting in speed restrictions for the tracks. Reducing the speed of the traffic can further complicate efforts to keep commuter rail trains on time. Another maintenance-of-way challenge identified was handling the different track maintenance requirements for passenger and freight trains. Because of the speed of passenger trains, the tracks used by these trains must be maintained at a higher standard compared with tracks used solely by freight trains. In addition, freight trains create more wear and tear on the tracks because of their weight. In combination, these differences create the need for more maintenance on tracks shared by passenger and freight trains, compounding the problem of finding time to schedule and perform maintenance work.

There Is No Template for Success, but Certain Actions Can Help Facilitate Good Relationships

According to industry representatives and officials from commuter rail agencies and freight railroads, there is no single approach or "cookie cutter" formula for developing mutually beneficial arrangements between commuter rail agencies and freight railroads. A cookie cutter approach is not possible because every situation is unique—from the parties involved to the needs and expectations for the commuter rail system—requiring the agreements to be tailored to the circumstances of the situation. The characteristics of the rights-of-way, such as freight traffic density and the physical constraints of each rail line and whether the tracks are a main or branch line, also vary from location to location, creating unique negotiating environments. An example of how the characteristics of the rights-of-way can affect negotiations is Sound Transit's efforts to extend service from Seattle to Everett, Washington. In particular, the right-of-way from Seattle to Everett is a main line of the Burlington Northern Santa Fe, which experiences heavy freight traffic and serves as a critical link from the Pacific Northwest seaports to the markets in the midwest and on the east coast. Amtrak also uses the corridor, adding to the level of traffic on the right-of-way. Moreover, the right-of-way is physically constrained—

Puget Sound is on one side of the right-of-way and steep terrain is on the other side, which can be prone to mud slides. (See fig. 4.) The high level of traffic and physical constraints along this corridor have made adding passenger trains to the existing infrastructure or adding capacity difficult and, therefore, made negotiations between Sound Transit and Burlington Northern Santa Fe challenging.[14]

Figure 4: Photograph of a Segment of Burlington Northern Santa Fe Right-of-Way in the State of Washington

Source: Sound Transit in Seattle, Washington.

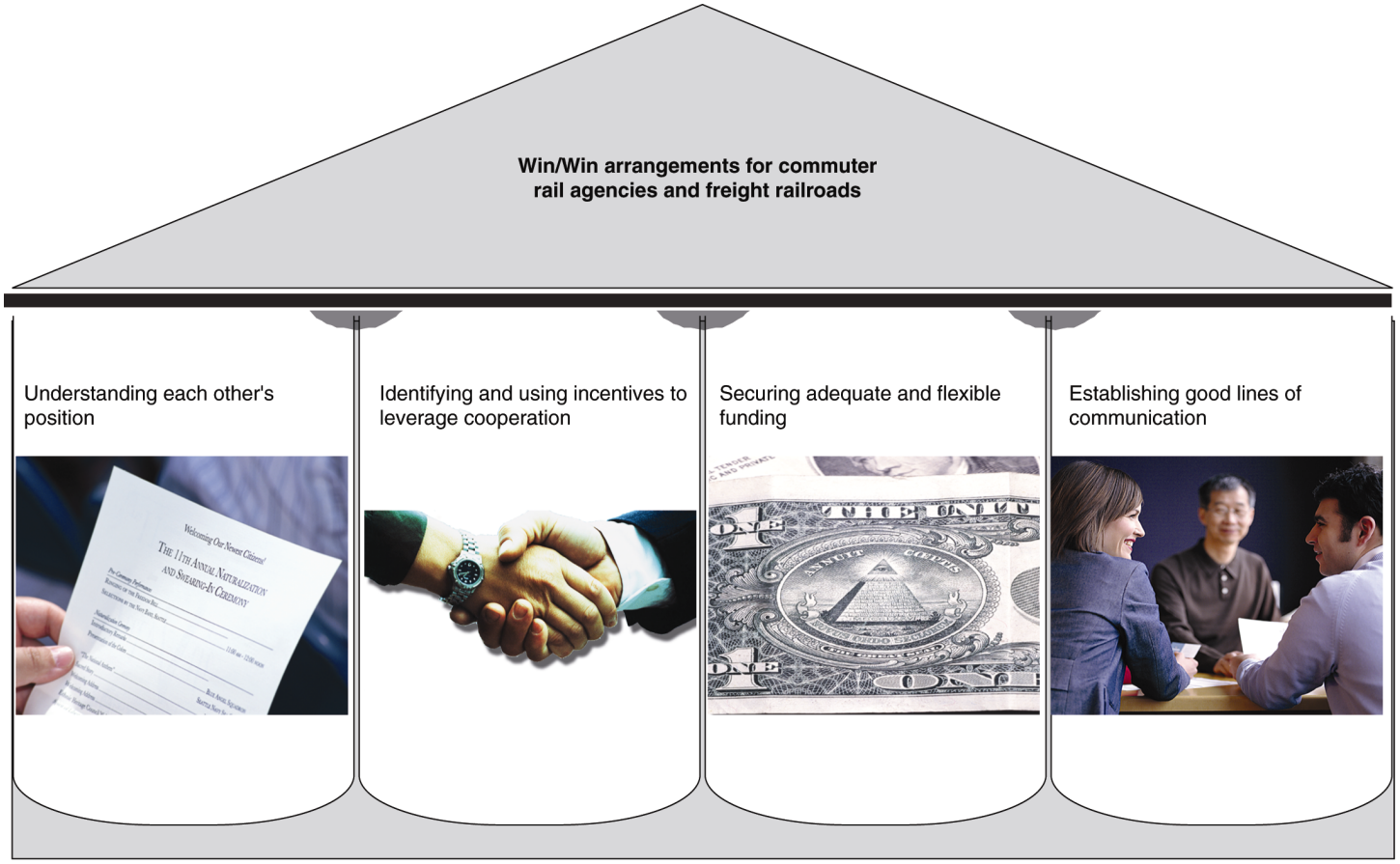
This picture illustrates an example of physical constraints that may limit capacity enhancements. Specifically, this section of Burlington Northern Santa Fe's right-of-way is constrained by Puget Sound to one side and steep terrain on the other.

