



Office of the Chairman

Surface Transportation Board
Washington, D.C. 20423-0001

June 10, 2010

The Honorable David R. Obey
Chairman
House Committee on Appropriations
Washington, DC 20515

The Honorable Jerry Lewis
Ranking Republican Member
House Committee on Appropriations
Washington, DC 20515

Dear Chairman Obey and Ranking Member Lewis:

Congress recently directed the Surface Transportation Board (STB) to “review the [liability] issues surrounding agreements between entities responsible for passenger and freight rail, to the extent that those agreements fall within the STB’s jurisdiction,” and to “examine historic precedent, current practices and existing agreements.”¹ The conference report directed the STB to produce a letter report on the results of its liability review within 180 days of enactment. The STB respectfully submits this letter report in response to this direction.

This letter report discusses the STB’s review of liability provisions, summarizes a recent Government Accountability Office (GAO) report on commuter rail liability and indemnity provisions,² and discusses new agreements, additional information, and case law since issuance of the GAO Report. The GAO Report provides information on liability arrangements between freight and passenger railroads in place or planned as of the 2008-09 timeframe, as well as a review of court and STB case law precedent.

Liability and indemnity obligations are two of the most contentious issues among parties operating jointly on rail lines. Such obligations may increasingly hinder the addition of passenger rail operations on existing rail lines, as uncertainty about the relationship between federal and state laws, concerns about risk exposure from recent passenger rail accidents, and relatively tight capacity over some rail lines, lead freight railroads and passenger rail providers to more disparate negotiating positions.

¹ *Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010*, H.R. Rep. No. 111-366, at 39 “*Liability review*” (2009) (Conf. Rep. to accompany H.R. 3288).

² U.S. Gov’t Accountability Office, GAO-09-282, *Commuter Rail: Many Factors Influence Liability and Indemnity Provisions, and Options Exist to Facilitate Negotiations* (2009) (GAO Report). The GAO Report can be found at <http://www.gao.gov/new.items/d09282.pdf>.

STB Approach

To conduct its review, the STB requested copies of liability and indemnity provisions covering passenger rail (both intercity and commuter), as well as summaries of these provisions, from the National Railroad Passenger Corporation (Amtrak), Class I freight railroads,³ and 23 commuter rail authorities.⁴ Most parties responded to these requests, furnishing contractual and related information. The STB reviewed these contract provisions and summaries, and also compared this information to that provided in the GAO Report to determine whether the current information was consistent with what GAO reviewed. The STB also conducted a review of case law precedent, particularly in the period since the release of the GAO Report.

Several STB stakeholders raised concerns about the scope of the STB's review. Some were concerned about whether their agreements relating to passenger rail were within the STB's jurisdiction. Another party offered to provide information related to its principal-agent relationship as an operator for commuter railroads. The STB cast a wide net for the information it intended to review in order to provide a comprehensive response to Congress. However, the STB is not, through this report, making any determinations about its jurisdiction. The STB has relied on its governing statute and its jurisdictional decisions to date as the basis for the boundaries of its review.

Issues Surrounding Liability Provisions in Passenger Rail Agreements

The STB notes the following issues as a result of its review:

³ A Class I railroad is one that has annual operating revenues of \$250 million or more (in 1991 dollars). As adjusted for inflation, the threshold for Class I status currently is \$401 million or more. 49 C.F.R. Pt. 1201, General Instructions 1-1(a). The 7 Class I railroads operating in the U.S. are: BNSF Railway, Canadian National Railway Company (Grand Trunk Corporation), Canadian Pacific Railway (Soo Line Railroad Company), CSX Transportation (CSXT), Kansas City Southern Railway Company (KCS), Norfolk Southern, Union Pacific Railroad Company. Class I railroads own and operate 94,313 miles of the total 140,134 miles of rail lines in the U.S., or 67%. The majority of passenger rail in the U.S. runs over rail lines that are shared in some way with the Class I railroads. One Class I railroad, KCS, does not have any agreements with passenger rail operators. GAO Report at 43 n.e (verified for current accuracy by STB telephone call to KCS counsel).

