



Highlights of [GAO-09-282](#), a report to congressional requesters

## Why GAO Did This Study

The National Railroad Passenger Corporation (Amtrak) and commuter rail agencies often share rights-of-way with each other and with freight railroads. Negotiating agreements that govern the shared use of infrastructure can be challenging, especially on issues such as liability and indemnity. As requested, this report discusses (1) the liability and indemnity provisions in agreements among passenger and freight railroads, and the resulting implications of these provisions; (2) federal and state court opinions and Surface Transportation Board (STB) decisions related to contractual liability and indemnity provisions of passenger and freight railroad agreements; (3) factors that influence the negotiations of liability and indemnity provisions among passenger and freight railroads; and (4) potential options for facilitating negotiations of liability and indemnity provisions.

GAO obtained information from all existing and proposed commuter rail agencies, Amtrak, and major freight railroads through site visits or telephone interviews. GAO analyzed the liability and indemnity provisions in agreements between commuter rail agencies, Amtrak, and freight railroads. GAO also reviewed federal and state laws, STB decisions, and court cases related to liability and indemnity provisions. The Department of Transportation and STB had no comments on the report. Amtrak provided technical comments, which we incorporated where appropriate. GAO is not making recommendations in this report.

To view the full product, including the scope and methodology, click on [GAO-09-282](#). For more information, contact Susan A. Fleming at (202) 512-4431 or [flemings@gao.gov](mailto:flemings@gao.gov).

## COMMUTER RAIL

### Many Factors Influence Liability and Indemnity Provisions, and Options Exist to Facilitate Negotiations

#### What GAO Found

The liability and indemnity provisions in agreements between commuter rail agencies and freight railroads differ, but commuter rail agencies generally assume most of the financial risk for commuter operations. For example, most provisions assign liability to a particular entity regardless of fault—that is, commuter rail agencies could be responsible for paying for certain claims associated with accidents caused by a freight railroad. The provisions also vary on whether they exclude certain types of conduct, such as gross negligence, from the agreements. The provisions also require that commuter rail agencies carry varying levels of insurance. Because commuter rail agencies are publicly subsidized, some liability and indemnity provisions can expose taxpayers as well as commuter rail agencies to significant costs.

Federal statutes, STB decisions, and federal court decisions are instructive in interpreting liability and indemnity provisions, but questions remain. In response to industry concerns, Congress enacted the Amtrak Reform and Accountability Act of 1997 (ARAA), which limited overall damages from passenger claims to \$200 million and explicitly authorized passenger rail providers to enter into indemnification agreements. However, questions remain about the enforceability and appropriateness of indemnifying an entity for its own gross negligence and willful misconduct. A federal court of appeals, in a recent decision regarding Amtrak, overturned an earlier court opinion, holding that it was against public policy to indemnify for gross negligence and willful misconduct because this could undermine rail safety. STB, however, has held, when setting the terms of agreements between Amtrak and freight railroads, that it is against public policy to indemnify an agency against its own gross negligence or willful misconduct.

Several factors influence the negotiations of liability and indemnity provisions, including the freight railroads' business perspective, the financial conditions at the time of negotiations, the level of awareness or concern about liability, and federal and state laws. For example, some freight railroad officials told us they are requesting more insurance coverage for new commuter rail projects than what they had required in some past agreements, in part, because ARAA's liability cap has not been tested in court and does not cover third-party claims. Statutes governing Amtrak also influence the negotiations between Amtrak and other railroads.

Options for facilitating negotiations on liability and indemnity provisions include amending ARAA; exploring alternatives to traditional commercial insurance; providing commuter rail agencies with more leverage in negotiations; and separating passenger and freight traffic, either physically or by time of day. For example, officials from commuter rail agencies and freight railroads suggested amending ARAA to expand the scope of the liability cap to include third-party claims. Although each of these options could facilitate negotiations on liability and indemnity provisions, each option has advantages and disadvantages to consider.