Although there is no template for success, officials from commuter rail agencies and freight railroads identified conditions or actions that can help facilitate mutually beneficial arrangements between commuter rail agencies and freight railroads. The officials identified a number of actions,

[14]As of November 2003, negotiations between Sound Transit and Burlington Northern Santa Fe are ongoing.

ranging from capacity improvements strategies to legislative initiatives. Although the officials discussed a range of ideas related to these themes, there were several recurring suggestions, including understanding each other's position, identifying and using incentives to leverage cooperation, securing adequate and flexible funding to help improve capacity and infrastructure, and establishing good communication between both parties (see fig. 5).

Figure 5: Identified Actions Can Help Lay Foundation for Win/Win Arrangements



Sources: GAO illustration using pictures from Photodisc and EyeWire.

- **Understanding each other's position**: Although commuter rail agencies and freight railroads are both in the rail business, they differ in many respects. Commuter rail agencies want to have fast and predictable service for their customers, which can clash with the railroads' desire for flexible

scheduling and need for trains of varying lengths and speeds to meet their customers' shipping demands. Also, freight railroads have **shareholders** while commuter rail agencies have **stakeholders**—that is, freight railroads are private companies that seek to generate profits to benefit their stockholders, and commuter rail agencies are usually public entities that provide service to the public. In addition, commuter rail agencies are usually concerned with relatively small, defined portions of the right-of-way. In contrast, freight railroads own and operate rail networks that span thousands of miles and multiple states. These differences, as well as others, result in freight railroads and commuter rail having very different agendas and goals for the negotiations. For example, commuter rail agencies may want to get through the negotiation process as quickly as possible because of public pressure to begin service; however, such a rush to reach agreement does not necessarily benefit freight railroads' shareholders. Freight railroads will likely want to examine how the proposed commuter rail service will affect their entire network, not just the specific location of the proposed service. To help commuter rail agencies better understand their position, several freight railroad companies have developed guiding principles that they provide to commuter rail agencies that are interested in using freight railroads' rights-of-way. (Fig. 6 lists Burlington Northern Santa Fe's guiding principles for commuter rail service.) Several commuter rail agency officials also stressed the importance of having people with freight railroad knowledge and expertise on their teams. According to these officials, having railroad expertise on their teams during negotiations helps commuter rail agencies better understand the challenges faced by the railroads, speak and understand railroad terminology, and establish credibility with the railroads.

Figure 6: Burlington Northern Santa Fe's (BNSF) Guiding Principles for Commuter Rail Service

Commuter Principles

BNSF is willing to cooperate on commuter rail studies and provide state and local officials with information. Where commuter service is proposed on a minimally used line that BNSF is willing to sell, BNSF shall be paid fair market value for the property. Where commuter service is proposed on a line BNSF intends to continue owning, the following principles apply:

- Any commuter operation cannot degrade BNSF's freight service, negatively affect BNSF's freight customers, or BNSF's ability to provide them with service.
- BNSF must be compensated for any and all costs incurred in providing commuter service and make a reasonable return for providing the service.
- Capital investments necessary for commuter service are the responsibility of the public.
- BNSF will not incur any liability for commuter operations that it would not have but for those operations. These operations are provided by BNSF primarily as a public service; the relatively modest compensation BNSF receives does not begin to justify assuming the significant liability associated with passenger service.
- Studies of how commuter service might be provided must take into account not only the current freight traffic levels, but projected freight traffic growth.
- Investments made for commuter projects must not result in BNSF incurring a higher tax burden. Property improvements should not become part of our tax base; materials used should be exempt from all sales and use taxes, etc.; or BNSF must be made whole for any increased tax burden.
- BNSF must retain operating control of rail facilities used for commuter service. All dispatching, maintenance and construction must be done under the control of BNSF. Passenger stations, parking lots and other nonrail facilities may be publicly owned and operated.
- Studies must reflect BNSF's actual operating conditions and cost structures. For example, construction work estimates must reflect our labor contract costs; schedules cannot assume that we will not operate any freight trains during peak commuter periods, etc.
- BNSF will limit commuter operations to the commuter schedules initially agreed upon and for which the capital improvement plan has been designed. Future expansions will have to undergo the same analysis and provide any required capital improvements before schedules can be altered, service added, or stations added.
- Improvements must include grade crossing warning systems and intertrack fencing as required to minimize the risk of accidents, due to both liability and service interruption concerns.

Source: BNSF.

- **Identifying and using incentives to leverage cooperation**: Officials from commuter rail agencies told us that identifying and using incentives to leverage freight railroads' cooperation can help negotiations. According to both commuter rail agency and freight railroad officials, using an incentive or "carrot" can make the freight railroads more amenable to commuter rail service by making the opportunity to host commuter rail service more attractive. There is a range of incentives commuter rail agencies may be able to offer, from lobbying for rail infrastructure funding with the railroad, to seeking local tax relief, to investing in railroad infrastructure. According to several commuter rail officials, the key is

identifying something the freight railroad wants or needs. For example, the Utah Transit Authority (UTA) in Salt Lake City was interested in purchasing a portion of a right-of-way owned by Union Pacific. However, the purchase of this right-of-way would significantly diminish the ability of Union Pacific to operate its downtown freight intermodal transfer yard. In order to spur negotiations, UTA offered to pay the cost of relocating Union Pacific's facility to a site that allowed Union Pacific to upgrade its support operations and provide for future growth opportunities. According to UTA officials, adding this incentive helped UTA and Union Pacific reach agreement on UTA's purchase and lease of Union Pacific rights-of-way. In another example, the state of Delaware financed the reconstruction of a bridge that will provide access to an alternative freight route. In exchange, Norfolk Southern agreed to grant Delaware's Department of Transportation free access to all of its Delaware rights-of-way for its commuter rail service for a 20-year period.

- **Securing adequate and flexible funding**: Several commuter rail officials stressed the importance of treating the freight railroads as true partners and acting as real customers. For instance, one commuter rail agency official noted that commuter rail agencies should be willing to fully reimburse the freight railroads and pay their fair share. Officials from the freight railroads also echoed the importance of commuter rail agencies bringing adequate funds to the negotiating table to pay for the costs they impose. APTA suggests that commuter rail agencies and freight railroads can work together to obtain federal, state, or local funds for rail improvements that benefit both parties. For example, Metra, the commuter rail agency in Chicago, is partnering with the city of Chicago, the state of Illinois, and six freight railroads to secure $1.5 billion in funds for rail improvements in the Chicago area that will reduce the impact of freight traffic on the region as well as benefit both freight and passenger operations.[15] In addition to adequate funding, officials from several commuter rail agencies emphasized the importance of having the flexibility to invest in capacity improvements outside the commuter rail service area. Because freight railroads operate national networks, delays on one part of the system are likely to cause ripple effects throughout the entire network. Thus, according to several commuter rail and freight railroad officials, sometimes the most effective way to improve commuter rail operations or to accommodate additional trains on a given corridor is to make improvements to the rail infrastructure 10 miles or even hundreds

[15]The identified sources of funding for the rail improvements include Metra, the city of Chicago, the state of Illinois, the federal government, and freight railroads. As of this date, the federal government has not committed any funds to this project.

of miles away from the corridor. Having the flexibility to invest funds outside the commuter service area allows for the freight railroads and commuter rail agencies to implement the most effective solution.