⁴ The STB requested information from the following commuter rail authorities: Altamont Commuter Express, Capital Metropolitan Transportation Authority (CapMetro), Connecticut Department of Transportation Shore Line East, Maryland Transit Administration (MARC), Massachusetts Bay Transportation Authority (MBTA), MTA Long Island Rail Road, MTA Metro-North Railroad, New Jersey Transit Corporation, New Mexico Rail Runner Express, North County Transit District (Coaster), Northeast Illinois Regional Commuter Railroad Corporation (Metra), Northern Indiana Commuter Transportation District, Peninsula Corridor Joint Powers Board (Caltrain), Pennsylvania Department of Transportation (PennDOT), Regional Transportation Authority Music City Star, Regional Transportation District, Sound Transit, Central Puget Sound Regional Transportation Authority, South Florida Regional Transportation Authority (SFRTA or Tri-Rail), Southeastern Pennsylvania Transportation Authority (SEPTA), Southern California Regional Rail Authority (Metrolink), Trinity Railway Express, Utah Transit Authority (FrontRunner), and Virginia Railway Express.

(1) The emerging trend toward governmental authorities assuming, or being forced to assume, “but for” liability (i.e., responsibility for losses that would not have occurred “but for” the presence of the passenger rail operator) for their passenger rail operations over rail lines traditionally used solely or predominantly for freight rail: From the standpoint of the freight operator, the risk of injury and/or death to any persons as a result of an accident increases dramatically due to the presence of the passenger rail operator. Passengers, people picking up and dropping off passengers, and even trespassers attracted by the passenger rail operations would not have been on the property if not for the presence of the passenger rail operator. As a result, freight operators increasingly are looking to passenger rail operators to indemnify them for all such losses.

(2) The ability of states and other governmental authorities to claim shelter under state sovereign immunity laws from the enforcement of liability and indemnity provisions they have agreed to commercially with freight and/or passenger railroads: There has been a steady increase in the number of states and other governmental authorities as funders/subsidizers/providers of passenger rail service. At least one stakeholder has recently expressed its concerns about governmental authorities acquiring – in a commercial capacity – rail lines used traditionally and predominantly for freight traffic, but then refusing to enter into, or refusing to honor, liability and indemnity agreements on the ground of sovereign immunity.⁵

(3) The extent to which 49 U.S.C. § 28103, the federal statute that enables passenger rail providers to enter into liability-shifting agreements, preempts state laws governing indemnification agreements.⁶ Recent court decisions can be harmonized, but highlight the potential for disparate interpretation of § 28103 among various federal and state courts. In addition, there exists the possibility of state-by-state carve-outs in federal statutes. For example, Virginia commuter rail authorities are authorized to cap their liability for incidents in the District of Columbia at \$200 million. 49 U.S.C. § 28102.

(4) The extent to which liability and indemnity provisions can and should be standardized through federal legislation:⁷ Both the STB and GAO reviewed the majority of these provisions without seeing the other provisions of the contracts from which they were excerpted. Questions thus remain: Were concessions made by one party or the other in exchange for the particular liability and indemnity provisions agreed to? How would standardization of such provisions affect the remainder of these contracts and the

⁵ See National R.R. Passenger Corp.’s Comments in Opp. to Florida Dep’t of Transp. Motion to Dismiss and Related Pet. to Revoke Exemption, filed Apr. 30, 2010 in Florida Dep’t of Transp. – Acquis. Exemption – Certain Assets of CSX Transp., FD 35110 (FDOT–CSXT); Reply of Fla. Dep’t of Transp. to Comments of Nat’l R.R. Passenger Corp. and Brotherhood of R.R. Signalmen, Exh. 3, filed May 17, 2010 in FDOT–CSXT

⁶ Amtrak Reform and Accountability Act of 1997 (Amtrak Reform Act), Pub. L. No. 105-134, section 161(a), 111 Stat. 2570, 2577-78 (1997), currently codified at 49 U.S.C. § 28103.

⁷ See, e.g., High-Speed Intercity Passenger Rail Program – Stakeholder Agreements, at 15 (FRA guidance requiring state grantees and/or high-speed intercity rail operators using certain federal funding to maintain a minimum of \$200 million of liability coverage through insurance and self-insurance to comply with the liability requirements of 49 U.S.C. §§ 28103 and 24405(c)) (available at www.fra.dot.gov/downloads/Stakeholder_Agreements_Guidance_052110.pdf).

working relationships between contracting parties? Would standardization eliminate the potential for confusion over federal preemption of conflicting state laws in the areas of torts, insurance, and sovereign immunity?

Summary of GAO Report

In February 2009, GAO issued a report entitled Commuter Rail: Many Factors Influence Liability and Indemnity Provisions, and Options Exist to Facilitate Negotiations (GAO Report). The STB reviewed the report – and discusses it here – to avail itself of work already done in this area and to avoid unnecessary duplication of effort.