- **Establishing good lines of communication**: Officials from many commuter rail agencies and freight railroads stressed the importance of early, direct, and continuous communication. Officials from both commuter rail agencies and freight railroads noted that freight railroads should be notified early in the planning process about proposed commuter rail systems or expansions on their rights-of-way because the freight railroads can help the commuter rail agencies develop realistic cost estimates. Moreover, many freight railroads noted that hearing about such proposals through the media or other sources sets a bad tone for negotiations. Officials from freight railroads also commented that they prefer to work directly with the commuter agency rather than being pressured through the media or elected officials. As one freight railroad official noted, when commuter rail agencies use elected officials to apply political pressure, his company is likely to "dig their heels in" rather than bow to the pressure. In addition to early and direct communication, a number of commuter rail officials stated that continuous communication with the freight railroads was important in order to identify and resolve issues as they arise. One commuter rail official said that his agency has daily monitoring and conference calls as well as quarterly meetings with railroad contacts. Similarly, through the Chicago Transportation Coordination Office, Metra works with the freight railroads that travel through the Chicago area to coordinate freight and passenger train movements and to address any problems as they arise. Although there was general agreement that early communication is important, a number of the commuter rail officials noted that the freight railroads do not want to begin negotiations until they are sure the project is funded and moving forward; however, the commuter rail agencies cannot secure funding and move the project forward until they reach agreement with the freight railroads. One official described this situation as a "Catch 22."

Federal Government Currently Does Not Play a Role in Commuter Rail Access

The federal government currently does not participate in access negotiations between commuter and freight railroads. Three federal agencies— FRA, FTA, and STB—have responsibility for different aspects of rail transportation. FRA is primarily focused on ensuring safe operation of railroads; FTA's primary role is providing funding to transit projects, including commuter rail; and STB serves as the freight rail industry's economic regulator. None of these three agencies currently play a part in facilitating negotiations between freight and commuter railroads. Commuter rail agencies told us that they have few options if they reach an

impasse with freight railroads; as a result, they usually continue negotiations or elevate the problem through the railroad's chain of command. Commuter rail agencies and freight railroads disagree on the role they would like to see the federal government play in resolving disputes between commuter rail agencies and freight railroads. Specifically, most commuter rail agencies would like the federal government to play a more active role; freight railroads generally do not want the federal government involved except for assuring the adequacy of funding for commuter rail projects.

FRA's Primary Focus Is on Rail Safety, Not Access Issues

FRA has safety jurisdiction over all freight and passenger railroads in the United States.[16] FRA is responsible for promoting and enforcing rail safety, administering railroad financial programs, conducting research and development, and developing executive branch policy on railroad industry issues. Both commuter rail agencies and freight railroads are subject to FRA's oversight. According to an FRA official, the agency's primary role in commuter rail issues is promoting and enforcing safety—that is, ensuring that the commuter rail system is safe. For example, FRA has issued regulations that establish safety standards for passenger rail cars that are used by commuter rail agencies.

FRA does not currently play a role in commuter rail access issues. According to FRA officials, FRA has no specific statutory authority over commuter rail access issues. FRA officials also stated that FRA does not have responsibilities for negotiations between commuter rail agencies and freight railroads. Consequently, FRA is not involved in helping commuter rail agencies negotiate agreements with freight railroads or resolving impasses between commuter rail agencies and freight railroads. FRA also has not issued regulations related to commuter rail access issues or issued any guidance to assist commuter rail agencies in developing agreements with freight railroads.

[16]Excluding urban rapid transit operations that are not connected to the general railroad system of transportation.

FTA Provides Funding for Commuter Rail Projects but No Assistance on Access Issues

Since the early 1970s, the federal government has provided a large share of the nation's capital investment in mass transit.[17] FTA is the primary federal funding source for commuter rail projects, and much of the investment has come through FTA's New Starts program, which helps pay for certain transit projects, including commuter rail, through full-funding grant agreements. A full-funding grant agreement establishes the terms and conditions for federal participation, including the maximum amount of federal funds available for the project.[18] The New Starts program is an important source of funding for many commuter rail projects. For example, FTA reports that the commuter rail project in Johnson County, Kansas proposes to use New Starts funds for 80 percent of the project's total capital cost of $31 million and the commuter rail project in Washington County, Oregon proposes to use New Starts funds for 60 percent of the project's total capital cost of $120 million.[19] In making funding recommendations to the Congress, FTA assesses the cost estimates for the commuter rail projects, which would include payments to freight railroads for purchasing, leasing, or accessing freight-owned tracks. According to FTA officials, FTA will not award full-funding grant agreements to commuter rail projects unless the commuter rail agency and freight railroad have reached agreement on relevant access issues. To obtain a full-funding grant agreement, a commuter rail project must first progress through a local or regional review of alternatives, develop preliminary engineering plans, and obtain FTA's approval for final design.

[17]U.S. General Accounting Office, *Mass Transit: FTA Could Relieve New Starts Program Funding Constraints*, GAO-01-987 (Washington, D.C.: Aug. 15, 2001).

[18]Current law allows FTA to grant up to 80 percent of the estimated net project cost to individual transit projects. However, on the basis of direction from the Congress in the conference report that accompanied DOT's fiscal year 2002 appropriations act, FTA instituted a preference policy to recommend projects with federal shares that do not exceed 60 percent for funding. The administration's proposed surface transportation reauthorization legislation seeks to reduce the statutory federal share to no more than 50 percent of the net project cost.

[19]Federal Transit Administration, *Annual Report on New Starts: Proposed Allocations of Funds for Fiscal Year 2004* (Washington, D.C.: Feb. 3, 2003).