GAO was given 4 tasks for its study of the liability and indemnity provisions governing passenger and freight rail services: (1) Describing the characteristics of liability and indemnity provisions in agreements among passenger and freight railroads and the resulting implications of those provisions; (2) analyzing how federal and state courts, and the STB, have interpreted those provisions; (3) reviewing the factors that influence the negotiations of those provisions; and (4) identifying options for facilitating negotiations of those provisions.⁸

(1) GAO found that the liability and indemnity provisions in agreements between commuter rail authorities and freight railroads differ, but that commuter rail authorities generally assume most of the financial risk of commuter operations on freight railroads' lines. Most liability and indemnity provisions assign liability to one or the other of the contracting parties regardless of which party caused an accident. This method of assigning liability is referred to as "no fault." In some of the "no fault" agreements, certain types of conduct are excluded (such as gross negligence, recklessness, or willful misconduct) from the responsible party's scope of liability. GAO found that commuter rail authorities' agreements with Amtrak are generally also "no fault," as are Amtrak's agreements for use of the Class I freight railroads' facilities. GAO also found that Amtrak's agreements with freight railroads are generally silent as to any excluded conduct. And, where freight railroads use Amtrak-owned lines, the majority of the agreements are also "no fault,"⁹ (i.e., parallel arrangements, no matter which carrier is host).

GAO also found that the liability and indemnity provisions require that commuter rail authorities carry certain levels of insurance ranging from \$75-\$500 million, guaranteeing their ability to pay for their allocation of damages. Because commuter rail authorities are government entities and publicly subsidized, GAO also found that some liability and indemnity provisions can expose taxpayers and the authorities themselves to significant costs. GAO noted that Amtrak's agreements with freight railroads are silent as to the amount of insurance Amtrak must carry to use the freight railroads' lines.¹⁰

⁸ GAO Report at 3-4.

⁹ Id. at 5, 16, 17 and n.27.

¹⁰ Id. at 5, 17.

(2) GAO concluded that federal law is instructive at interpreting liability and indemnity provisions, but that questions remain. In 1997, Congress capped overall damages from passenger claims to \$200 million, and explicitly authorized passenger rail providers to enter into indemnification agreements with no cap on the shifted responsibility.¹¹ GAO noted that the enforceability of indemnifying an entity for its own gross negligence and willful misconduct is not settled law. It compared a U.S. Court of Appeals 2008 decision¹² holding that 49 U.S.C. § 28103 preempted a Connecticut statute prohibiting indemnification in cases of negligence with STB precedent (referenced below in the Historic Precedent section of this report).¹³

(3) GAO identified several factors as influencing negotiations of liability and indemnity provisions among passenger and freight railroads: (a) freight railroads' business perspectives, from which they start their negotiations; (b) freight railroads' financial positions; (c) freight railroads' level of awareness or concern about liability; (d) freight railroads' views on what is a sufficient amount of insurance; (e) a variety of state laws governing or limiting the extent to which a public agency may indemnify a private party; and (f) federal statutes governing Amtrak.¹⁴

(4) GAO discussed several options that commuter rail authorities, Amtrak and freight railroads identified for facilitating negotiations of liability and indemnity provisions: (a) amending existing laws; (b) exploring alternatives to traditional commercial insurance (such as pooled insurance programs); (c) providing commuter rail authorities with greater leverage in negotiations (such as a right to force access onto others' rail lines on par with Amtrak's statutory right of access); and (d) separating passenger and freight traffic either into separate corridors or separate tracks within shared corridors. Specifically, GAO noted that the Amtrak Reform Act could be amended to clarify whether the \$200 million liability cap applies to commuter rail authorities as well as to passenger rail providers, and to expand the scope of this cap to include third-party claims to reduce the cost of insurance.¹⁵

Historic Precedent

Key STB precedent on liability issues provides that a rail carrier cannot be indemnified for its own gross negligence, recklessness, willful or wanton misconduct, as that would be contrary to public policy in encouraging safe rail operations.¹⁶ The STB has also ruled that a freight railroad on whose lines Amtrak operates should be compensated by Amtrak for certain "residual damages" for which liability is not

¹¹ 49 U.S.C. § 28103.

¹² O&G Indus., Inc. v. National R.R. Passenger Corp., 537 F.3d 153 (2d Cir. 2008) (O&G).

¹³ GAO Report at 5-6.

¹⁴ Id. at 6-7.

¹⁵ Id. at 7-8.

¹⁶ Boston & Maine Corp. v. New England Cent. R.R., FD 34612, 2006 WL 47366, at *2 (2006); Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)—Springfield Terminal Ry., 3 S.T.B. 157, 162 (1998) (Application).

otherwise apportioned between the parties.¹⁷ Beyond this precedent and the case law that GAO reviewed in its report, two recent cases shed light on how courts view indemnity arrangements among parties involved in passenger rail operations.

In Deweese v. National Railroad Passenger Corp., 590 F.3d 239 (3d Cir. 2009) (Deweese), the court held that Pennsylvania's sovereign immunity statute was preempted to the extent it conflicted with the Amtrak Reform Act. Thus, the court found that a contractual indemnity provision between a Pennsylvania passenger rail authority and Amtrak was enforceable. The case arose out of an accident in which a passenger commuting on the SEPTA was struck by an Amtrak train. Two agreements between Amtrak and SEPTA contained provisions under which SEPTA agreed to indemnify Amtrak – regardless of any fault of Amtrak – for all damage or liability that would not have occurred but for SEPTA's commuter service over Amtrak's line.¹⁸ When Amtrak sought reimbursement from SEPTA for its settlement payment to the injured commuter, SEPTA claimed that it could not be held to the indemnification obligations it had agreed to in these contracts because it was immune as a state governmental entity.¹⁹

The Deweese court found that under the circumstances before it, the Pennsylvania sovereign immunity statute – if it applied – would preclude full implementation of the Amtrak Reform Act provision authorizing passenger rail carriers such as Amtrak to enter into contracts to transfer liability risk to other entities.²⁰ The court thus held that the Amtrak Reform Act preempted application of the sovereign immunity statute, because to do otherwise would have prevented Amtrak from shifting liability risk to others, jeopardizing its financial stability.²¹ In the court's view, Congress intended that all of Amtrak's indemnity agreements be enforceable under the Amtrak Reform Act, "regardless of . . . conflicting state law."²²

More recently, in CSX Transportation, Inc. v. Massachusetts Bay Transportation Authority, ___ F.Supp. 2d ___, 2010 WL 1051190 (D. Mass. 2010) (CSXT v. MBTA), the court held that the Amtrak Reform Act did not preempt the state's policy of declining to enforce indemnification agreements covering grossly negligent, reckless, willful or wanton conduct. In this case, a MBTA contractor was killed by a CSXT freight train while he was removing snow from a MBTA commuter rail station. MBTA, a governmental entity, provides commuter rail service over CSXT's lines, which are used for both freight and passenger service. MBTA and CSXT are parties to an operating agreement that obligates MBTA to defend and indemnify CSXT – regardless of fault –

¹⁷ Application, 3 S.T.B. at 160. As conceptualized by Amtrak, "residual damages" include: injury to trespassers and licensees; general indirect damages such as environmental damage to houses near tracks; and injuries or death to the freight railroad's employees, damage to their property, or damage to the freight railroad's property. Id. at 159.

¹⁸ Deweese, 590 F.3d at 242.

¹⁹ Id.

²⁰ Id. at 245-47. 49 U.S.C. 28103 provides in pertinent part that "[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims."

²¹ Deweese, 590 F.3d at 247-48.

²² Id. at 251.

from damage and liability from injury to or death of any MBTA employee or contractors.²³

CSXT sought indemnification from MBTA for the wrongful death action brought against it by the contractor's estate. MBTA claimed that, to the extent the indemnification provision required it to indemnify CSXT against liability from CSXT's own "grossly negligent, reckless, willful or wanton conduct," the provision was contrary to public policy. CSXT countered that the Amtrak Reform Act preempted state laws that might nullify or limit indemnification arrangements such as that between it and MBTA.²⁴

The court found that the parties' contract required MBTA to indemnify as well as defend CSXT in the wrongful death action. The court also concluded that the Massachusetts state courts would not enforce indemnification agreements that supposedly covered grossly negligent conduct,²⁵ as the goals of deterrence and punishment would be frustrated if a party were permitted to shift the costs of its own gross negligence.²⁶ Finally, the court found that the Amtrak Reform Act did not preempt state law to the extent state law limited the scope of an indemnification agreement. In other words, because Massachusetts' public policy could be "reconciled" with the plain language of 49 U.S.C. § 28103, there was no conflict between application of both.²⁷ The court distinguished cases from other judicial circuits on the ground that Massachusetts' public policy does not completely prohibit indemnity clauses, as would the statutes preempted in the other cases.²⁸ In short, the court held that "[i]ndemnification agreements between rail carriers are enforceable, but not free of all state regulation."²⁹

Case law continues to evolve in this area. While the lawsuits arising from Metrolink's 2005 Glendale, California crash settled, lawsuits remain pending over its 2008 Chatsworth, California crash.

Current Practices and Existing Agreements³⁰

As discussed above, GAO concluded that most of the liability and indemnity provisions it reviewed are based on "no fault" liability. The STB's review of liability and indemnity provisions confirms that this continues to be the case. "No fault" liability assigns liability to one or the other of the contracting parties regardless of which party caused the accident.