Projects may receive federal funds as they advance through the planning, preliminary engineering, and final design phases.[20]

FTA does not currently play a role in commuter rail access issues. According to FTA officials, FTA does not have authority over commuter rail access issues. Consequently, FTA does not consider it appropriate to help commuter rail agencies negotiate agreements with freight railroads or resolve disputes between commuter rail agencies and freight railroads. FTA officials state that because FTA has no specific statutory responsibilities over commuter rail access issues, the agency has not developed or issued any guidance to commuter rail agencies on negotiating with freight railroads. Although FTA has not issued any guidance, agency officials indicated that they encourage commuter rail agencies to contact the affected freight railroads early in the planning stages and to consult with the railroads as the project advances through the stages of development. These officials stated that getting the freight railroad's early buy-in and assistance in developing realistic cost estimates is important to the successful implementation of the commuter rail project. FTA does not have any documented guidance, however, on when the commuter rail agency should contact the freight railroad or why such consultation is important.

STB Has No Role in Negotiations between Commuter Rail Agencies and Freight Railroads

STB's mission is to ensure that competitive, efficient, and safe transportation services are provided to meet the needs of shippers, receivers, and consumers. Among other things, STB must determine whether freight railroads may construct, acquire, or discontinue service over individual rail lines, and whether proposed railroad mergers and consolidations will be allowed. STB also adjudicates complaints concerning the quality of freight rail service and the reasonableness of

[20]The alternatives analysis stage provides information on the benefits, costs, and impacts of alternative strategies leading to the selection of a locally preferred solution to the community's mobility needs. During the preliminary engineering phase, project sponsors refine the design of the proposal, taking into consideration all reasonable design alternatives, which results in estimates of costs, benefits, and impacts (e.g., environmental or financial). Final design is the last phase of project development before construction and may include right-of-way acquisition, utility relocation, and preparation of final construction plans and cost estimates.

certain freight rail rates.[21] In making these decisions STB considers a number of factors, including the interests of affected shippers and the financial health of the railroad(s) involved. In carrying out its duties, STB is charged with providing an efficient and effective forum for the resolution of certain disputes. Because Amtrak was specifically created to relieve freight railroads of the requirement to provide passenger service, STB has jurisdiction to resolve compensation and access issues between freights and Amtrak in the event of an impasse in negotiations. According to STB officials, STB's authority to adjudicate disputes or provide a forum for the resolution of shipper disputes does not extend to disputes over access between commuter rail agencies and freight railroads.

STB officials stated that STB does not currently have a role in or responsibilities for commuter rail access issues. In particular, STB officials noted that STB is statutorily prohibited from assuming jurisdiction over mass transportation provided by local government authorities.[22] STB officials said that STB's jurisdiction may be extended to commuter rail in certain circumstances, including if (1) the local government authority providing commuter rail services meets the definition of a rail carrier;[23] (2) the commuter rail agency enters into a contract with Amtrak;[24] or (3) a commuter rail agency acquires control of a railroad and therefore meets the definition of a rail carrier.[25] STB officials stated that because the Board does not have a specific statutory role in commuter rail access issues, STB has not been involved in helping commuter rail agencies and freight railroads negotiate agreements or resolving disputes between commuter

[21]Under the ICC Termination Act of 1995 (49 U.S.C. 10101), STB may review the reasonableness of a rate only upon a shipper's complaint. Moreover, STB may consider the reasonableness of a rate only if (1) the revenue produced is equal to or greater than 180 percent of the railroad's variable costs for providing the service and (2) it finds that the railroad in question has market dominance for the traffic at issue.

[22]49 U.S.C. 10501(c)(2).

[23]A rail carrier is an entity providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation (49 U.S.C. 10102(5)). STB officials noted that STB has not had an opportunity to interpret its jurisdiction pursuant to this subsection within a ruling.

[24]STB officials noted that a commuter rail agency has never tried to use STB's jurisdiction over compensation and access issues between freights and Amtrak as a means to have STB resolve a dispute between the commuter rail agency and freight railroad. Therefore, STB officials were unsure as to the outcome of such an approach.

[25]49 U.S.C. 10501(c)(3)(B).

rail agencies and freight railroads. Moreover, STB has not issued regulations related to commuter rail access issues, nor has it issued any guidance to assist commuter rail agencies in developing agreements with freight railroads.

Prior to the sun-setting of STB's predecessor, the Interstate Commerce Commission (ICC) played a more active role in commuter rail access issues.[26] In particular, the ICC's Rail Services Planning Office provided technical expertise and assistance to commuter rail agencies and conducted national studies on such matters as rail and port rates and rail mergers. The Rail Services Planning Office also examined the U.S. Railway Association's plan to reorganize the northeastern railroads after the Penn Central Railroad's bankruptcy and assessed the impact of the plan on commuter rail agencies. According to DOT officials, the roles and responsibilities of this office were not transferred to STB when ICC was abolished in 1995.

Commuter Rail Agencies and Freight Railroads Have Differing Views on the Appropriate Role of the Federal Government

Commuter rail agencies and freight railroads do not agree on the appropriate role for the federal government in commuter and freight rail access issues. Although there was some difference of opinions among individual commuter rail agencies, most commuter rail agencies would like the federal government to take a more active role in access issues. Officials from commuter rail agencies suggested a number of roles the federal government could serve in negotiations or dispute resolution between commuter rail agencies and freight railroads, ranging from helping with the liability issue to giving commuter rail agencies the same statutory rights as Amtrak. The most frequently cited suggestions by commuter rail agencies were for the federal government to serve as an arbitrator or mediator for disputes between commuter rail agencies and freight railroads, provide additional funding for commuter rail projects and railroad infrastructure, and provide guidance and information. In contrast, officials from freight railroads generally do not see a role for the federal government except for assuring the adequacy of funding for commuter rail projects.

[26]The ICC Termination Act of 1995 (49 U.S.C. 10101) terminated the ICC, eliminated various functions performed by the ICC, transferred licensing and certain nonlicensing motor carrier functions to the Federal Highway Administration, and transferred remaining rail and nonrail functions to the STB.