²³ CSXT v. MBTA, 2010 WL 1051190 at *1-2, 17.

²⁴ Id. at *1-2, 10, 13.

²⁵ Id. at *7-8, 10, 12.

²⁶ Id. at *12. The court dismissed arguments that both parties here were sophisticated entities that knowingly entered into the indemnification arrangement, and that either party might exact concessions in exchange for a particular indemnification provision. Id.

²⁷ Id. at *13-17.

²⁸ Id. at *16-17 (distinguishing O&G, 537 F.3d at 156 and Deweese, 590 F.3d at 242-43).

²⁹ Id. at *14.

³⁰ The Appendix to this letter report contains several tables summarizing the liability and indemnity provision information WTS reviewed.

Liability Provisions Between Amtrak and Non-Class I Railroads

While GAO did not review Class II and III³¹ freight railroad (so-called “regional” and “shortline,” respectively) contracts with passenger rail providers,³² the STB did review Amtrak’s agreements with these non-Class I carriers. Like the commuter rail agencies’ operating agreements with Class I freight railroads, Amtrak operating agreements with non-Class Is require Amtrak to bear most of the losses that arise from the operation of passenger rail service. All 10 of the operating agreements that the STB received from Amtrak contain no-fault liability provisions. The no-fault provisions make Amtrak liable for losses that arise from the operation of its passenger rail service regardless of the negligence or fault of the freight railroad. Examples of the type of losses Amtrak is responsible for include: (1) injuries, death, and property loss of its employees; (2) injuries, death, and property loss of ticketed passengers and persons connected to those passengers; (3) damage and destruction to Amtrak equipment; (4) injuries, death, and property loss of any person arising from a collision of a vehicle or a person with an Amtrak train; and (5) property loss of third parties caused by an Amtrak fuel oil spill.

Seven of the 10 operating agreements also contain no-fault liability provisions under which the freight railroad is made responsible for certain losses. Examples of the type of losses the freight railroad would be responsible for include: (1) injuries, death, and property loss of freight railroad employees arising from Amtrak operations; (2) injuries, death, and property losses of any person arising from Amtrak operations that are not already the responsibility of Amtrak; and (3) injuries, death, and property losses of any person other than Amtrak employees who is struck by improperly secured equipment or freight of the railroad operating on tracks at or adjacent to a passenger station.

The remaining 3 operating agreements contain “but for” liability provisions in favor of the regional or shortline host, which require Amtrak to bear all losses of any party (e.g., Amtrak, the freight railroad, or third parties) that would not have occurred if Amtrak did not conduct passenger rail operations on the line. “But for” liability in 2 of these agreements, however, does not indemnify the freight railroad in cases of the freight’s own gross negligence or willful and wanton misconduct (i.e., “excluded conduct”).

Even with “but for” liability, the responsibility for certain types of losses remains unclear. For example, it is unclear which party would be responsible for losses arising from a regional or shortline derailment that was caused by defective installation by the regional or shortline of an upgrade to the track for passenger rail service purposes.

³¹ A Class II railroad is one that has annual operating revenues of more than \$20 million but less than \$250 million, and a Class III railroad is one that has annual operating revenues of \$20 million or less, in 1991 dollars. 49 C.F.R. Pt. 1201, General Instructions 1-1(a). As adjusted for inflation, the range of annual operating revenues for Class II status currently is more than \$32 million but less than \$401 million; for Class III status it is \$32 million or less.

³² GAO Report at 4 n.9 (confirmed by STB communication with Amtrak).

Although the majority of the Amtrak operating agreements that STB reviewed place some liability for losses on the regional or shortline railroad, a review of the relevant provisions reveals a possible emerging trend toward “but for” liability in the passenger rail operating environment. The 2 most recent operating agreements between the non-Class Is and Amtrak contain “but for” liability clauses (Minnesota Commercial Railway Company in 2005 and Belt Railway Company of Chicago in 2009). From the perspective of the freight railroad, but for the presence of Amtrak, losses would not occur and therefore any losses are the responsibility of Amtrak.

Recent Agreements Between Class I Freight Railroads and Passenger Rail Operators

Several new or planned commuter rail services have progressed since GAO issued its report last February. The STB has reviewed the liability and indemnity provisions covering several of these operations and found that they fall within the patterns of agreements analyzed by GAO and reviewed by the STB.