Officials from a number of existing and proposed commuter rail agencies would like to see the federal government serve as an arbitrator or mediator for disputes between commuter rail agencies and freight railroads. Commuter rail officials often stated that commuter rail agencies have little to no recourse if the freight railroads refuse to negotiate, prolong the negotiations, or demand what they perceive as unaffordable amounts of compensation or capacity enhancements. Officials from most commuter rail agencies told us that they continue to negotiate or elevate the problem through the railroad's chain of command if they reach an impasse during negotiations. These officials commented that it would be beneficial to have a forum in the federal government that commuter rail agencies and freight railroads could use if negotiations broke down. Commuter rail officials emphasized, however, that the federal government agency that served as a mediator or arbitrator must be viewed by the industry as having rail expertise and being unbiased. Although a number of commuter rail officials supported the idea of a federal government entity serving as a mediator or arbitrator, a few commuter rail officials explicitly rejected this role for the government because they were concerned it would only further complicate negotiations.

According to some commuter rail officials, another potential role for the federal government is providing additional funding for commuter rail investments and railroad infrastructure. Commuter rail agencies sometimes must pay freight railroads a significant amount of money to use their rights-of-way. For example, one commuter agency agreed to pay for approximately $350 million in capital improvements to a freight railroad's rights-of-way in exchange for access. Obtaining the necessary funds is not an easy task for the commuter rail agencies, especially considering that their fare box revenues do not cover their costs. Moreover, although the federal government provides funding for capital improvements, many commuter rail agencies are prohibited from using federal dollars for operating expenses, such as access fees. According to commuter rail agencies, being able to come to the negotiating table with additional funds would help them reach agreement with the freight railroads. In addition, commuter rail agencies noted that additional federal funding for freight railroads' infrastructure would also benefit commuter rail negotiations. As discussed earlier, negotiations between commuter rail agencies and freight railroads often get hung up on capacity issues. According to commuter rail officials, increased federal funding for rail infrastructure could help pay for additional capacity; moreover, it could improve the infrastructure, which would benefit commuter rail operations.

Officials from commuter rail agencies also repeatedly suggested that the federal government provide guidance and information, such as best practices, tips for negotiations, and technical expertise. Commuter rail officials said it would be helpful if the federal government provided information on such matters as what to expect during negotiations and what data are needed for negotiations. Providing this type of information would establish a framework for negotiations, which could guide commuter rail agencies and freight railroads through the negotiation process. American Public Transportation Association (APTA) and Association of American Railroads (AAR)—trade associations that represent commuter rail and freight railroad interests, respectively—attempted to work together to develop a framework for negotiations several years ago. According to representatives from APTA and AAR, both associations believed a framework would be beneficial; however, the two associations were unable to develop a framework and are no longer actively continuing this effort. Commuter rail officials also said that it would be helpful if the federal government identified and shared best practices from past negotiations as well as provided technical assistance. Officials from several commuter rail agencies told us that in the past they had relied on ICC's Rail Services Planning Office for technical expertise and assistance, which was helpful to their agencies. A commuter rail agency official noted that since the Rail Services Planning Office was abolished, there is no longer a source of professional, accurate, and unbiased information that can be used during negotiations.

In general, officials from the freight railroads we spoke to did not believe the federal government should be involved in negotiations between commuter rail agencies and freight railroads. There was universal agreement among officials from all of the freight railroads we spoke to opposing the federal government serving as an arbitrator or mediator. According to freight railroad officials, negotiations over the purchase or lease of rights-of-way should be private and at arms-length. They said that limiting the negotiations to the affected commuter rail agency and freight railroad helps to ensure that mutually beneficial arrangements will be negotiated—that is, that they make economic and business sense for both parties. Freight railroad officials expressed concern that having the federal government serve as an arbitrator or mediator would result in freight railroads being forced to accept arrangements that do not make good business sense for the railroads. Officials from a number of freight railroads we spoke to also expressed opposition to the federal government granting commuter rail agencies the same statutory rights of Amtrak—that is, giving commuter trains priority access to freight-owned tracks at the incremental cost. Freight railroad and AAR officials stated that giving

commuter rail agencies these statutory rights would force the freight railroads to subsidize commuter rail operations and harm their freight business. Moreover, officials from one freight railroad characterized extending Amtrak's statutory rights to commuter rail agencies as the "taking" of private property.

Rather than taking a direct role in negotiations, a number of officials from freight railroads stated that the most appropriate role for the federal government was serving as a source of funding for commuter rail agencies. Freight railroad officials noted that commuter rail could provide public benefits, such as reduced highway congestion and pollution; therefore, the federal government, not freight railroads, should pay for these benefits. In addition, officials from a couple of freight railroads raised concerns that the federal funding process, notably FTA's New Starts program, may skew communities' decision-making about the implementation of commuter rail projects or create a situation where the commuter rail service is unsustainable. For example, officials from one freight railroad noted that there is a significant amount of pressure on proposed commuter rail systems to make "the numbers work" so that the commuter rail option is the preferred alternative in the New Starts evaluation—that is, commuter rail is chosen as the preferred public transit option.[27] According to these officials, this pressure can result in the costs of proposed commuter rail systems being underestimated, which may create funding shortfalls in the future. Officials from another freight railroad also commented that the timing of FTA's New Starts program can create problems. For example, local communities can use New Starts funds for feasibility studies for proposed commuter rail projects, which can result in increased public expectations; however, the funding of these studies is not a guarantee that the federal government will help pay for the proposed commuter rail system.

Conclusions

The expeditious flow of people and goods through our transportation system is vital to the economic well-being of the nation. The movement of people and goods by rail is an important part of the nation's transportation system and is likely to play an even greater role in the future. To ensure that both commuter and freight rail reach their potential, it is important

[27]There are three stages of the New Starts program—alternatives analysis, preliminary engineering, and final design. The alternatives analysis stage provides information on the benefits, costs, and impacts of alternative strategies leading to the selection of a locally preferred solution to the community's mobility needs.

that the success of one form of rail does not come at the expense of the other. Striking the right balance is a difficult task that the federal government, commuter rail agencies, and freight railroads will wrestle with as demand for commuter and freight services continues to grow.