CapMetro in Austin, Texas reports that under its current contracts with its commuter rail and freight operators, both operators are liable for their respective operations over CapMetro’s track and right-of-way. The commuter rail operator is responsible for maintenance of the line and right of way as well. All liability language is included in the insurance language in both contracts.

New developments have occurred in the liability and indemnity arrangements between the Florida Department of Transportation (FDOT) and CSXT.³³ During a special session of the Florida Legislature in 2009, the Legislature approved amendments to state law intended to give statutory authority for the liability provisions contained in both the existing operating agreement between FDOT and CSXT governing the South Florida Rail Corridor (the Tri-Rail service), and in the FDOT-CSXT agreement for FDOT to purchase another corridor in Central Florida for commuter rail use (the proposed Sun Rail service). Section 341.302(17)(b) of Florida Statutes authorizes FDOT to purchase up to \$200 million in liability insurance (an increase of \$75 million over the existing \$125 million contractual limit).³⁴ This statute also allows FDOT to increase its self-insurance retention deductible from \$5 million to \$10 million, and requires CSXT to contribute to the cost of the insurance.³⁵ The Legislature also approved provisions for a “limited covered accident,” which reduces FDOT’s liability exposure in case of CSXT’s willful misconduct.³⁶ Finally, the Legislature codified that neither the contractual duties to indemnify, purchase insurance, nor establish a self-insurance retention fund may be construed as a waiver of any sovereign immunity defense that might be asserted by FDOT, SFRTA, or their private contractors.³⁷

³³ See GAO Report at 9-10, 28, 42-43, 44 n.4, 49-52.

³⁴ Fla. Stat. § 341.302(17)(b) (2009).

³⁵ Id. FDOT’s authority to implement these increases may only be exercised if FDOT implements a 2007 agreement it has with CSXT that would allow FDOT to assume control or maintenance and dispatching on the Tri-Rail corridor (SFRTA would perform these services on FDOT’s behalf).

³⁶ Fla. Stat. §§ 341.301(7) and 341.302(17)(a)2 (2009).

³⁷ Id. § 341.302(17) (2009).

It is unclear whether or how these newly authorized statutory protections will be effected, and how they will be interpreted by the courts if challenged. FDOT's proposed acquisition of CSXT's line that would be used for the Sun Rail service remains pending before the STB.³⁸ Amtrak has raised issues regarding its liability exposure for passenger rail services provided within that corridor.³⁹

The liability provisions in the 2009 Operating Agreement between MBTA and CSXT (analogous provisions discussed above in the context of the CSXT v. MBTA case) for the joint operations over certain CSXT assets are best described as MBTA's assuming not only no-fault, but in addition "but for," liability.⁴⁰ This agreement contains carve-outs for specific conduct of CSXT, but only for the first \$7.5 million worth of damage. MBTA is also required to carry liability insurance of at least \$75 million covering CSXT. In a transaction related to MBTA's acquisition of CSXT's assets, the Massachusetts Coastal Railroad LLC, a Class III railroad, has agreed to no fault liability for its freight operations (transferred from CSXT) over the newly-acquired MBTA assets.⁴¹

The STB notes an additional case pending before it in which relevant agreements have not yet been filed, but which could contain liability and indemnity provisions governing the planned Denver-area commuter rail service.⁴²

Conclusion

Liability and indemnity issues are a major source of contention among parties negotiating over joint use of rail lines. Ultimately, the discord is over which sector – private or public – should bear the risk of exposure for accidents involving passengers. Passenger rail service is generally seen as a public good or public service, even if it is provided by a non-governmental entity such as Amtrak or other private operator. But most of the nation's rail lines and equipment are private property. As a federally subsidized, but non-governmental, entity, Amtrak may occupy a unique position in the liability debate. It is possible that liability issues could be resolved, or would be different, if passenger and freight rail shared corridors but not track, or operated in separate corridors altogether.

³⁸ See FDOT–CSXT. Because of the transaction's pendency, we have not summarized the relevant liability provisions on charts in the Appendix.

³⁹ See National R.R. Passenger Corp.'s Comments in Opp'n to Florida Dep't of Transp. Motion to Dismiss and Related Pet. to Revoke Exemption, filed Apr. 30, 2010 in FDOT–CSXT. See also Reply of Fla. Dep't of Transp. to Comments of Nat'l R.R. Passenger Corp. and Brotherhood of R.R. Signalmen, Exh. 3, filed May 17, 2010 in FDOT–CSXT.

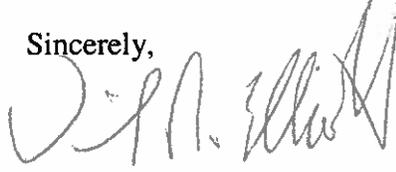
⁴⁰ See Massachusetts Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. (STB served May 3, 2010) (MassDOT–CSXT).

⁴¹ See Mot. to Dismiss, Exh. K at unnumbered pages 4-5, filed Nov. 24, 2009 in MassDOT–CSXT; see also Massachusetts Coastal R.R.—Acquis.—CSX Trans., Inc., FD 35314, slip op. (STB served Mar. 29, 2010).

⁴² See Verified Notice of Exemption, at 2-3, filed Mar. 5, 2010 in Regional Transp. Dist.—Acquis. Exemption—BNSF Ry., FD 35358. Because of the transaction's pendency, we have not summarized the relevant liability provisions on charts in the Appendix.

Thank you for the opportunity to submit this letter report. If you have any questions or we can be of further assistance on this matter, please do not hesitate to contact Matthew Wallen, Director, Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238.

Sincerely,

A handwritten signature in black ink, appearing to read "D. R. Elliott, III". The signature is fluid and cursive, with a large initial "D" and "E".

Daniel R. Elliott, III

Appendix to STB Letter Report

Table 1 Summary of Liability and Indemnity Provisions of Class II and III Railroads and Amtrak for Amtrak Operations on Those Railroads

CLASS II/III RAILROAD	DATE OF CONTRACT	AMTRAK NO FAULT LIABILITY	RAILROAD NO FAULT LIABILITY	AMTRAK "BUT FOR" LIABILITY	EXCLUDED CONDUCT
Terminal RR Ass'n of St. Louis	Not provided	X	X		
Denver Union Terminal Ry	1976	X	X		
Kansas City Terminal Ry	1983	X	X		
New England Central RR	1995	X	X		
Vermont Ry, Inc., and Clarendon & Pittsford Ry	1996	X	X		
Pan Am Ry	1998	X		X	
CSXT (Buckingham Branch)	2004	X	X		
Golden Isles Terminal RR/CSXT	2004	X	X		
Minnesota Commercial Ry	2005			X	X
Belt Ry Co. of Chicago	2009			X	X

Table 2 Summary of Liability and Indemnity Provisions of Amtrak and Class II and III Railroads for Operations of Those Railroads on Amtrak

RAILROAD	AMTRAK NO FAULT LIABILITY	RAILROAD NO FAULT LIABILITY ¹	EXCLUDED CONDUCT
Chicago Rail Link	X	X	
CSS&SB	X	X	
Conrail	X	X	
Connecticut Southern	X	X	
Providence & Worcester	X	X	
Pan Am Ry	X	X ²	

Appendix to STB Letter Report

Table 3 Summary of Liability and Indemnity Provisions of Class I Railroads and Amtrak for Amtrak Operations on the Class I Railroad

CLASS I RAILROAD	AMTRAK NO FAULT LIABILITY	RAILROAD NO FAULT LIABILITY	EXCLUDED CONDUCT
BNSF	X	X	
CN	X	X	
CP (D&H)	X	X	
CP (Soo)	X	X	
CSXT ³	X	X	
NS	X	X	
UP	X	X	

Table 4 Summary of Liability and Indemnity Provisions of Amtrak and Class I Railroads for Operations of the Class I Railroad on Amtrak

CLASS I RAILROAD	AMTRAK NO FAULT LIABILITY	RAILROAD NO FAULT LIABILITY	EXCLUDED CONDUCT
BNSF ⁴	X	X	
CN	X	X	
CP (D&H) ⁵	X	X	
CSXT	X	X	
NS (on Northeast Corridor)	X	X	
NS (on Michigan Line)	X	X	
UP	X	X	

Appendix to STB Letter Report

Table 5 Summary of Liability and Indemnity Provisions of Commuter Rail Authorities and Freight Railroads for Commuter Rail Operations on the Freight Railroad

COMMUTER RAIL AUTHORITY	OPERATING ON FREIGHT RAILROAD	COMMUTER NO FAULT LIABILITY	RAILROAD NO FAULT LIABILITY	EXCLUDED CONDUCT
<i>Altamont Commuter Express</i>	UP	X	*	X
Caltrain	UP ⁶	X	# ⁷	X
FrontRunner ⁸	UP	X ⁹		X
MARC	CSXT	X	Commuter covers all	Some ¹⁰
MBTA	CSXT ¹¹	X	# ¹²	Some ¹³
Metra	BNSF	X		X
Metra	CN (IC line)	X	*	
Metra	NS	X	*	
Metra	UP	X		X
Metrolink	BNSF shared			X
Metrolink	UP shared	¹⁴		X
MTA Metro North	NS	X	#	
<i>Music City Star</i>	¹⁵			
NJT	CSX Shared	X	*	
NJT	NS Shared	X	*	
<i>North Star</i> ¹⁶	BNSF	X	Commuter covers all	
SEPTA	CSXT Shared	X	¹⁷	
Sounder	BNSF	X	*	
VRE	CSXT	X	Commuter covers all	
VRE	NS	X	Commuter covers all	

If italicized, commuter rail authority's information was not submitted to STB and data is based on GAO Report.