Negotiating mutually beneficial arrangements between commuter rail agencies and freight railroads is challenging. The negotiation process can be lengthy and tedious as commuter rail agencies and freight railroads try to reach agreement on a number of tough and critical issues. To help tackle these issues, officials from commuter rail agencies told us that information and guidance, such as best practices, would be useful. Several commuter rail officials said that they had relied on the Rail Services Planning Office in the former ICC for technical assistance and expertise; however, this office was not transferred to the STB when the ICC was terminated in 1995. The federal government could act to help facilitate and inform negotiations by providing guidance and information, such as best practices, tips for negotiations, and information on the applicability and limitations of the liability provisions in the Amtrak Reform and Accountability Act of 1997, to commuter rail agencies and freight railroads. Without accurate, unbiased guidance and information, negotiations may stall, issues (such as the applicability of the federal liability cap) may be needlessly reexamined, and/or decisions may be made on the basis of questionable data. The three federal agencies—FTA, FRA, and STB—responsible for different aspects of commuter and freight rail have not provided such guidance and information because they do not consider it an appropriate role for them to play. The upcoming reauthorization of the surface transportation legislation, however, provides an opportunity for these agencies and the Congress to reexamine their roles and responsibilities for commuter rail access issues, notably their roles in providing guidance and information to commuter rail agencies and freight railroads to better inform negotiations. As long as the federal government is funding the planning and development of individual commuter rail projects, it may be appropriate for the government to provide guidance and information to help facilitate negotiations between commuter rail agencies and freight railroads and thereby help to ensure that federal dollars are efficiently used.

Recommendation

In order to facilitate and inform negotiations between commuter rail agencies and freight railroads, we recommend that the Secretary of Transportation and the Chairman of the Surface Transportation Board determine whether it would be appropriate and useful for them to provide guidance and information, such as tips for successful negotiations and

information on best practices, availability of federal resources, and the applicability of the liability provisions in the Amtrak Reform and Accountability Act of 1997, to commuter rail agencies and freight railroads. If DOT and STB determine that it would be helpful for them to provide such information but that they lack the statutory authority to do so, DOT and STB should seek a legislative change to allow them to provide guidance and information to commuter rail agencies and freight railroads.

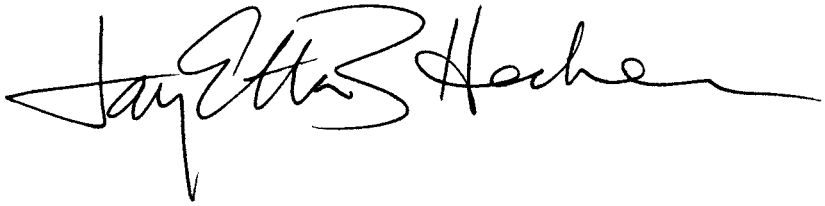
Agency Comments

We provided draft copies of this report to DOT and STB for their review and comment. On December 8, 2003, DOT and STB officials provided oral comments on the draft. DOT and STB officials generally agreed with the report's findings, conclusions, and recommendation. They also provided some technical comments, which we incorporated into this report where appropriate.

As we agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution of it until 30 days from the date of this report. We will then send copies of this report to the Secretary of Transportation, the Chairman of the Surface Transportation Board, the Administrators of the Federal Railroad Administration and Federal Transit Administration, the Director of the Office of Management and Budget, and interested congressional committees. We will make copies available to others upon request. In addition, this report will be available at no charge on our Web site at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me on (202) 512-2834 or at heckerj@gao.gov. Individuals making key contributions to this report are listed in appendix III.

Sincerely yours,



JayEtta Z. Hecker
Director, Physical Infrastructure Issues

Appendix I: Scope and Methodology

To address our objectives, we contacted officials from all existing and proposed commuter rail agencies and Class I freight railroads. To identify the universe of existing and proposed commuter rail agencies, we compiled a list on the basis of information published by the American Public Transportation Association (APTA), the Federal Transit Administration's (FTA) New Starts Project Profiles from fiscal years 2003 and 2004, and the 2001 National Transit Summaries and Trends report.[1] We reviewed our initial list with a representative from APTA in order to identify potential changes in program status and to confirm contact information for the commuter rail systems. Using these sources, we identified 19 existing and 30 proposed commuter rail agencies. We then contacted officials from the 49 commuter rail systems to verify the status of each commuter rail service or project. On the basis of information collected from these officials, we further refined our list of existing and proposed commuter rail agencies—resulting in the identification of 18 existing commuter rail systems and 19 proposed commuter rail systems.[2] To identify the Class I railroads, we reviewed the January 2003 Surface Transportation Board (STB) Report of Railroad Employment and information provided by the Association of American Railroads (AAR). AAR also provided contact information for each Class I railroad. We limited our scope to Class I railroads because they own the majority of all rail lines in the United States and therefore have more interaction with commuter rail agencies than short line or regional railroads. (Table 2 lists the names and locations of the 18 existing and 19 proposed commuter rail agencies and the 7 Class I freight railroads.)

[1]APTA does not consider the Port Authority Trans-Hudson (PATH) a commuter rail service, therefore it was not included in our universe. According to an APTA official, PATH's vehicles and services are more characteristic of heavy rail rather than commuter rail. PATH is regulated by FRA because it provides interstate service.

[2]Specifically, we eliminated 11 commuter rail agencies (1 existing and 10 proposed) from the initial list because the agency no longer provided commuter rail service or the agency was still considering what type of transit service to provide. We combined 2 commuter rail projects from the initial list of proposed commuter rail systems because we found they were the same project. We also combined 1 proposed commuter rail system with an existing commuter rail system because we found that the proposed system was merely an expansion project of the existing commuter rail. Finally, we separated 1 commuter rail project on the list of proposed commuter rail systems because we found that it was 2 distinct projects.

Table 2: Names and Locations of Existing and Proposed Commuter Rail Agencies and the Class I Freight Railroad Companies

Name of commuter rail agency and freight railroad	Location
Existing commuter rail	
Altamont Commuter Express	Stockton, CA
Connecticut Department of Transportation (Shore Line East and New Haven lines)	New Haven, CT
Maryland Transit Administration (MARC)	Baltimore, MD
Massachusetts Bay Transportation Authority	Boston, MA
Metra	Chicago, IL
MTA Long Island Rail Road	New York, NY
MTA Metro-North Railroad	New York, NY
New Jersey Transit Corporation	Newark, NJ
North County Transit District (Coaster)	Oceanside, CA
Northern Indiana Commuter Transportation District	Chesterton, IN
Peninsula Corridor Joint Powers Board (CALTRAIN)	San Carlos, CA
Pennsylvania Department of Transportation	Harrisburg, PA
Southeastern Pennsylvania Transportation Authority	Philadelphia, PA
Southern California Regional Rail Authority (Metrolink)	Los Angeles, CA
Sound Transit, Central Puget Sound Regional Transportation Authority	Seattle, WA
Tri-County Commuter Rail Authority	Pompano Beach, FL
Trinity Railway Express	Dallas, TX
Virginia Railway Express	Alexandria, VA
Proposed commuter rail	
Akron Line, Northeast Ohio Corridors[a]	Cleveland, OH
Alaska Railroad Corporation	Anchorage, AK
Austin-San Antonio Intermunicipal Commuter Rail District	Austin, TX
Charlotte Area Transit System	Charlotte, NC
Cumberland-Dauphin-Harrisburg Transit Authority	Harrisburg, PA
Dane County T2020 (Transport 2020)	Madison, WI
Delaware Department of Transportation[b]	Wilmington, DE
Eastern Corridor, Hamilton County Transportation Improvement District	Cincinnati, OH
Georgia Rail Passenger Program	Atlanta, GA
Johnson County Transit	Johnson County, KS
Nashville to Lebanon Corridor Regional Transportation Authority	Nashville, TN
NeoRail Line, Northeast Ohio Corridors	Cleveland, OH
New Haven-Hartford-Springfield Commuter Rail	Hartford, CT
Northstar Corridor	Minneapolis, MN
Regional Transit District	Denver, CO