North Star data are from information submitted by BNSF.

* Indicates that third-party liability is shared.

Indicates that third-party liability is fault based.

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Table 6 Summary of Liability and Indemnity Provisions of Commuter Rail Authorities and Freight Railroads for Freight Railroad Operations on the Commuter Rail Authority

COMMUTER RAIL AUTHORITY	USING FREIGHT RAILROAD	COMMUTER NO FAULT LIABILITY	RAILROAD NO FAULT LIABILITY	EXCLUDED CONDUCT
Coaster	BNSF			
MBTA	CSXT	¹⁸		
MBTA ¹⁹	CSXT	x	x	
MBTA ²⁰	Mass. Coastal	No current passenger		
Metra	CN (WC line)	x	x	x
Metra	CP	x	*	
Metra	CSXT	x	*	
MTA Metro North	CSXT	x	*	
MTA Metro North	CP	x	²¹	
NM Rail Runner Express	BNSF	x	Commuter covers all ²²	
SEPTA	NS		²³	
Trinity Railway Express	UP	²⁴	* ²⁵	x
Trinity Railway Express	BNSF		* ²⁶	
Tri-Rail	CSXT	x	Commuter covers all	
MTA-LIRR	NYAR	x	x	
NICTD	CSS&SB	x	x ²⁷	

* Indicates that third-party liability is shared.

¹ In case of an accident or incident involving trains of both parties, silent as to how liability is shared.

² Responsibility for passenger loss is Pan Am Railway's.

³ CSXT currently is conveying a portion of its line in Massachusetts to the state.

This line is currently also used by MBTA commuter trains. The transfer is now pending before the STB. The parties state that Amtrak's use of the line will continue under its current agreement.

⁴ For losses to passengers, liability is fault based.

⁵ For losses to passengers, liability is CP's.

⁶ There are some minor differences in each of the three lines depending on circumstances.

⁷ For passengers or other invitees, each party is responsible up to \$25 million and then they share based on fault up to \$125 million.

⁸ UP also operates freight service on a temporally separated basis on UTA's light rail system.

⁹ For passengers or other invitees, each party is responsible up to \$50 million and then they share based on fault up to \$125 million.

¹⁰ Excluded for below \$5 million in losses.

¹¹ CSXT currently is conveying a portion of its line in Massachusetts to the state.

The transfer is now pending before the STB. The current agreements for the remainder of the line will remain in place. CSXT will become a user of the state portion of the line, see table 6.

¹² MBTA responsible if MBTA equipment is involved in third-party cases.

¹³ CSXT property and employees excluded for losses due to negligence.

¹⁴ No fault up to \$25 million; fault based to \$100 million or \$125 million, depending on track at issue.

¹⁵ No information was submitted to STB, and the GAO Report did not include this operation.

¹⁶ Information received from BNSF.

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¹⁷ CSXT and SEPTA each cover own employees and property regardless of fault; liability to third parties fault based.

¹⁸ Each carrier liable for own employees and property; all other losses, including losses to passengers, fault based.

¹⁹ CSXT currently is conveying a portion of its line in Massachusetts to the state.

This line is currently also used by MBTA commuter trains. The transfer is now pending before the STB. CSXT will become a user on the line from the current MBTA ownership to Worcester. The agreement is more fully described in the body of the report.

²⁰ CSXT currently is conveying a portion of its line in Massachusetts to the state.

The transfer is now pending before the STB. Upon completion of the transfer, a class III railroad (Massachusetts Coastal) will assume freight operations. There are currently no passenger services on the lines. There is a term agreement in place for the initial operations, with a permanent agreement to follow.

²¹ CP covers own and 50% of other liability.

²² Third-party claims where both parties' trains are involved, parties seek coverage under required insurance policy. If not covered by insurance, a special escrow account is established. If escrow insufficient, agreement is silent.

²³ SEPTA and NS each cover own employees and property regardless of fault; losses to third parties fault based.

²⁴ No fault for losses to passengers.

²⁵ UP responsible for crossing accidents.

²⁶ BNSF responsible for crossing accidents.

²⁷ All passenger liability borne by NICTD.