Name of commuter rail agency and freight railroad	Location
Sonoma-Marin Area Rail Transit	San Francisco, CA
Triangle Transit Authority	Raleigh, NC
Utah Transit Authority, Commuter Rail	Salt Lake City, UT
Washington Country Commuter Rail	Portland, OR
Class I Freight Railroad Companies	
Burlington Northern Santa Fe Railway Company	Fort Worth, TX
Canadian National Railway (Grand Trunk Corporation)[c]	Montreal, Canada
Canadian Pacific Railway (Soo Line Railroad Company)[c]	Calgary, Canada
CSX Transportation	Jacksonville, FL
Kansas City Southern Railway Company	Kansas City, MO
Norfolk Southern	Norfolk, VA
Union Pacific Railroad Company	Omaha, NE

Source: GAO.

Notes:

The commuter rail agencies and freight railroad companies that we visited are listed in italics.

A number of the existing commuter rail agencies are currently planning expansion projects.

[a]The Akron line, which is proposed to run between Cleveland and Canton, Ohio, was originally part of the NeoRail study, which has several proposed lines out of Cleveland. Due to an opportunity to move forward, the Akron line was separated as a distinct project for planning purposes. The Akron and NeoRail lines may be integrated again at some point in the future.

[b]Southeastern Pennsylvania Transportation Authority provides a "turnkey," or contracted commuter rail service for the Delaware Department of Transportation between Newark/Wilmington, Delaware, and Philadelphia, Pennsylvania.

[c]The entire Canadian National Railway and Canadian Pacific Railway systems are not Class I railroads. However, the U.S. portions of these railroads (e.g., Grand Trunk Corporation and Soo Line Railroad Company) meet the U.S. regulatory criteria and are Class I railroads.

We conducted site visits to eight commuter rail agencies across the country and to the four largest U.S. Class I freight railroads. We selected the eight commuter rail agencies on the basis of the type of track arrangements (i.e., lease or own); representation of the four largest U.S. Class I freight railroads; the system's maturity; and geographic dispersion. (The commuter rail agencies and railroads that we visited are listed in italics in table 2.) During the site visits, we interviewed senior level management; toured operation, dispatching, and maintenance facilities; and/or traveled on the commuter rail system. In addition to the site visits, we also conducted semistructured interviews with officials from the remaining existing and proposed commuter rail agencies and Class I freight railroad companies via teleconference or in-person meetings. We synthesized the information we collected from the site visits and semistructured interviews. We also performed a content analysis of the

information to identify major themes and commonalities and differences among proposed and existing commuter rail agencies as well as between commuter rail agencies and freight railroads. We did not observe significant differences between the existing and proposed commuter rail agencies in terms of the most frequently cited challenges in negotiating and sharing rights-of-way, actions that could help facilitate mutually beneficial arrangements, and possible roles for the federal government in access issues.

We also conducted informational interviews with DOT, FRA, STB, and FTA; and with representatives from industry associations, including AAR, APTA, the National Industrial Transportation League, and the American Short Line and Regional Railroad Association. We also interviewed representatives from the law office of Kirkpatrick and Lockhart and Woodside Consulting, who have served as consultants to commuter rail agencies and freight railroads. Additionally, we reviewed statutory and case law and federal and commuter rail agency regulations, guidance, and internal documents as well as information from freight railroads, including annual reports, ridership and traffic density reports, and position papers. We also identified and analyzed rail-related research.

We did not examine FTA's process of reviewing commuter rail projects for federal funding, the costs and benefits of individual commuter rail projects, and the merits of Amtrak's statutory access rights to freight-owned rights-of-way or the costs and benefits of extending these rights to commuter rail agencies. Statistics presented in the background section of this report about the freight and commuter rail industries, such as freight ton-miles hauled and ridership, were obtained from DOT, FRA, FTA, AAR, and APTA. This information was presented for background and illustrative purposes only; consequently, we did not assess the reliability of this information. We also did not assess the reliability of the factual information provided by commuter rail agencies, freight railroads, and industry associations because of the abundance of corroborating evidence. Therefore, we determined that the data we obtained were sufficiently reliable for the purposes of this report.

Appendix II: Federal Legislation Addresses the Major Liability Concerns, but Other Issues Remain

The issue of managing risk and liability is a huge concern for commuter rail operators and freight railroads when they negotiate agreements for commuter rail operators to use the freight railroads' rights-of-way. This concern has the potential to slow the expansion of commuter rail services by delaying or preventing the signing of such "access" agreements. Understandably, freight railroads want to minimize their exposure to liability for any potentially large damage awards and associated costs that may result when they allow commuter rail operators to use their tracks. Accordingly, it has become customary for freight railroads to require commuter rail operators to enter into agreements with them that will hold the host freight railroads harmless, indemnify the freight railroads from all liability, and require the commuter rail operators to purchase commercial liability insurance that will ensure a reliable funding source to pay the entire amount of any damage awards. In some parts of the country, freight railroads generally require commuter rail operators using their rights-of-way to acquire up to $500 million in liability coverage. The required premiums to obtain such a large amount of insurance coverage are cost-prohibitive for many existing or proposed commuter rail operators.

The issue of liability arising from rail accidents was addressed by Congress when it enacted the Amtrak Reform and Accountability Act of 1997 (ARAA). Congress introduced tort reform measures within Section 161 of the ARAA in response to concerns from freight railroads, commuter rail operators, and Amtrak about the liability issue and the difficulties the parties were having in negotiating the use of freights' rights-of-way by Amtrak and the commuter rail operators. These concerns were particularly acute after a 1987 district court decision that put in doubt the ability of private parties to deal contractually with liability issues by entering into indemnification agreements. That decision, *National Railroad Passenger Corp. v. Consolidated Rail Corp.*, 698 F. Supp. 951 (D.C. 1988), vacated, 892 F.2d 1066 (D.C. Cir. 1990), stemmed from the 1987 collision of Amtrak and Conrail trains in Chase, Maryland, that left 16 people dead and more than 350 injured.

The catastrophic Chase accident was caused by the gross negligence of Conrail employees, including the engineer, who was under the influence of illicit drugs. Amtrak asked the court to abrogate its indemnification agreement with Conrail, which required that Amtrak defend and indemnify Conrail for any claims and damages arising out of the Chase accident, on the grounds that it violated public policy. The trial court acted in Amtrak's favor and voided the indemnification agreement. This decision had a ripple effect throughout the industry, and as the House Committee reported, "[t]his avoided a large taxpayer-funded expense in the short-term, but in

the long run convinced the entire freight industry that the indemnity agreements offered no real legal protection." H.R. Rep. No. 105-251, at 21 (1997).

In 1997, Congress enacted Section 161 of the ARAA, which limited the overall damages for passenger claims from a single rail incident to $200 million and also authorized the providers of passenger rail transportation to enter into contracts allocating financial responsibility for claims. Pub. L. 105-134, § 161 (1997); 49 U.S.C. § 28103. Congress intended to facilitate the ability of freight railroads and passenger rail operators to contract for the use of the freights' rights-of-way, stating that without tort reform and liability protection, "future passenger operations, whether commuter, high-speed rail, or intercity rail, will be placed in jeopardy as freight railroads resist taking on what is increasingly viewed as an unacceptable and uncompensated liability exposure." H.R. Rep. No. 105-251, at 22 (1997).

During the course of our work, questions arose about the proper interpretation and application of the liability protections set forth in the ARAA and related issues. In particular, questions were raised about whether the liability provisions that are part of the ARAA apply to commuter rail operators and whether the statute applies to all types of rail incident damages claims. The ensuing discussion addresses the interpretation and application of the ARAA and the limitations of this legislation in resolving all of the concerns raised by commuter rail operators and freight railroads.

Our examination of Section 161 of the Amtrak Reform and Accountability Act of 1997 leads us to conclude that all commuter rail operators, as well as Amtrak, are covered by the $200 million cap on awards for any claims by or on behalf of rail passengers resulting from an individual rail accident. The act creates a $200 million cap for passenger injuries arising "in connection with any rail passenger transportation operations over or rail passenger transportation use of right-of-way or facilities owned, leased, or maintained by any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State." 49 U.S.C. 28103(a)(1)(emphasis added). Additionally, the definitions section defines a "claim" as "against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State." 49 U.S.C. 28103 (e)(1)(emphasis added). The plain language of the statute expressly provides that commuter authorities or operators are protected by this statutory cap.

The statutory language that specifically authorizes freight railroads and commuter rail operators to enter into agreements allocating financial responsibility for claims, which forms the statutory underpinning for the indemnification agreements that protect freight railroads, is embodied within 49 U.S.C. § 28103(b). That subsection provides that "[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims." 49 U.S.C. § 28103(b). By enacting this provision, Congress intended to protect commuter rail operators, as well as Amtrak, by establishing a clear statutory basis for the enforceability of indemnification contracts. In this respect, the Senate Committee's report on the legislation states "[t]he bill contains a provision that would help assure the enforceability of certain contracts between operators of rail passenger services—some of which are state and local governments—and owners of rights-of-way and other facilities." S. Rep. No. 105-85, at 9 (1997). Although we understand that the enforceability of indemnification agreements entered into pursuant to this provision has never been addressed in federal court, we believe the express statutory language and clear legislative history suggest that such indemnification agreements would be upheld.

Although Section 161 of the ARAA resolves the major concerns that have been voiced by commuter rail operators and freight railroads with respect to the liability issue, it does not address all potential issues that have been raised. For example, the ARAA's liability provision is limited in the scope of claims that it covers. The liability limitation, which does include claims for punitive damages, is restricted to "a claim for personal injury to a passenger, death of a passenger, or damage to property of a passenger." 49 U.S.C. § 28103(a)(1). It does not cap personal and property third-party (nonrail passenger) claims. Such potential plaintiffs could include adjacent property owners or populations that may be harmed in a hazardous materials spill or an accident at a rail crossing. Although the original version of the bill (H.R. 2247, § 401, 105th Cong. (1997)) would have applied to all potential plaintiffs, it was not contained in the legislation as enacted. H.R. Rep. No. 105-251, at 93-94 (1997). An official of one freight railroad said that in this era of escalating verdicts, they need to have adequate insurance to protect themselves in the event of potential third-party claims, and they use the example of an environmental spill and evacuation that may cause no human injuries or deaths but nonetheless could amount to a very large damages award against the freight railroad determined to be responsible. Because of the limited nature of the liability cap in the ARAA, extensive arms-length negotiation between the freight railroads and commuter rail operators to address the concerns of both parties remains essential.

There are other concerns that compound the freight railroads' desire to require commuter rail operators to obtain a high level of liability insurance coverage for use of their rights-of-way. The concerns that have been raised include potential state law claims and questions about whether a court will uphold the liability limit established in the ARAA as it has never been tested in federal court. Although many carriers admit that they are being "super-cautious" in requiring such high levels of insurance, they point to the Amtrak-Conrail decision as an example of "judicial justice" as they seek to be protected from any potential liability.

We find that the ARAA offers a good starting point for resolving many of the most important issues that arise when commuter rail operators use rights-of-way owned by freight railroads. However, it does not eliminate the need for freight railroads and commuter rail operators to consider individual circumstances and factors as they negotiate the terms of these access agreements because of the potential liability concerns that are otherwise not addressed by the statute.

Appendix III: GAO Contacts and Staff Acknowledgments

GAO Contacts

JayEtta Z. Hecker (202) 512-2834
Susan Fleming (202) 512-4431

Acknowledgments

In addition to those named above, Alan Belkin, Nikki Clowers, Lindy Coe-Juell, Michelle Dresben, Sharon Dyer, Amy Higgins, Kristen Massey, and Stacey Thompson made key contributions to this report.

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